UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 19 | Number 1 Article 21

12-1-1940

Torts -- Municipal Corporations -- Liability for Death or Injury to Prisoner

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financial arrangements as exigencies arise. If, in that event, the trust approved by the decree appeared to be in final satisfaction of the obligation made specific by that judgment itself, the continuity of the general duty to support would be broken; and the obligation would exist only as and when declared in a modifying judgment. Should the new decree place burdens upon the husband which are discharged in a manner unconnected with the original trust, it is clear that the trust payments should not have been taxed to him. Thus, not the mere potentiality of its exercise, but the exercise of the power itself in the form of a modifying judgment, which prescribed new obligations and the manner of their discharge, would be looked to in determining taxability. Not only does this view seem to conform more closely to the realities of the situation, but also its adoption would eliminate the inequities which arise from the use of a criterion found in local law, the effect whose existence or non-existence is more often theoretical than real.

Although the uniformity of tax incidence guaranteed by the Constitution is "geographic" rather than "intrinsic",[33] and a statute conforming to the present view of the Court would no doubt be sustained on this ground, it is highly desirable from the point of view of both the Government and the taxpayer to avoid any inequalities not justified by considerations peculiar to the particular tax.[34] No such considerations are apparent here. The uncertainties inherent in the present holdings suggest the need of a statute expressly designed to cover the maintenance trust situation. Meanwhile, rather than to adopt a policy which often permits discrimination, the Court might well have sanctioned a tax upon the settlor in all such cases, an approach which the dissent asserts is most consistent with the choice first made in *Douglas v. Willcuts*.[35] But whether a statute is forthcoming, it should be strongly emphasized that insistence upon highly doctrinary theory will not always assure that reality of treatment which the Court itself has so often encouraged and tax administration demands.

E. H. SEAWELL.

Torts—Municipal Corporations—Liability for Death or Injury to Prisoner.

Two recent North Carolina cases[1] involve injuries committed by one prisoner on a fellow-prisoner. It is significant to note that on

[33] Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. ed. 969 (1900); Florida v. Mellon, 273 U. S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1927).

[34] See PAUL, *op. cit. supra* note 22, at 49-52.

[35] See Helvering v. Fuller, 310 U. S. 69, —, 60 Sup. Ct. 784, 789, 84 L. ed. 715, 720 (1940).

[1] Dunn v. Swanson, 217 N. C. 279, 7 S. E. (2d) 563 (1940); Parks v. Princeton, 217 N. C. 361, 8 S. E. (2d) 217 (1940).

strikingly similar facts different statutes were invoked, a different class of defendants named, and different results reached. These variances make pertinent an investigation of the contrasting liabilities where suit has been against the individual officers, against the town, against the county and against the state.

A. Suits Against the Individual Officers

In the principal case of *Dunn v. Swanson*, suit was against the sheriff, jailer and surety company for jailer's negligence in putting *X* in a cell with a prisoner whom the jailer knew to be violently insane, and who beat *X* to death with a table leg. Recovery was allowed under C. S. 354[2] which provides that a sheriff and his surety shall be civilly liable, on an officer's bond, for "all acts done by said officer by virtue or *under color of* his office". Prior to the addition of the words "under color of" to the statute in 1883, recovery had been limited to instances where the injury resulted from a type of negligence specifically enumerated in the bond.[3] After such statutory change, several decisions correctly effectuated the legislative purpose of increasing the scope of liability.[4] Then in two later decisions the court inconsistently reverted to the old precedents, ignoring the broadened scope of the statute.[5] *Price v. Honeycutt*[6] and the principal case apparently represent a return to a liberal construction of the statute, and in so doing accord with the general rule that a prison official is liable when he knows of, or in the exercise of reasonable care should anticipate, danger to the prisoner, and with such knowledge or anticipation fails to take the proper

[2] N. C. CODE ANN. (Michie, 1939) §354.

[3] Crumpler v. Governor, 12 N. C. 52 (1826) (surety not liable for sheriff's failure to collect tax not mentioned in bond); State v. Long, 30 N. C. 415 (1848) (surety not liable for sheriff's taking cash money in lieu of bail bond); Eaton v. Kelly, 72 N. C. 110 (1875) (surety not liable for unauthorized sale conducted by sheriff); Holt v. McLean, 75 N. C. 347 (1876) (surety not liable for register of deed's issuance of marriage license to girl under age).

[4] Kivett v. Young, 106 N. C. 567, 10 S. E. 1019 (1890) (register of deeds and surety liable for failure to properly record a deed when bond specifically covered such duty); Joyner v. Roberts, 112 N. C. 111, 16 S. E. 917 (1893); Daniel v. Grisette, 117 N. C. 105, 23 S. E. 93 (1895) (register of deeds liable on bond for failure properly to index a mortgage); Warren v. Boyd, 120 N. C. 56, 26 S. E. 700 (1897) (constable liable on bond for illegal arrest and false imprisonment).

[5] Sutton v. Williams, 199 N. C. 546, 155 S. E. 160 (1930); Davis v. Moore, 215 N. C. 449, 2 S. E. (2d) 366 (1939). Explaining its switch from these latter two cases to the present view in the Dunn case, the court said: "A re-examination of the authorities convinced the court that . . . the court was not justified in ignoring the plain terms of the statute as it had been correctly interpreted and applied in *Kivett v. Young*, and other cases decided after its passage, all, of course, subsequent to *Crumpler v. Governor*, 12 N. C. 52, and other decisions of a similar nature rendered prior to the statute. It is only fair to say that in *Davis v. Moore* neither the correcting statute nor the cases interpreting it were called to the attention of the court."

[6] 216 N. C. 270, 4 S. E. (2d) 611 (1939).

precautions to safeguard his prisoners.[7] No test of what constitutes "reasonable care" has been prescribed by our court, but a case from another jurisdiction intimates that it at the least extends to searching incoming prisoners for any possible weapons.[8]

Only one North Carolina decision deals with the liability of an officer for wilful injuries,[9] and it is one of the two aforementioned instances in which the court narrowly construed C. S. 354 and refused recovery on the bond. Yet recovery was allowed under C. S. 4407, which provides that any keeper of a jail who shall do or cause any unlawful injury to the prisoners in his charge shall pay treble damages to the person injured and be guilty of a misdemeanor. Apparently this statute had never before been cited in its 145 years of existence, and even in this case was not adhered to by the court in its assessment of damages. Explanation for the signal lack of reliance on this statute perhaps lies in the fact that no cases involving wilful injuries have arisen, and also in the belief that such a statute was designed to supplement rather than to substitute for the common law action. Seemingly our court holds an officer responsible for any excessive and unnecessary injuries, whether occasioned by acts within the scope of his employment or *ultra vires*.[10] Since the principal case overrules the prior narrow construction of C. S. 354, liability will extend to the bonding surety except in those cases where the officer acts beyond his powers and so assumes sole responsibility.[11]

B. Suits Against the City or Town

Suits against a municipality for injury or death of a prisoner ordinarily involve the question of adequate furnishings of a jail in regard to health and sanitation. The usual rule is that maintenance of a city jail is a governmental (as distinguished from a proprietary) func-

[7] Gunther v. Johnson, 36 App. Div. 437, 55 N. Y. Supp. 869 (2d Dep't 1899) (sheriff not liable for damages inflicted by assault as he knew of no trouble in jail); Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897) (sheriff and surety liable for injuries inflicted by "kangaroo court" as he knew of its existence and danger); Stinnett v. Sherman, 43 S. W. 847 (Tex. Civ. App. 1897) (chief of police not liable to prisoner attacked by insane cell-mate when he knew of neither's presence); Riggs v. German, 81 Wash. 128, 142 Pac. 479 (1914) (sheriff knew of "kangaroo court" but not liable for injuries inflicted by it since there was no evidence that he knew or had reason to know that prisoners contemplated an assault on plaintiff).

[8] Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918) (sheriff liable for failure to search insane cell-mate who attacked plaintiff); *cf.* Gunther v. Johnson, 36 App. Div. 437, 55 N. Y. Supp. 869 (2d Dep't 1899).

[9] Davis v. Moore, 215 N. C. 449, 2 S. E. (2d) 366 (1939) (deputy closed door on plaintiff's thumb).

[10] Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915), see note 24, *infra;* for cases from other jurisdictions so holding see Note (1927) A. L. R. 111. For the proposition that an officer may be personally liable although not liable on his bond, see Holt v. McLean, 75 N. C. 347 (1876).

[11] Sutton v. Williams, 199 N. C. 546, 155 S. E. 160 (1930).

tion,[12] and therefore the municipality is not liable to a prisoner for injuries due to improper construction or negligent maintenance.[13] North Carolina departs from the general rule insofar as liability is imposed by Article XI, Section 6, of the Constitution, which provides that "competent legislation" shall require that the "structure and superintendence" of penal institutions of the state, city and county "secure the health and comfort" of the prisoners. What will satisfy the constitutional requirement as to "structure" is uncertain, but apparently almost any pretense is sufficient, for *Nichols v. Fountain,*[14] held adequate a second floor cell in a frame building which caught fire in the absence of any attendants and burned the prisoner to death. Speaking in ambiguous generalities, the court said that there was no liability as long as the jail was constructed properly and "reasonable provision" made for comfort and protection. Should a town be held blameless for locking up and deserting a prisoner in a cell manifestly dangerous? Was "reasonable provision" made for comfort and safety when no guard was near to rescue from just such an eventuality? Other jurisdictions answer affirmatively.[15] But encouragingly, the court has held that an 8 by 14 foot cell underneath a garbage-strewn marketplace helped "accelerate" death "by the noxious air of the guardhouse", and further intimated that absence of a chair, bed, blanket, would attach liability to the city.[16]

The legislation enacted pursuant to the Constitutional requirement makes it the duty of the sheriff or keeper of a jail to cleanse daily the cells of the prisoners, to furnish adequate food and water, fuel, and "every necessary attendance".[17] Six cases have arisen under this law, and only twice were facilities found sufficiently inadequate to warrant recovery.[18] No recovery for injuries due to unsanitary conditions has

[12] For a textual statement of the distinction, see 6 McQUILLEN, MUNICIPAL CORPORATIONS (6th ed. 1928) §§2795 to 2798.

[13] 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1656. *Contra,* Edwards v. Pocahontas, 47 Fed. 268 (C. C. W. D. Va. 1891) (city not absolutely required to maintain a jail and, if it does so, it is liable).

[14] 165 N. C. 166, 80 S. E. 1059 (1914).

[15] McAuliffe v. Victor, 15 Colo. App. 337, 62 Pac. 231 (1900) (prisoner died in jail that burned through negligence of jailer); Alvord v. Richmond, 3 Ohio N. P. 136 (1896) (town not liable for negligence of jailer in not watching fire in faulty stove—but officials liable for plaintiff's death); Carty v. Winooski, 78 Vt. 104, 62 Atl. 45 (1905) (plaintiff suffocated by fumes from fire of unknown origin in mattress); Brown v. Guyandotte, 34 W. Va. 299, 12 S. E. 707 (1890) (jail consumed by fire while keeper was away); McKenzie v. Chilliwhack, 15 B. C. 256 (1909) (prisoner burned to death by fire of unknown origin during temporary absence of jailer on official duties).

[16] Lewis v. Raleigh, 77 N. C. 229 (1887).

[17] N. C. CODE ANN. (Michie, 1939) §1346.

[18] Recovery allowed: Lewis v. Raleigh, 77 N. C. 229 (1877); Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896) (on rehearing). Recovery denied: Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889); Shields v. Durham, 116 N. C. 394, 21 S. E. 402 (1895); Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897); Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915).

been allowed since the turn of the century. This may be attributed less to the indifference of the court regarding jail conditions than to the improvement brought about in jail standards by the regular inspections of the State Board of Health and the Board of Charities and Public Welfare.[19]

Notice has several times been held prerequisite to a city's liability. An early case permitted recovery without mention of the necessity that the city have knowledge of the inadequacy, saying: "No question arises as to how far the city is liable for the misconduct of its officials, because the act complained of (leaving the prisoner in an unsanitary cell) is the act of the city itself."[20] In the next case against a city,[21] for a jailer's failure to replace broken windows and worn-out bedding, the court held that there was no liability in the absence of a showing that the governing officers of the town had actual notice of the condition, but intimated that if they had such notice and retained incompetent or careless jailers after awareness of their negligent character, there would be liability. A long-standing condition of filth and neglect was held sufficient notice in *Shields v. Durham*[22] particularly since the chief of police informally told the commissioners of the bad facilities. A final opinion[23] held that knowledge of the chief of police concerning defective jail equipment was not adequate notice to impose liability, unless communicated. This leaves the question of what constitutes notice shrouded with uncertainty; but any requirement of notice appears unjust and contrary to the rule that knowledge of the agent is knowledge of the principal. The interests of justice would seem better served if the court imposed liability on a showing that the city had allowed jail conditions to fall below the constitutional and statutory standards. Such a change might well prompt a salutary civic alertness and concern.

In the principal case of *Parks v. Princeton,* the city was held not liable for the negligence of the jail-keeper in putting an unsearched and violent drunk in a cell with the plaintiff, when the drunk wrapped the sleeping plaintiff in an inflammable mattress and set fire to it. Justification was supplied by the time-worn formula that a municipality has no liability for injuries arising out of the performance of a governmental function. The plaintiff introduced evidence to show lack of lights, toilet facilities, ventilation, and proper bedding, apparently seek-

[19] N. C. CODE ANN. (Michie, 1939) §§5008, 7050.
[20] Lewis v. Raleigh, 77 N. C. 229, 231 (1877).
[21] Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889).
[22] Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896) (plaintiff's feet frozen in filthy cell with window glass out and insufficient bedding).
[23] Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897) (plaintiff died from filth and poor ventilation of jail). Absence of the requirement of notice in other jurisdictions is probably due to the fact that such jurisdictions have no statute comparable to C. S. 1346.

ing to recover on the basis of the town's failure to meet the required standards of construction and supervision, but the court declared that, even conceding sub-standard conditions, there was no causal connection between such omissions and the injury of the plaintiff.[24] Seemingly the court might with more equity have decided oppositely on both rulings. First, the immunity of governmental units, particularly municipalities, to suits of this nature is open to strong criticism.[25] No longer does close adherence to this antiquated precedent promote justice or adequately protect the public under modern conditions of society. Secondly, assuming the prison conditions to have violated the constitutionally-imposed standard, causal connection might reasonably have been found in the utter lack of any safety appliance or means of summoning help to meet such an emergency.

Had the plaintiff sued the sheriff under C. S. 354 on the basis of his deputy's negligence in placing the violent drunk in the same cell, chances of recovery would seem excellent, for such a prisoner was foreseeably dangerous, and the exercise of reasonable care would seem to demand a search of the inebriated prisoner for matches or other dangerous instruments before admitting him.[26] Suit under such a theory is obviously easier of proof than an attempt to establish (assuming a causal connection): (1) violation by the city of a loosely construed constitutional standard of maintenance, and (2) notice of such violation by the city.

C. Suits Against the County and the State

No exception has been found in this state to the general rule that counties are not liable for injuries to prisoners in the absence of some specific statute.[27] In two instances[28] recovery was denied against a

[24] In Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915), the town and sheriff were joint defendants and no liability attached to the town for the *ultra vires* act of a county official in putting plaintiff in the *city* jail where he suffered from filth and exposure, yet the officer was held personally responsible. Would not the city have been liable if, (1) the plaintiff had been arrested by an authorized city officer, and placed in the contaminating city jail, or, (2) the city and county jointly provided jail facilities?

[25] The dissenting opinion of Justice Wanamaker in Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919), although little followed in later decisions, is the classic revolt against the immunity rule. For comment on this decision, see Notes (1920) 54 AM. L. REV. 916; (1920) 20 COL. L. REV. 772; (1919) 5 CORN. L. Q. 90; (1920) 34 HARV. L. REV. 66; (1920) 18 MICH. L. REV. 708; (1920) 4 MINN. L. REV. 460; (1921) 7 VA. L. REV. 383; (1920) 29 YALE L. J. 911.

[26] Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918) (sheriff held liable for failure of deputy to search insane prisoner before committing him).

[27] The general rule and an analysis of the cases thereunder will be found in: Notes (1906) 2 L. R. A. (N. S.) 95; (1924) 31 A. L. R. 293; (1929) 61 A. L. R. 569; 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §1640.

[28] Manuel v. Board of Commr's, 98 N. C. 9, 3 S. E. 826 (1887); Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935).

county and its commissioners for injuries sustained in the county jail. In one case non-liability for injuries resulting from the negligent failure to provide blankets was rationalized by a recital of the rule that a county, being a subdivision of the state, is immunized against the acts of its agents in the absence of an express statute.[29] Other states would hold the jailer personally liable,[30] and C. S. 354 warrants North Carolina in likewise holding a sheriff and his surety liable for failure to provide heat or food, or for injurious subjection to unnecessary filth. The second case[31] is comparable to the principal cases in that injury arose from actions of fellow-prisoners who subjected the plaintiff to a mock trial by their "kangaroo court" and, upon his refusal to pay a fine, severely beat him. The county commissioners knew of the illicit court, but had taken no steps to safeguard newly admitted prisoners. Instead of suing the sheriff upon his statutory bond,[32] the plaintiff elected to rely on C. S. 1317, requiring the commissioners to pass regulations governing the prisoners; but the court held the statute to impose only a "discretionary" duty, and that only on proof of corrupt and malicious motives would the commissioners incur individual liability.[33]

The immunity of a sovereign state to suit[34] (without its consent) and the inapplicability of the rule of *respondeat superior* to agents of the state effectively prevent recovery against the state for injuries to prisoners. North Carolina has held the state prison non-suable in the absence of express statute,[35] and has also exempted the state from liabil-

[29] Manuel v. Board of Commr's, 98 N. C. 9, 3 S. E. 829 (1887). This case also discusses the distinction between the liabilities of city and county, which distinction is further commented on in Note (1934) 12 N. C. L. REV. 172.

[30] Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819 (1894); Nixa v. McMullin, 198 Mo. App. 1, 193 S. W. 596 (1917) (marshal liable for placing plaintiff in unsanitary cell); Richardson v. Capwell, 63 Utah 616, 176 Pac. 205 (1918) (marshal liable for exposing prisoner to cold, poor food, and unsanitary conditions); Clark v. Kelly, 101 W. Va. 650, 133 S. E. 365 (1926) (jailer liable for placing plaintiff in unsanitary jail); *cf.* Martin v. Moore, 99 Md. 41, 57 Atl. 671 (1904); Williams v. Adams, 3 Allen 171 (Mass. 1861) (prisoner confined in house of correction recovered against master for negligent failure to furnish food, heat, and clothes); Rose v. Toledo, 24 Ohio C. C. 540 (1903); Lunsford v. Johnson, 132 Tenn. 615, 179 S. W. 151 (1915); Bishop v. Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029 (1899) (neither policeman nor marshal liable for janitor's transfer of prisoner to filthy cell, in absence of showing that defendants were responsible for condition of cell, or had ordered the transfer, or were aware of it).

[31] Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935).

[32] For the view that a recovery could have been obtained in such event: Ratcliff v. Stanley, 224 Ky. 819, 7 S. W. (2d) 230 (1928); Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897); Taylor v. Slaughter, 171 Okla. 152, 42 P. (2d) 235 (1935); Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17 (1920). In each of these cases there was a "kangaroo court" whose existence and dangerous propensities were known to the jailer.

[33] Authority for the latter statement is contained in Hipps v. Ferrall, 173 N. C. 167, 91 S. E. 831 (1917).

[34] McGuire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20.

[35] Moody v. State's Prison, 128 N. C. 12, 38 S. E. 131 (1901).

ity where a convict was injured through negligence of a state supervisor while working on the streets (a proprietary function to which liability ordinarily attaches).[36]

An investigation of other jurisdictions reveals cases of fellow-prisoner injuries analagous to the two principal cases, and in no instance has a city been held liable for the negligence of its agents in not regulating prisoners more carefully.[37] However, where suit has been against the individual bonded officer, there has been recovery in nearly all cases in which the officer knew or should have known of the danger to the prisoner.[38] Thus the knowledge rule has extended not only to "kangaroo court" and direct assault cases, but to a situation where a prisoner caught small-pox due to the jailer's failure to isolate an inmate known to be diseased,[39] and to a situation where the sheriff knew of an inmate's wounds but failed to secure medical aid.[40]

Thus North Carolina accords with the weight of authority in granting recovery when the sheriff is defendant and denying it when the town is defendant, on substantially identical fact-situations. From a social point of view the result reached in the Parks case is palpably undesirable, yet remedy lies only in a statutory imposition of liability on town and county for negligence in the exercise of its "governmental" functions.

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Workmen's Compensation—Injury from Personal Assault as Arising Out of Employment.

While at work, *P* was jeeringly taunted by his supervisor until he retaliated with abusive language. Thereupon the supervisor struck and injured *P*. Recovery was allowed under Workman's Compensation Act.[1]

Admittedly the injury occurred in the "course of employment." But it is highly controversial whether an assault flowing from purely personal bickering may be said to "arise out of employment." Difficulty inheres in the necessity of establishing a sufficient causal connection between the injury and the employment.[2]

[36] Clodfelter v. State, 86 N. C. 51 (1882).
[37] In each case the jailer had reason to anticipate the danger from the prisoner, but liability was denied against the city on the basis of immunity to suit for injuries arising out of governmental functions.
[38] See note 31, *supra*.
[39] Hunt v. Rawton, 14 Okla. 181, 288 Pac. 342 (1930).
[40] Moxley v. Roberts, 43 S. W. 482 (Ky. 1897).

[1] Hartford Accident & Indemnity Co. v. Cardillo, 112 F. (2d) 11 (App. D. C. 1940).
[2] Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212 (1916); Connelly v. Samaritan Hospital, 259 N. Y. 137, 181 N. E. 76 (1932).