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Municipal Corporations - Waiver of Governmental Immunity - Defective Traffic Control Devices - Fanning v. City of Laramie

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from \$96,000 to \$23,740. Approximately three-fourths of the residuary estate would have been taken for the payment of taxes. This result appears especially inequitable in the case where the residuary beneficiaries are the testator's spouse or children, who are generally the natural objects of his bounty. Such a result is what the Uniform Act and other apportionment statutes were meant to prevent. These statutes are effective to this end in a situation where there is no tax clause. However, in view of the fact that the testator is still given the power to direct what fund will pay the tax, these statutes may be foiled by unclear tax clauses. The clause considered in the principle case was admittedly such a clause.³² It is important that one drawing up a will consult an attorney; but it is even more important that the attorney advise his client as to the tax consequences involved in the disposition of the client's property at death. In order to protect adequately his client, an attorney should be able to draw up a clear and comprehensive tax clause concerning the entire estate, testamentary and non-testamentary, to the end that his client's wishes will not be subject to defeat due to unclear or inadequate information in the tax clause.

R. MICHAEL MULLIKIN

MUNICIPAL CORPORATIONS — Waiver of Governmental Immunity — Defective Traffic Control Devices. *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965).

Plaintiff's son was killed at an intersection of a through street. In a suit against the City of Laramie, it was alleged that the proximate cause of the accident was due to the city's failure to remove limbs and foliage of trees which obscured a stop sign and thereby created a condition dangerous to motorists. The complaint was dismissed by the trial court on the grounds that the city possessed governmental immunity from suit. Upon appeal, the Wyoming Supreme Court *held*

32. *In re Ogburn's Estate*, *supra* note 2, at 658.

that the city's usual governmental immunity from suit had been waived,¹ and remanded the action for trial.

When determining the tort liability of a municipal corporation, state and federal courts in the United States usually apply the governmental-proprietary test. Generally, this means that torts which arise out of a city's governmental functions will not create liability, while torts which arise out of a city's proprietary or corporate functions will create liability.²

It is obvious that, as far as the users of the streets and highways are concerned, the obligation to construct and maintain streets is public in nature with no accompanying profit or benefit to a city.³ Thus, it would seem that construction and maintenance of a street is a purely governmental function, the negligent performance of which would be exempt from tort liability. Streets and highways, however, have always received treatment that is separate from the usual rules of governmental immunity.⁴

The necessity for this separate treatment has never been adequately explained, but can be attributed to the historical development of control and maintenance of streets and highways.

During the early periods of English history, highways were laid out, constructed and managed solely by the government. These activities were recognized as typical governmental functions.⁵ In this country, control over highways is also considered a state duty, but it is a duty which is not exclusive and can be delegated. The practice of delegating this duty to municipal corporations and other government entities soon developed, and was accompanied by the inevitable lawsuits which arose from a failure to perform adequately that duty. Two separate theories arose with which courts held municipalities liable for injuries resulting from inadequate conditions in their streets.

1. *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965).

2. 2 HARPER & JAMES, TORTS § 29.6, at 1619 (1956). This seemingly simple rule has been subject to much confusion and misapplication by the courts, so that the law of municipal immunity exists in a morass of uncertainty.

3. 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.03 (3d ed. 1950).

4. 2 HARPER & JAMES, *op. cit. supra* note 2, at 1624, § 29.7, at 1627.

5. 10 McQUILLIN, MUNICIPAL CORPORATIONS § 30.39 (3d ed. 1950).

The first theory is that cities should be held liable for a failure to keep their streets free from dangerous defects and obstructions.⁶ The basis of the liability has been called an illogical exception to the general rule that cities are not responsible for negligent performance of governmental duties.⁷

This illogical exception has been implemented by the courts under the following rationales: (1) that the maintenance of streets from dangerous defects and obstructions was a corporate or ministerial function;⁸ (2) that statutes had expressly imposed liability on a city for allowing the existence of dangerous defects or obstructions in its streets;⁹ or (3) that the failure of maintaining streets free from defects and obstructions was an exception to the general rule of governmental immunity.¹⁰

The element which is common to all three rationales and which determines their applicability is the term "defects or obstructions." Before liability can be waived, there must be a determination that the particular hazard in question comes within the definition of defects and obstructions. The typical approach has been that this term includes only actual imperfections or obstructions in the street itself.¹¹ Defective traffic control devices, in most instances, have not been included within the usual definition.¹² Such devices have been viewed as essential adjuncts to the regulation of traffic, which, by the majority view, is considered to be a truly governmental function under the police power of the state.¹³ "We think that the distinction between the failure of a city to keep its streets in a safe condition as regards physical defects therein

6. 2 HARPER & JAMES, *op. cit. supra* note 2, § 29.7; 19 MCQUILLIN, *op. cit. supra* note 3, §§ 54.01, 54.02, 54.03; RHYNE, MUNICIPAL LAW § 30-14 (1957); *Dorminey v. Montgomery*, 232 Ala. 47, 166 So. 689 (1936); *Hagerman v. City of Seattle*, 189 Wash. 694, 66 P.2d 1152, 110 A.L.R. 1110 (1937).

7. 19 MCQUILLIN, *op. cit. supra* note 3, § 54.03.

8. *Missano v. City of New York*, 160 N.Y. 123, 54 N.E. 744 (1899).

9. *Belhumuer v. City of Bristol*, 121 Conn. 475, 185 Atl. 421 (1936).

10. *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948).

11. *Blaschke v. City of Watertown*, 226 Wis. 1, 275 N.W. 528 (1937) (wagon tipped over when its wheels dropped into ruts, injuring plaintiff). *Optiz v. City of Town of Newcastle*, 35 Wyo. 358, 249 Pac. 799 (1926) (plaintiff injured when car dropped through bridge undergoing repairs).

12. *Martin v. City of Canton*, 41 Ohio App. 420, 180 N.E. 78 (1931); *Carruthers v. City of St. Louis*, 341 Mo. 1073, 111 S.W.2d 32 (1937).

13. RHYNE, *op. cit. supra* note 6, § 18-21, at 431, § 30-17, at 759; PROSSER, TORTS § 125, at 1008 (3d ed. 1964); *Dorminey v. Montgomery*, *supra* note 6; *Avey v. City of West Palm Beach*, 152 Fla. 717, 12 So. 2d 881 (1943); *Auslander v. City of St. Louis* 332 Mo. 145, 56 S.W.2d 778 (1932).

and the failure or neglect in regulating traffic thereon is clear and definite."¹⁴

Nevertheless, a minority of the jurisdictions have classified defective traffic control devices as typical unsafe conditions or defects of streets, and have imposed liability.¹⁵

The second theory courts have employed to escape governmental immunity is somewhat unique. If a function is governmental, it generally does not matter whether the performance by the municipality is undertaken voluntarily or under legislative imposition; the city would still be considered a governmental agency acting in behalf of the sovereign, and would still be entitled to the freedom from liability enjoyed by the state itself.¹⁶ Some states, however, have adopted the theory that a duty to perform a governmental function imposed by the legislature upon a city may be the basis of liability.¹⁷

In *Phinney v. City of Seattle*¹⁸ the Washington Supreme Court held that, although regulation of traffic was a governmental function, the city is still liable for a failure to maintain adequately a stop sign. The decision was based neither upon a statute which expressly waived the usual immunity, nor upon one of the rationales for defective conditions of streets. It merely stated, "[E]ven though the function

14. *Tolliver v. City of Newark*, 145 Ohio St. 517, 521, 62 N.E.2d 357, 361, 161 A.L.R. 1891, 1897 (1945).

15. Maintenance of traffic control devices is a governmental function, but it is included within the duty to maintain streets in a safe condition. *Johnston v. City of East Moline*, 338 Ill. App. 220, 87 N.E.2d 22 (1949). "[O]nce a municipality has decided to exercise the discretion vested in it to declare one street a through street and erect a stop sign . . . the sign becomes an important part of the physical appurtenances of the street." *O'Hare v. City of Detroit*, 262 Mich. 19, 21, 106 N.W.2d 538, 540 (1960). In California defective traffic control devices came within the scope of a statute which created liability for the existence of dangerous or defective public property. *Irvin v. Padelford*, 127 Cal. App. 2d 135, 273 P.2d 539 (1954).

16. *City of Wooster v. Arbenz*, 116 Ohio St. 281, 292, 156 N.E. 210, 211, 52 A.L.R. 518, 521 (1927). The distinction has been made between statutes that impose governmental duties and those that impose proprietary duties. In the former no liability generally attaches: in the latter there can be liability. Another distinction has been made that if the duty was placed upon the city by a command of the legislature so that no discretion in how or when to act was present, liability would attach. The difficulty under any theory is that without an express waiver present in the statute, any waiver found by the court can come only by implication.

17. *Lyle v. Fiorito*, 187 Wash. 537, 60 P.2d 709 (1936); *Phinney v. City of Seattle*, 34 Wash. 2d 330, 208 P.2d 879 (1949).

18. *Phinney v. City of Seattle*, *supra* note 17.

may be governmental in character if the statute commands performance by the city and such command is disobeyed the city is liable for the resultant damages to injured users of the highways."¹⁹

In the principal case, *Fanning v. City of Laramie*, the court's holding is not entirely clear; but it appears the court first recognized the plaintiff's contentions that although the erection of a stop sign by the city was a governmental function, there could be exceptions to the general rule of immunity from liability afforded governmental functions. In this regard, the court cited *Ramirez v. City of Cheyenne*²⁰ where it had previously recognized, in dicta, that liability for inadequate maintenance of streets and highways was an exception to the general rule of immunity enjoyed by governmental functions.²¹ By recognizing this exception, the court apparently classified the obscured stop sign as a typical unsafe defect in a street and apparently accepted the minority view that traffic regulation is not a governmental function separate and distinct from maintenance of streets.

The court also stated that governmental immunity may be modified or abrogated by statute and noted several Wyoming statutes which granted a city possession and control over its streets.²² It cited a Wyoming statute²³ which imposed

19. *Phinney v. City of Seattle*, *supra* note 17, 208 P.2d at 882.

20. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925). This was the first recognition by Wyoming that there were exceptions to the general rules of immunity for governmental functions. The court held the City of Cheyenne liable to suit for the death of a child due to the negligent maintenance of a swing on a public playground. It is evident that the reference to an exception for inadequate maintenance of streets was dicta in that case. The court later applied this exception in *Optiz v. City of Town of Newcastle*, *supra* note 11.

21. *Fanning v. City of Laramie*, *supra* note 1, at 463.

22. Wyo. Laws 1884, ch. 57, § 20, as amended, Wyo. Laws 1886, ch. 14, § 4; ch. 95, §§ 4-7; Wyo. Stat. § 15-686 (1957); repealed and deleted, Wyo. Laws 1965, ch. 112, § 491. This statute empowered the city to open and improve its avenues, control their use and to prevent and remove all encroachments into or thereon. Wyo. Laws 1923, ch. 74, § 68; Wyo. Stat. § 15-337 (1957) (now Wyo. Stat. § 15.1-269 (Comp. 1965)). This statute empowered a city, through its manager, to supervise and control its streets and highways.

23. Wyo. Laws 1923, ch. 74, § 73; Wyo. Stat. § 15-342 (1957) (now Wyo. Stat. § 15.1-274 (Comp. 1965)): "All persons who shall by means of any excavations in, or obstructions upon any street of said city, not authorized by law or the ordinance of said city, render such streets unsafe for travel, or shall by negligence in the management of any such excavation or obstruction as shall be authorized, or by failure to maintain proper guards or lights thereat, render such street insufficient or unsafe for travel, shall be liable for all damages recovered by the party injured . . ."

liability on all persons²⁴ who rendered a street unsafe for travel by unauthorized obstructions and which authorized the joining of a city as a party defendant. It then concluded that these statutory provisions taken in the light of several Wyoming decisions²⁵ gave legislative recognition that a city acting in its governmental capacity is now without immunity in an instance of defective traffic control devices.²⁶ Therefore, it would appear the court placed the usually immune regulation of traffic within a statute which imposed liability for defective streets.

The court further added that statutes had granted the city control over streets within its boundaries and had granted the right to place stop signs thereon.²⁷ The court stated that once a city has decided to act under the foregoing statutes, any traffic control devices erected must conform to Wyoming's Manual for Uniform System of Traffic Control Devices.²⁸ This manual requires that all stop signs be maintained so as to insure their visibility. This the court stated, placed an imperative duty upon the city. This duty was ordained by the legislature, and the usual governmental immunity was thereby impliedly waived.²⁹ When the court applied this doctrine, it expressly accepted and cited the rationale formulated by the decision of *Phinney v. City of Seattle*.³⁰

The court noted in conclusion that the rule of governmental immunity as declared by previous Wyoming decisions was still the law to which it adhered, but this did not require that the court should fail to recognize an exception to the usual rule. It was the court's opinion that the waiver of immunity recognized in this case was justified by statutory enactments and authorized highway regulations and directives.³¹

24. The court did not expressly decide whether a municipal corporation was within the definition of "person" for purposes of the statute.

25. *Optiz v. City of Town of Newcastle*, *supra* note 11; *Wilson v. City of Laramie*, *supra* note 10.

26. *Fanning v. City of Laramie*, *supra* note 1.

27. Wyo. Stat. §§ 31-86(a), (c), -137, -145 (1957).

28. Wyo. Stat. § 31-137 (1957) requires that any devices erected must conform to the state manual.

29. *Fanning v. City of Laramie*, *supra* note 1, at 467.

30. *Phinney v. City of Seattle*, *supra* note 17.

31. *Fanning v. City of Laramie*, *supra* note 1, at 467.

A possible conclusion to be drawn from the *Fanning* case is that it constitutes a material departure from Wyoming's usual rules of governmental immunity. Such a conclusion, however, is not entirely justified. Even though the decision accepted a minority viewpoint in regard to traffic regulation, there was sufficient authority from other jurisdictions to justify a waiver on the exception theory or upon the statute theory. It should be noted that the Wyoming court had already recognized in *Optiz v. City of Town of Newcastle*³² that a city could be held liable for defects in its streets. In that case the court applied the exception theory it had previously noted in dicta in the *Ramirez* case³³ and held the city liable for allowing the existence of a defective bridge. Thus, when the court classified defective traffic control devices as typical defects of streets, it brought *Fanning* squarely within the scope of the *Optiz* decision.

Furthermore the *Fanning* opinion did not state whether immunity had been waived because of the exception theory, the statute theory or upon the rationale of the *Phinney* decision. It merely discussed all three. Therefore, it is possible that the court relied upon the cumulative effect of the rationales and not upon their individual application. If this is true, the future impact of the decision on governmental immunity will not be great. The decision should have an appreciable impact in other areas of governmental immunity only if the *Phinney* doctrine can be removed as a separate and sufficient basis for a waiver of immunity. Under this doctrine the immunity of any governmental function will be waived when the legislature has commanded that a city perform the function and there is a failure to perform it properly.³⁴

It is doubtful, however, that *Phinney* can be divorced from the context of street and highway defects.³⁵ Since the court stated that it still recognized its long-standing position on governmental immunity, it probably will not allow the doc-

32. *Optiz v. City of Town of Newcastle*, *supra* note 11.

33. *Ramirez v. City of Cheyenne*, *supra* note 20.

34. As an example of the possible application of the *Phinney* doctrine, *cf.* Wyo. Stat. §§ 35-449, -450 (1957) with the statutes involved in the principal case.

35. It should be noted that the facts of the *Phinney* case were identical to the *Fanning* case, *i.e.*, inadequate maintenance of stop sign.

trine to go beyond the specialized area of streets and highways. It is not likely the court intentionally advanced a new theory with which to waive governmental immunity. The better explanation is that the court believed a waiver of immunity would yield a more equitable result and considered itself justified when it was able to find three rationales upon which to base the decision.

It would appear, therefore, that the real significance of *Fanning* lies only in the area of traffic regulation. Henceforth, cities will be liable to suit for any injuries caused because of defective traffic control devices. It seems quite evident that in addition to obscured stop signs, other defective traffic control devices will fall within the definition of defects in streets, and will be encompassed by the *Phinney* doctrine if they fail to meet the specifications and requirements of the Manual on Uniform Traffic Control Devices.

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