Volume 35 | Number 4 Article 20

6-1-1957

Torts -- Distinction Between Intentional and Negligent Conduct Under Torts Claims Act

B. Frank Maready

Special notice should be taken to the following:

1) Payments of either interest or installments *must be made* during the life of the surviving spouse, and only to the surviving spouse. Here special care should be taken in making certain that interest, or even dividends, could not be received by anyone other than the surviving spouse.

2) Payments must be made at least annually, and commence within thirteen months of decedent's death. An annuity for the surviving spouse that would commence two years from decedent's death would fail to qualify if interest were not paid in the interim.

3) The power of appointment in the surviving spouse can be exercisable only in favor of the surviving spouse or her estate.

4) Only the surviving spouse may exercise the power of appointment, and it *must be exercisable* in all events. If the policy provided that the surviving spouse would lose the power of appointment, for example, if she remarried, this condition would not be satisfied.[23]

It would pay the estate planner to compare payments made under each settlement option employed, with the requirements set out in the regulations, with particular attention toward all contingencies that might occur under each option. In this way the planner would be assured that the proceeds which he expects to qualify would, in the final analysis, be subject to marital deduction.

ROBERT M. HUTTAR.

Torts—Distinction Between Intentional and Negligent Conduct Under Tort Claims Act

Governmental immunity from civil suit is an historical characteristic of Anglo-American jurisprudence. The principle developed in England on the premise that "the king can do no wrong."[1] While it may be said that immunity is still the basic rule and liability the exception, the modern trend is to allow limited avenues of enforceable liability against the government.[2] In allowing itself to be sued for any wrongful act of its employees and permitting liability "to the same extent as a private individual,"[3] the Federal Government, with a few exceptions,[4] has

[23] The only exception to this rule is that an interest passing to surviving spouse will not be considered terminable because of a common disaster clause provided 1) the clause does not exceed six months, and 2) the termination of wife's interest by a common disaster does not, in fact, occur. Sec. 21 Fed. Reg. 7894 (1956).

[1] See Hans v. Louisiana, 134 U. S. 1, 33 Law. Ed. 842 (1889).
[2] Leflar and Kantrowitz, *Tort Liability of the States,* 29 N. Y. U. L. REV. 1363 (1954).
[3] 28 U. S. C. § 2674 (1952).
[4] 28 U. S. C. § 2680 (1952).

waived immunity. Adoption of Tort Claims Acts among the states has been piecemeal and accompanied by a hesitancy of the courts to accede to alterations of century old concepts. Thus, almost without exception, the courts have applied the doctrine of strict construction to these acts. The result is that tort liability against most states is either unenforcable or restricted to specifically defined categories of tort.[5]

The North Carolina Tort Claims Act[6] goes as far toward removing sovereign immunity as most state acts. Under the Act,[7] a plaintiff is permitted to sue the state if (1) the injury was the proximate result of the negligence of a state employee or agency, (2) the active tortfeasor was acting within the scope of his employment, and (3) the plaintiff was free of contributory negligence.[8] The Industrial Commission is authorized to hear and determine claims under the act and may award a maximum amount of $10,000[9] with the privilege of appeal by either party to the courts. The court has committed itself to a strict construction of the act.[10] It has been held that there can be no recovery for a negligent *omission* since the statute refers only to a negligent *act*,[11] but that the common law principles of negligence apply;[12] that a prisoner is not a state employee within the meaning of the act,[13] and that a full release given by plaintiff to the active tort feasor is also a release to the state.

As a practical matter, the label given a tort is often not so critical as to defeat or effect the right of recovery.[14] However, the requirement of the Tort Claims Act that recovery may be had only for a *negligent act* has recently focused attention on the often difficult distinction between a negligent and an intentional tort.

The formula for ordinary negligence is simple, its application more difficult. It is usually defined as the failure to use due care, or to act as a reasonable and prudent man would act under the same or similar circumstances.[15] Because the Tort Claims Act refers only to negligence, it is

[5] Borchard, *Government Liability in Tort*, 34 YALE L. J. 1 (1924).
[6] N. C. GEN. STAT. § 143-291 *et seq.* (1952 and Supp. 1955).
[7] See 29 N. C. L. REV. 416 (1951), for a history and analysis of the Act.
[8] Alliance Co. v. State Hospital at Butner, 241 N. C. 329, 85 S. E. 2d 386 (1955).
[9] N. C. GEN. STAT. § 143-291 (Supp. 1955).
[10] Floyd v. North Carolina State Highway and Public Works Comm'n, 244 N. C. 461, 85 S. E. 2d 703 (1955); 33 N. C. L. REV. 613 (1955).
[11] Flynn v. North Carolina State Highway and Public Works Comm'n, 241 N. C. 617, 94 S. E. 2d 571 (1956).
[12] McFarlane v. North Carolina Wildlife Resources Comm'n, 244 N. C. 385, 93 S. E. 2d 557 (1956).
[13] Alliance Co. v. State Hospital at Butner, 241 N. C. 329, 85 S. E. 2d 386 (1955).
[14] "Whether we say this is an action for damages resulting from a continuing trespass or for the maintenance of a nuisance or accord it some other name is immaterial." Phillips v. Hassett Mining Co., 244 N. C. 17, 21, 92 S. E. 2d 429, 432 (1956).
[15] PROSSER, TORTS § 31 (1955).

necessary to distinguish gross negligence in order to appraise the extent of recovery against the state. The term gross negligence has appeared in North Carolina decisions as indicating a degree of conduct more reprehensible than ordinary negligence but falling short of an intentional injury. It is attributed to the actor who is cognizant of the probable consequences of his act but nevertheless acts in conscious disregard of the likely consequences.[16] It is synonymous with wanton conduct.[17] To this type of conduct, contributory negligence is no defense.[18] Since contributory negligence is stated to be a defense to an action brought under the Tort Claims Act, it would seem to follow that the legislature did not contemplate actions against the state for gross negligence. This seems to be the view of the court as indicated by *dicta* in a recent case.[19] The same considerations deny recovery for the intentional injury. This type of tort assumes actual knowledge by the actor of the impending danger, coupled with a design and purpose to commit the injury.[20] Compensation for such torts is not recoverable against the state.

In *Jenkins v. North Carolina Dept. of Motor Vehicles*,[21] a state highway patrolman shot and killed an arrestee. The findings of the Commission revealed that the patrolman had arrested plaintiff's intestate, placed him in the patrol car and proceeded to drive away. Upon being seized around the neck by the deceased, the patrolman stopped the car and pulled deceased out. In the ensuing struggle, the patrolman pulled his pistol and after firing two warning shots into the ground in front of deceased, fired a third shot which grazed decedent's chest, causing him to fall. The fourth and fatal bullet struck deceased in the back. The full Commission reversed a finding of negligence by the hearing Commissioner.[22] On appeal to superior court, the Commission was reversed, the court being of the opinion that the death of plaintiff's intestate was the result of the negligence of a state employee acting within the scope of his employment.[23] On appeal to the Supreme Court, the decision was reversed, the court holding that the Tort Claims Act covers only negligent acts by state employees and that negligence cannot be predicated on an intentional act.

[16] Wagoner v. North Carolina R. R. Co., 238 N. C. 162, 168, 77 S. E. 2d 701, 706 (1953).

[17] See, Hinson v. Dawson, 244 N. C. 23, 28, 92 S. E. 2d 393, 396 (1956).

[18] Fry v. Southern Public Utilities Co., 183 N. C. 281, 111 S. E. 354 (1922).

[19] "That contributory negligence is made a defense lends powerful support to the view that the *negligent acts* contemplated are those to which *contributory negligence would be a defense.*" Jenkins v. North Carolina Dept. of Motor Vehicles, 244 N. C. 560, 564, 94 S. E. 2d 577, 581 (1956).

[20] Wagoner v. North Carolina R. R. Co., 238 N. C. 162, 168, 77 S. E. 2d 701, 706 (1953).

[21] 244 N. C. 560, 94 S. E. 2d 577 (1956).

[22] Record on appeal, P. 46, Jenkins v. North Carolina Dept. of Motor Vehicles, 244 N. C. 560, 94 S. E. 2d 577 (1956).

[23] *Ibid.*, P. 59.

Three months before the *Jenkins* case, the court decided *Lowe v. Dept. of Motor Vehicles.*[24] There, defendant's patrolman accidentally shot and wounded plaintiff while attempting to arrest him for a speeding violation. It appeared that the patrolman had pursued plaintiff for several miles and after the cars had stopped, pulled his pistol and ran toward plaintiff's car with the pistol pointed toward plaintiff. He tripped in the darkness, causing the pistol to accidentally discharge and wound plaintiff. The court affirmed a finding of negligence. The rationale of the court's decisions seems to be: in intentionally and unjustifiably pointing a pistol at plaintiff, the patrolman violated G. S. 14-34,[25] a statute designed to protect human life. Therefore his conduct was negligence *per se.*[26]

In both the *Lowe* and *Jenkins* cases, the patrolman exceeded his authority in using his pistol. Although the facts are strikingly similar and recovery was had in one and denied in the other, the cases are distinguishable. In the *Jenkins* case, although the patrolman undoubtedly violated the assault statute in using his pistol, he *intended* to fire the pistol and commit the injury. In the *Lowe* case, the patrolman's negligence was based upon the *intentional assault,* but the injury itself was not intended. It was rather the result of a *negligent* act.

The writer finds no quarrel with the court on the result reached in either case. The difference was required by the Tort Claims Act. However, the decisions graphically demonstrate the limitations of the act, limitations which might well be regarded as inadequacies. Thus it will be observed that under the act, if any employee of the state is slightly negligent and injures plaintiff, there may be recovery. But if the employee is grossly negligent or inflicts a wanton or intentional injury in the course of his employment, the plaintiff must suffer the loss. The *Jenkins* case is an express declaration of this point. It can be conceded that immunity from civil suit is an inherent right of the sovereign state and that any legislative concessions to allow the state to be sued for any action is purely *gratis.* However it is a *non sequitur* to say that the waiver should allow one plaintiff to recover and at the same time refuse relief to the other because the tort against him arose from a more culpable state of mind.[27] The moral injustice is obvious. The medieval idea that

[24] 244 N. C. 353, 93 S. E. 2d 448 (1956).
[25] This statute provides that pointing a gun at any person constitutes assault.
[26] See, *Case Survey,* 35 N. C. L. REV. 177, 249 (1957).
[27] In the *Jenkins* case, the patrolman weighed 185 pounds and had received training in self defense in the Marines. The deceased was intoxicated and weighed only 135 pounds. The fatal shot entered his back as he fell to the ground. In this regard, the court said: "Strong and appealing argument can be advanced why compensation should be allowed in this case, upon the ground that the more grievous the fault on the part of the agent of the State, the more readily the State should compensate for the injury. But the court must construe the act as written." Jenkins

the "king can do no wrong" has evolved in our enlightened age to mean "the king can do little wrong."

Two factors are primarily responsible for the frustration of the trend toward waiver of immunity: several states have constitutional provisions against government liability.[28] These provisions were undoubtedly carry-overs from the highly theoretical English view that the king was infallible. History relates and practical experience sustains the view that the sovereign is fallible. The North Carolina constitution contains no such restriction.[29] Secondly, and perhaps more controlling, is a fear by the various state legislatures and courts that the public treasury can not afford to pay the sums demanded if tort liability were imposed.[30] This feeling was undoubtedly justified during the early growth of this country when most state treasuries were financially instable. Today however, the states do not have so serious a problem. Large budgets and greater governmental spending conclusively show that government is "big business." A policy against government liability is diametrically opposed to the modern view that those most able to pay should pay for the sufferer's loss; a view which prompted our Workman's compensation acts and similar legislation. The king's immunity is antiquated.

New York is more liberal than any state in allowing general liability ". . . in accordance with the same rules of law as applied to actions . . . against individuals or corporations."[31] Of like effect is the Federal Tort Claims Act.[32] Had these statutes resulted in serious inroads upon the public treasury, it would seem to follow that they would have been repealed long ago. The fact that they remain on the books is convincing evidence that they not only represent a growing social view toward compensation for the innocent victim of tort, but also that they are practical of operation.

It is not contended that the State should be liable for the torts of its employees under all circumstances. It is obvious that such liability should be restricted to acts within the principle of *respondeat superior* and the New York and Federal acts, *supra* are so limited. In the

v. North Carolina Dept. of Motor Vehicles, 244 N. C. 560, 565, 94 S. E. 2d 577, 581 (1956).

[28] Some of these states are West Virginia, Illinois, Arkansas and Alabama. Most state constitutions provide that the legislature may waive liability. See Leflar and Kantrowitz, *Tort Liability of the States,* 29 N. Y. U. L. REV. 1363 (1954).

[29] The only pertinent provision provides: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action." N. C. CONST. ART. IV, § 9.

[30] See, Gellhorn and Schenck, *Tort Actions Against the Federal Government,* 47 COL. L. REV. 722 (1947).

[31] N. Y. CT. CL. ACT § 8 (1939).

[32] 28 U. S. C. 2671 *et. seq.* (1952).

Jenkins case, the act was clothed in the dignity and authority of the state and would seem to fall within the principle of *respondeat superior*. If the State of North Carolina were liable "in accordance with the same rules of law as applied to actions against individuals,"[33] the plaintiff in the *Jenkins* case would have been compensated for an obvious wrong.[34] It is submitted that the North Carolina act should be amended to provide not only for the negligence of state employees, but also for intentional wrongs committed by employees while acting within the scope of the employment. There seems to be no logic nor valid reasons for restricting sovereign liability to acts of simple negligence.

B. FRANK MAREADY.

Workmen's Compensation—Employees of Subcontractors—Rights Against Owners and Principal Contractors

In *Adams v. Davison-Paxon Co.*[1] the South Carolina Supreme Court held that an employee of an independent contractor, who operated the millinery department of defendant department store, could not maintain an action at law for negligence against the department store, but that her remedy under the Workmen's Compensation Act was exclusive. The Court held that the department store was an owner within the South Carolina act,[2] and the independent contractor operating the millinery department was performing part of the "trade business or occupation" of the department store so as to make the department store liable to the employees of the millinery department for workmen's compensation.

The contract between the millinery company and the department store gave the latter direct supervision over the operation of the department, and stated that the name of the millinery company was not to be used, but that it was to operate and advertise in the name of the department store. The money from all sales was paid to the cashier of the

[33] From the N. Y. Act; N. Y. CT. CL. ACT § 8 (1939).

[34] In view of the facts as found in the *Jenkins* case, the following excerpt from a letter to the writer from the plaintiff's attorney is significant: ". . . the patrolman who shot and killed D. C. Jenkins was tried . . . upon a charge of manslaughter .... [A]t the conclusion of the State's evidence, the court sustained the defendant's motion for judgment as of nonsuit and directed a verdict of not guilty."

[1] — S. C. —, 96 S. E. 2d 566 (1957).

[2] S. C. CODE § 72-11 (1952). When any person, in this section . . . referred to as owner, undertakes to perform or execute any work which is a part of his trade, business, or occupation, and contracts with any other person (. . . referred to as subcontractor) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.