

Negligence: Abolition of the Defense of Municipal Immunity

Frederick Muth

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Frederick Muth, *Negligence: Abolition of the Defense of Municipal Immunity*, 46 Marq. L. Rev. 252 (1962).
Available at: <http://scholarship.law.marquette.edu/mulr/vol46/iss2/14>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

Therefore, at present a partnership is not subject to the provisions of Section 16 if one of its partners is a director of a corporation unless deputization is proven. This imposes a difficult burden of proof in an action against such a partnership to recover short swing profits. Although inequitable on its face, the courts may balance the scales of justice in the future by making a more liberal and common sense appraisal of evidence indicating deputization in fact. If in fact such a liberal approach is not followed it will then be incumbent on Congress to act, if any teeth are to remain in the Act. Likewise, only Congressional amendment of 16(b) will impose liability upon a partnership for short swing profits without proof of deputization where one of its members is a director of the company at whose expense the partnership so profited.

For comparison purposes, it might be pointed out that the courts did not allow one other devastating wedge to be driven into the Act. Namely, the attempt of the partner-director to waive his right to any profit made by the partnership from the purchase of such stock and thus disclaim any individual liability for his proportionate share. This scheme was disallowed under the theory that such profits were nevertheless in contemplation of law realized by him. The court of appeals felt that allowing such waiver would be too wide a breach in the intent of the law.²³ It might be questioned why the Court of Appeals wasn't equally concerned with the breach in the intent of the law which they were prepared to allow in freeing the partnership from any liability.

In the final analysis the Supreme Court may have closed the breach substantially when it accepted the deputization theory. Only Congressional action or federal courts concerned with preserving the intent of the law and using deputization as a foothold can in fact save the Act. Failure to do so will

leave a large and unintended loophole in the statute—one substantially eliminating the great Wall Street Trading firms from the statute's operation.²⁴

DONALD E. MAYEW

Negligence—Abolition of the Defense of Municipal Immunity—
An action was brought on behalf of a minor by her guardian ad litem against the City of Milwaukee to recover damages for personal injuries sustained while playing on a City playground. The minor's father joined in the action to recover damages for medical expenses and for the loss of her society and companionship. The plaintiff, a three and one-half year old child was playing on a playground known as a "tot-lot," operated by the City of Milwaukee for the use and enjoyment of

²³ *Blau v. Lehman*, *supra* note 13, at 791.

²⁴ *Blau v. Lehman*, *supra* note 13.

pre-school age children. She was injured when a steel trapdoor fell on her hands. The trapdoor, normally used to cover a water meter pit at a drinking fountain maintained by the City, had been negligently left in an unsecured position by a City employee. *Holytz v. City of Milwaukee*.¹

The defendant City demurred to the complaint on the ground that the City was immune to liability in a case of this nature. The trial court sustained the demurrer. On appeal to the Supreme Court, the plaintiff contended that "(a) the drinking fountain and the water meter pit trapdoor were created and maintained by the City in its proprietary capacity, or (b) the meter contraption constituted a nuisance and at the time the injury occurred the relationship of governor and governed did not exist between Janet Holytz and the City of Milwaukee, or (c) the trapdoor was an 'attractive nuisance' that was not created or maintained by the City in a governmental capacity."² In its decision, the Supreme Court passed over all of the appellant's contentions, saying: ". . . we are now prepared to disavow those rulings of this court which have created and preserved the doctrine of governmental immunity from tort claims. This makes it unnecessary that we rest this case on the elusive issues mentioned in the foregoing paragraph: the case turns exclusively on our abrogation of the principle of governmental immunity from tort claims."³

As authority for its action, the Court referred to decisions in other states which in abolishing the immunity had called the doctrine anachronistic,⁴ mistaken and unjust,⁵ unsupported by any valid reason,⁶ and an unjust burden on the individual citizen.⁷ Further, it quoted the following with approval:

. . . it cannot be urged . . . that an outmoded . . . curtailment of a general rule of action created by the judicial branch . . . should not be removed by its creator. . . .⁸

We closed our courtroom doors without legislative help, and we can likewise open them.⁹

. . . the courts should be alive to the demands of justice.¹⁰

The *Holytz* case is a significant example of a trend which the Wisconsin Court appears to be setting, to wit: that it will invoke its full legal and equitable powers in aid of petitioners who come before it with

¹ 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).

² *Id.* at 29.

³ *Ibid.*

⁴ *Hargrove v. Town of Cocoa Beach*, (Fla. 1957), 96 So. 2d 130, 132 (1957).

⁵ *Muscopf v. Corning Hospital District*, 11 Cal. 89, 359 P. 2d 457, 458 (1961).

⁶ *Molitor v. Kaneland Community District No. 302*, 18 Ill. App. 2d 11, 163 N.E. 2d 89, 96 (1959).

⁷ *Hernandez v. County of Yuma*, 91 Az. 35, 369 P. 2d 271, 272 (1962).

⁸ *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A. 2d 820, 832 (1960).

⁹ *Pierce v. Yakima Valley Memorial Hospital Association*, 43 Wash. 2d 162, 260 P. 2d 765, 774 (1953).

¹⁰ *Hargrove v. Town of Cocoa Beach*, (Fla. 1957), 96 So. 2d 130, 132 (1957).

just claims, but who have been prevented from recovering by prior judicial decisions no longer having any reasonable basis.

In adopting the reasoning expressed above by other courts, the Supreme Court abandoned its previous position, that if the doctrine of municipal immunity was to be abolished, it was the responsibility of the Legislature to do so;¹¹ that questions of public policy should be addressed to the Legislature and answered by them;¹² and that the Legislature's failure to enact a bill was evidence of the Legislature's intent that the law not be changed.¹³ Once again the Wisconsin Court has held that "The rule of *stare decisis*, however desirable from the standpoint of certainty and stability, does not require us to perpetuate a doctrine that should no longer be applicable. . . ."¹⁴

No longer can there be any doubt that the Wisconsin Court is prepared to change the law to avoid an injustice, even though it has declared in the past that the specific change involved a matter of public policy and should therefore be made by the Legislature. The *Holytz* and *Kojis* cases¹⁵ bear this out. It is now reasonable to expect that the Wisconsin Court will take a new look at questions of law which involve public policy when there have been numerous calls for reform. It is much less likely now than it once was, that the Court will restrain itself from acting on the ground that the doctrine in question, although in need of reform, is a question of public policy and can only be reformed by the Legislature. Where a doctrine has been engrafted into the law by the Courts, the judiciary is free to change or abolish it.¹⁶

In the *Holytz* case the Court not only determined that its decision to abolish municipal immunity was applicable to the case at bar and to those cases involving claims for tortious acts committed by the agents, servants or employees of the municipalities arising after July 15, 1962, but extended its ruling beyond the facts before it by declaring under what other circumstances the new ruling would apply and to whom it would apply.¹⁷

While one can never predict with certainty just how far and in exactly what direction an apparent trend of decisions will go, there may

¹¹ *Flamingo v. Waukesha*, 262 Wis. 219, 55 N.W. 2d 24 (1952); *Britten v. Eau Claire*, 260 Wis. 382, 51 N.W. 2d 30 (1952).

¹² *Smith v. City of Jefferson*, 8 Wis. 2d 378, 99 N.W. 2d 119 (1959); *Schwenkhoff v. Farmers Mutual Automobile Insurance Company*, 6 Wis. 2d 44, 93 N.W. 2d 867 (1959); *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W. 2d 896 (1953); *Flamingo v. Waukesha*, *supra* note 11; *Britten v. Eau Claire*, *supra* note 11.

¹³ *Smith v. City of Jefferson*, *supra* note 12; *Schwenkhoff v. Farmers Mutual Automobile Insurance Company*, *supra* note 12.

¹⁴ *Kojis v. Doctor's Hospital*, 12 Wis. 2d 367, 372, 107 N.W. 2d 131, 133 (1961).

¹⁵ *Id.* at 367, 107 N.W. 2d at 131.

¹⁶ *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

¹⁷ *Holytz v. City of Milwaukee*, *supra* note 16, at 39-42, 115 N.W. 2d at 625-626.

be practical value in considering certain other traditional immunities which may sooner or later be abolished by court decree.

When the Court abolished the immunity of a charitable hospital to paying patients for torts committed against them by the employees of the hospital,¹⁸ it specifically declined to decide whether a charitable hospital would continue to be immune to the tort claims of *non*-paying patients.¹⁹ Further, there has been no determination of the question whether a religious organization will continue to enjoy its immunity to tort claims. When the Court first recognized the immunity in 1917,²⁰ it did so chiefly because it was afraid that if charitable and religious organizations were held liable in tort for the acts of their agents, servants or employees, the financial resources of such institutions would be so badly depleted that they would no longer be able to carry on their beneficial works. In abolishing the immunity of hospitals to the tort claims of paying patients,²¹ the Court rested its decision largely on the fact that charitable hospitals are now generally able to pay the claims made against them.²²

If a charitable hospital should be liable to paying patients because it has the resources to meet such claims, should it not also be liable for the claims of non-paying patients? And should not the same reasoning apply with equal force to claims against religious organizations? The Court has said: "They (charitable hospitals) are now larger in size, better equipped, and on a more sound economic basis. Insurance covering their liability is available and prudent management would dictate that such protection be purchased."²³ Insurance can be purchased by charitable hospitals to cover the claims of non-paying patients as well as the claims of paying patients. Religious organizations can obtain insurance covering their tort liability. If an organization's "ability to pay" is the deciding factor, it seems likely that the new rule, so far applied only to paying patients, will be extended to abolish the immunity of charitable hospitals to non-paying patients. That the Court is looking in this direction may be indicated from its comment, in abolishing the immunity to paying patients, that it was "particularly impressed"²⁴ with Justice Rutledge's reasoning: "Retention [of immunity] for the non-

¹⁸ *Kojis v. Doctor's Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961).

¹⁹ Note, *Limitation on Tort Immunity of Charitable Hospitals*, 1961 WIS. L. REV. 509; Note, *Abolition of the Defense of Charitable Immunity*, 45 MARQ. L. REV. 128 (1961).

²⁰ *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 176 (1917).

²¹ Note, *Limitation on Tort Immunity of Charitable Hospitals*, 1961 WIS. L. REV. 509; Note, *Abolition of the Defense of Charitable Immunity*, 45 MARQ. L. REV. 128, (1961).

²² *Kojis v. Doctor's Hospital*, 12 Wis. 2d 367, 372, 107 N.W. 2d 131, 133 (1961). "The financial statement of the defendant clearly shows that the judgment for damages in the present action would not cause it to suspend its operations or to be seriously hampered therein."

²³ *Id.* at 372, 107 N.W. 2d at 133.

²⁴ *Ibid.*

paying patient is the least defensible and most unfortunate of the distinctions refinements. . . . He should be the first to have reparation, not the last and least among those who receive it."²⁵

Throughout the many years it maintained the doctrine of immunity of charitable and religious organizations for the tortious acts of their servants, agents and employees, the Court's chief concern seemed to have been that the imposition of liability would unduly impair the ability of such organizations to carry on their socially beneficial activities. Now that the Court feels such danger has disappeared, it seems quite likely that the Court will completely abolish the last remaining vestiges of the doctrine.²⁶

Another existing immunity which it seems likely the Court will abolish, is the immunity of a parent to a claim for damages by his unemancipated child for injuries to his person caused by the tortious conduct of his parent. This immunity has been recognized in Wisconsin since 1927.²⁷ It has been criticized by members of the Court and by legal writers.²⁸ In considering the doctrine in the past, the Court has "passed the buck" to the Legislature. The familiar words have been pronounced: let the legislature abolish the rule if modern policy requires a change;²⁹ or, since the legislature has not acted, the Court must presume that public policy is not to be changed.³⁰ Such words of the Court, however, pre-date the recent abolition of municipal immunity³¹ and the immunity of a charitable hospital to its paying patients.³²

²⁵ *President and Directors of Georgetown College v. Hughes*, 76 App. D.C. 123, 130 Fed. 2d 810, 827 (1942).

²⁶ *Duncan v. Steeper*, 17 Wis. 2d 226, 238-239, 116 N.W. 2d 154, 160 (1962). "On principle we now can perceive of no justification for limiting the abrogation of the charitable immunity to indigent or non-paying patients. In fact, the poor, who sustain injury as the result of negligent acts of charitable institutions, or their agents or employees, should not be discriminated against by a rule which would retain the defense of charitable immunity against their claims for damages, and abolish it with respect to more financially blessed citizens who are able to pay for all services received at the hands of charitable organizations. We doubt if the insurance now carried by charitable institutions against liability for tort makes any distinction between paying and charitable patrons. We make these observations to indicate that the rule of the *Kojis* case abolishing charitable tort immunity may not be limited to situations where a charge or fee was being paid for the services being rendered to the injured person."

²⁷ *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927); *Zutter v. O'Connell* 200 Wis. 601, 229 N.W. 74 (1930); *Groh v. W. O. Krahn*, 223 Wis. 662, 271 N.W. 374 (1937); *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940); *Cronin v. Cronin*, 244 Wis. 372, 12 N.W. 2d 677 (1944); *Fidelity Savings Bank v. Aulik*, 252 Wis. 602, 32 N.W. 2d 613 (1948); *Schwenkhoff v. Farmers Mutual Insurance Co.*, 6 Wis. 2d 44, 93 N.W. 2d 867 (1959).

²⁸ *Wick v. Wick*, *supra* note 27 (Dissenting Opinion); *Schwenkhoff v. Farmers Mutual Insurance Co.*, *supra* note 27 (Concurring Opinion); *Shealy, Right of Unemancipated Child to Sue Parent for a Personal Tort*, 1938 Wis. L. Rev. 176.

²⁹ *Schwenkhoff v. Farmers Mutual Insurance Co.*, 6 Wis. 2d 44, 93 N.W. 2d 867 (1959); *Fidelity Savings Bank v. Aulik*, 252 Wis. 602, 32 N.W. 613 (1948).

³⁰ *Schwenkhoff v. Farmers Mutual Insurance Co.*, *supra* note 29.

³¹ *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618, (1962).

³² *Kojis v. Doctor's Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961).

The declared reasons for holding parents immune to claims by their children are to preserve (1) family tranquility, (2) family resources, and (3) parental authority.³³ However, in Wisconsin a wife may sue her husband;³⁴ an unemancipated child may sue one standing in loco parentis;³⁵ an unemancipated brother may sue an unemancipated brother;³⁶ an unemancipated child may sue his father's estate for the loss of his mother's society and companionship because of the tortious conduct of the father;³⁷ and a parent may sue an unemancipated son for the death of another son under the death by wrongful act statute.³⁸ In all of these instances the Wisconsin Court has found that suits between members of the same family have not disturbed the tranquility of the family, or the resources of the family, or the authority of the father as head of the household.

Perhaps one reason for such a finding is the fact that liability insurance is now available to members of a family at a reasonable cost. Since parents carry insurance out of which strangers may recover their claims, why should their own unemancipated children be denied such protection?³⁹ Some have suggested that the danger of collusion between parent and child is a valid reason for the distinction. But is the danger of collusion any greater where an insured parent is sued by his unemancipated child than in those instances outlined above where the Court already allows members of a family to sue one another for their wrongful acts?⁴⁰ It seems reasonably safe to predict that, before long, the Court will take the next logical step and abolish parental immunity from the tort claims of unemancipated children.

The converse of parental immunity has also been the rule in Wisconsin, namely that a father cannot sue his unemancipated son for injuries caused by the child's tortious conduct. Here also it has been said that if any change is to be made it must be made by the Legislature.⁴¹ Again it is suggested, in line with the recent trend of decisions, that this is an area in which the Court may act without waiting for the Legislature.

It seems quite possible, considering the Court's attitude in the *Holytz* and *Kojis*⁴² cases, that the Court will not only abolish traditional immunities and defenses which are determined to be archaic and unjust

³³ *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

³⁴ *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926).

³⁵ *Steher v. Norris*, 188 Wis. 366, 206 N.W. 173 (1925).

³⁶ *Bielke v. Knaack*, 207 Wis. 490, 242 N.W. 176 (1932).

³⁷ *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940).

³⁸ *Munsert v. Farmers Mutual Insurance Co.*, 229 Wis. 581, 281 N.W. 671 (1939); Wis. STATs. §331.03 (1959).

³⁹ Comment, *Right of an Unemancipated Child to Sue Parent for a Personal Tort*, 1938 Wis. L. REV. 176.

⁴⁰ *Ibid.*

⁴¹ *Fidelity Savings Bank v. Aulik*, 252 Wis. 602, 32 N.W. 2d 613 (1948).

⁴² *Kojis v. Doctor's Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961).

in light of present day conditions, but may go even further, where injustice would otherwise clearly result, and create a new right and a corresponding duty in the absence of Legislative action. Justification for such judicial lawmaking might be argued, for example, with respect to a right of privacy in Wisconsin.⁴³ Currently, Wisconsin is one of the few states which do not in any way recognize such a right.⁴⁴ The modern trend towards recognizing such a right began in 1890 with the publication of a famous article urging the necessity of its recognition.⁴⁵ Through the years prominent writers in the tort field have generally advocated the enforcement of such a right.⁴⁶ An eminent American lawyer has declared that the invasion of the privacy of an individual ". . . may produce suffering much more acute than that produced by a mere bodily injury."⁴⁷ An indication of its general acceptance has been the demand for a uniform law in this area.⁴⁸ In light of the almost universal recognition of the need of the right of privacy, and in view of the tendency of the Wisconsin Court to depart from its traditional reluctance to exercise the "legislative" prerogative in policy matters,⁴⁹ it seems at least possible that, if it receives a case involving a serious invasion of the privacy of an individual causing the individual great harm, the Court may act affirmatively to protect the "right of privacy" even without prior legislative action.

Historically, especially since the development of courts of equity, the common law has found the means, where justice seemed to demand it, to "make" the law as well as interpret it. Recent Wisconsin Supreme Court decisions, with respect to immunities which have outlived the reasons for their existence, give every indication that judicial lawmaking is still a vital ingredient of our legal system.

FREDERICK MUTH

Insurance: Liability of an Agent or Fraud—In *Anderson v. Knox*,¹ the plaintiff brought an action for fraud and misrepresentation against an agent of the New York Life Insurance Company. The plaintiff alleged that the insurance agent, Anderson, had falsely and fraudulently induced his wife and him to purchase \$150,000 worth of bank financed life insurance, representing this as a suitable policy, in line

⁴³ Yoeckel v. Samonig, 272 Wis. 430, 75 N.W. 2d 925 (1956); State ex rel Distenfeld v. Neelen, 255 Wis. 214, 38 N.W. 2d 703 (1949); Judevine v. Benzies Mortgage Fuel and Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936).

⁴⁴ Note, *The Right of Privacy in Wisconsin*, 1961 WIS. L. REV. 332.

⁴⁵ Brandeis and Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

⁴⁶ PROSSER, TORTS 635 (2d Ed. 1955); HARPER AND JAMES, TORTS 677 (1956); RESTATEMENT OF TORTS, §867 (1939).

⁴⁷ Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363 (1915).

⁴⁸ Ludwig, *Peace of Mind in 48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948).

⁴⁹ Hoyltz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962); Kojis v. Doctor's Hospital, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961).

¹ 297 F. 2d 702 (1961).