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Municipal Immunity: Purchase of Liability by a Municipality Waives Immunity

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logical conclusion is that eleemosynary educational institutions will no longer be immune from liability.

The court, it seems, sees the availability of insurance as a panacea for the suffering of those injured by accidents, and this without any investigation by court or counsel as to the ability of religious institutions in particular to finance insurance coverage. This writer questions whether this type of decision reflects a trend in the law to minimize the negligence factor in a move toward strict liability.

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Municipal Immunity: Purchase of Liability Insurance by a Municipality Waives Immunity—In the recent case of *Marshall v. City of Green Bay*,[1] the Wisconsin Supreme Court held that the city's purchase of a liability policy in which the insurer renounced the defense of governmental immunity constituted a waiver by the city of municipal immunity for the tortious acts of its employees.

The action was brought by the injured wife and her husband and involved injuries sustained by the wife while tobogganing on a toboggan hill operated by the city outside of the corporate limits of Green Bay. The injured wife was thrown from the toboggan when it hit a rough area consisting of frozen hummocks. It was alleged that the city was negligent in allowing the rough area to exist and in not warning users of the hill of the danger.

Plaintiffs sued the city after disallowance of their claim by the common council. The city carried insurance covering any liability for its operation, supervision and maintenance of the toboggan hill. The policy provided that the insurance company should be notified and should defend any action on the policy at its own expense and could not claim that the city was free from liability because of the performance of governmental functions. It further provided that no action could be brought against the insurer unless the amount of the city's obligation to pay were first determined either by a judgment against the city after trial or by a written agreement between the city, the claimant and the insurer.

The city demurred to the complaint, and the trial court delayed ruling on the demurrer to await the decision in the pending case of *Holytz v. City of Milwaukee*.[2] After the *Holytz* decision which abolished municipal immunity prospectively, the trial court sustained the city's demurrer and the plaintiffs appealed. On appeal plaintiffs contended that their complaint stated a cause of action because:

(1) They were as diligent in pursuing their claims and in challenging governmental immunity as were the plaintiffs in *Holytz*

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[1] Marshall v. City of Green Bay, 18 Wis. 2d 496, 118 N.W. 2d 715 (1963).
[2] Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).

> *v. City of Milwaukee* . . . and should receive equal treatment, (2) the reason for the prospective application of the abolition of governmental immunity does not apply because the defendant has liability insurance, (3) the maintenance and operation of the toboggan hill outside of the corporate limits of the city was a proprietary function and independent of the *Holytz* case the city is liable for negligence, and (4) the defendant has waived its immunity by the purchase of insurance to the extent of the policy limits and is estopped from asserting the defense of governmental immunity.[3]

After deciding the first three contentions of the plaintiffs adversely, the supreme court held that the plaintiffs' complaint did state a cause of action against the city, because the city had purchased a liability insurance policy with the provision therein that the company would not raise the defense of immunity. The court said that it was deciding the case as if *Holytz* had not been decided.

This decision overruled *Pohland v. City of Sheboygan*[4] on the question of whether the purchase of liability insurance with a provision that the insurer would not raise the defense of immunity by a municipality waives its immunity. In doing so, the court stated:

> The power of a city to waive its tort immunity need not rest upon any express grant of statutory authority. The immunity granted municipalities from tort liability was created by case law basically and primarily to protect public funds and property. Such immunity can be waived by the municipality when it has secured that purpose by insurance and believes a waiver to be advantageous or desirable.[5]

The court specifically construed the clause in the insurance policy, providing that the insurer would not raise the defense of governmental immunity, to mean that the insurer, ". . . who is in control of the defense, will not raise such defense on behalf of the insured against the claimant."[6] In concluding its decision the court said:

> We construe this agreement to be a waiver of governmental immunity by the city recognized and agreed to by the insurer. Such immunity cannot be resuscitated by subsequent action of the city or the insurer or both. . . . We do not hold, however, a municipality waives its immunity when it takes out a liability policy which does not contain the condition or agreement to refrain from raising the defense of governmental immunity.[7]

There was a dissent in this case by Justice Gordon, who said:

> In a proper case, the city might have chosen to waive its immunity as a municipality performing a governmental function and,

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[3] Marshall v. City of Green Bay, *supra* note 1, at 498, 118 N.W. 2d at 716.
[4] Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W. 2d 136 (1947).
[5] Marshall v. City of Green Bay, *supra* note 1, at 500, 118 N.W. 2d at 717.
[6] *Id.* at 501, 118 N.W. 2d at 718.
[7] *Id.* at 501-502, 118 N.W. 2d at 718.

> in such event, its insurance coverage would be operative. The fact, however, that it reserved the power to do this should not be converted into a requirement that it do so. In my opinion the majority decision unwisely translates the protection of insurance to the creation of liability.[8]

Chief Justice Brown joined in the dissent.

This decision places Wisconsin among the growing number of states holding a minority view on this issue.[9] This view is more logical, since a city would not bother to insure itself against a non-existent risk.[10] If there were no risk to be insured against, a city might well be liable for an unauthorized expenditure of public funds.[11]

There is considerable vigor, however, in the majority view, that a city does not waive its immunity by purchasing the type of liability insurance policy purchased by the city in this case.[12] The following reasons are given to support this view:

1. The mere fact that a municipality is authorized to procure liability insurance does not warrant the conclusion that its immunity has been removed.[13]

2. A municipality lacks power to waive its immunity or to estop itself by procuring liability insurance.[14]

3. Liability insurance which is procured by a municipality entitled to immunity from tort liability is insurance only against torts which do not come within the scope of the immunity.[15]

The *Marshall* case approves a cause of action upon municipal torts which occurred prior to July 15, 1962 (the prospective application date of the *Holytz* decision) if the municipality being sued had in effect at the time of the tortious conduct a liability policy providing that the insurer would not raise the defense of governmental immunity. There may be some additional value to this decision in its possible application to suits commenced against charitable corporations which carry the type of liability insurance discussed in this case for injuries arising prior to the prospective application date of the *Widell*[16] case, which removed the immunity of such corporations to liability for the negligent acts of their employees.

Perhaps most importantly, however, this decision seems to give further evidence of the fact that the Wisconsin Supreme Court is pre-

[8] *Id.* at 503, 118 N.W. 2d at 719.
[9] See Annot., 68 A.L.R. 2d 1437 (1959).
[10] Lynwood v. Decatur Park District, 26 Ill. App. 2d 431, 168 N.E. 2d 185 (1960).
[11] RHYNE, MUNICIPAL LAW §15-4 (1957).
[12] Annot., *supra* note 9.
[13] Livingston v. Regents of New Mexico College of Agriculture and Mechanic Arts, 64 N.M. 306, 328 P. 2d 78 (1958).
[14] Taylor v. State, 73 Nev. 151, 311 P. 2d 733 (1957).
[15] Cushman v. Grafton County, 97 N.H. 32, 79 A. 2d 630 (1951).
[16] Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W. 2d 249 (1963).

pared to continue whittling away at immunities which no longer have any real reason for their existence.

FREDERICK A. MUTH

Constitutional Law: Obscenity Censorship in Wisconsin—The district attorney of Milwaukee county, acting under statutory authority,[1] commenced action seeking to have Henry Miller's *Tropic of Cancer* declared obscene. The challenged book, an autobiographical novel, recounts the experiences of an American artist living in Paris during the depression. A substantial portion of the narrative delineates in detail through the use of vulgar language, sexual experiences of the author and his associates. "References to the sexual episodes . . . are made in short English words of ancient origin and wide, but not often printed usage."[2] *Tropic of Cancer,* nevertheless, has received considerable attention as a serious literary work, and has been held to demonstrate substantial writing ability.

The circuit court, after a trial without jury, concluded that "the book is repugnant to decency and the moral standards of the community, and has no literary, cultural, social or educational value."[3] On appeal from this judgment the Wisconsin Supreme Court in a four to three decision reversed the circuit court's finding of obscenity.[4]

Justice Fairchild, writing the majority opinion, reiterates the court's previous determination[5] that the word "obscene" in the Wisconsin statute is the equivalent of the definition enunciated by the United States Supreme Court and referred to as the *Roth* test.[6] The test outlined was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[7] "All ideas having even the slightest redeeming social importance" were to enjoy full constitutional protection.[8]

In light of these statements, the Wisconsin court concludes that there can be no declaration of obscenity without consideration of such factors as "the seriousness of the author's purpose, the social importance of the idea expressed, or the artistic quality of expression."[9] A balancing of factors is declared essential for a determination of the dominant

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[1] WIS. STAT. §269.565 (1961).
[2] McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 145, 121 N.W. 2d 545, 551 (1963).
[3] *Id.* at 147, 121 N.W. 2d at 552.
[4] McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W. 2d 545 (1963).
[5] State v. Chabot, 12 Wis. 2d 110, 112, 106 N.W. 2d 286, 288 (1960).
[6] McCauley v. Tropic of Cancer, *supra* note 4, at 138, 121 N.W. 2d at 547.
[7] Roth v. United States, 354 U.S. 476, 489 (1957).
[8] *Id.* at 484.
[9] McCauley v. Tropic of Cancer, *supra* note 4, at 142, 121 N.W. 2d at 549.