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# Sovereign Immunity for Political Subdivisions

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## SOVEREIGN IMMUNITY FOR POLITICAL SUBDIVISIONS

**T**HE OHIO SUPREME COURT continued in 1983 to expand and define its abrogation of the doctrine of sovereign immunity for municipal corporations and political subdivisions. The court's decisions in this area have resulted in a significant increase in tort liability for local governments and school districts, who may now be found liable for tortious acts in the same manner as private individuals.

The defense of governmental immunity, though statutorily waived by the state in 1975,<sup>1</sup> remained intact for municipal corporations.<sup>2</sup> Municipal corporations have been characterized as being both a subdivision of the state and a corporate entity.<sup>3</sup> Therefore, the law traditionally attempted to distinguish between the two functions, and where the municipalities represented the state in its governmental, political, or public capacity they also shared its immunity from tort liability. Conversely, while acting in their corporate, private, or proprietary character they could be held liable.<sup>4</sup> Ohio had recognized this governmental-proprietary distinction in a long series of cases,<sup>5</sup> affording municipal corporations immunity in the performance of its governmental functions unless otherwise provided by statute,<sup>6</sup> while denying immunity to a municipal corporation in the performance of its proprietary functions.<sup>7</sup>

Recognizing that "attempts to classify municipal functions into these two categories have caused confusion and unpredictability in the law"<sup>8</sup> and that

<sup>1</sup>OHIO REV. CODE ANN. § 2743.02(A)(1) (Baldwin 1982) provides:

The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims . . . with the same rules of law applicable to suits between private parties except that the determination of liability is subject to the limitations set forth in this chapter . . . . To the extent that the state has previously consented to be sued, this chapter has no applicability.

<sup>2</sup>See *Hass v. Hayslip*, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977) where the court held that OHIO REV. CODE ANN. §§ 2743.01-.02 (Baldwin 1977), did not abrogate the defense of sovereign immunity for municipal corporations in the performance of their governmental functions. See also Note, *Hass v. Hayslip: Ohio's Municipal Immunity Doctrine*, 5 OHIO N.U.L. REV. 133 (1978).

<sup>3</sup>W. PROSSER, LAW OF TORTS, § 131 (4th ed. 1982) states: "On the one hand they are subdivisions of the state, endowed with governmental powers and charged with government functions and responsibilities. On the other they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and relations not shared by the state at large. They are at one and the same a corporate entity and a government." *Id.*

<sup>4</sup>*Id.*

<sup>5</sup>For a discussion of the historical development of the doctrine of sovereign immunity of municipal corporations see *Hass v. Akron*, 51 Ohio St. 2d 135, 140, 364 N.E.2d 1376, 1379-80 (1977) (Brown, J. dissenting); *Hack v. Salem*, 174 Ohio St. 383, 391, 189 N.E.2d 857, 862-63 (1963).

<sup>6</sup>See, e.g., *Broughton v. Cleveland*, 167 Ohio St. 2d 29, 146 N.E.2d 301 (1957).

<sup>7</sup>See, e.g., *Sears v. Cincinnati*, 31 Ohio St. 2d 157, 285 N.E.2d 732 (1972).

<sup>8</sup>*Haverlack v. Portage Homes*, 2 Ohio St. 3d 26, 29, 442 N.E.2d 749, 752 (1982) (Celebrezze, C.J.). See also Comment, *Local Government Sovereign Immunity: The Need for Reform*, 18 WAKE FOREST L. REV. 43 (1982).

this “bramble bush . . . deserves clarification with the formulation of a definite rule of law”<sup>9</sup> the Ohio Supreme Court abolished the distinction between the two classifications. In *Haverlack v. Portage Home, Inc.* the court held that a “municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its act,”<sup>10</sup> thus abrogating the doctrine of sovereign immunity in the Ohio courts.

Supreme Court cases following *Haverlack* have attempted to define the rather vague boundaries of the judicially created municipal liability.<sup>11</sup> This note will examine recent Supreme Court decisions in which the *Haverlack* holding is further expanded and defined in an effort to delineate the present boundaries of the expanded liability for political subdivisions.

The thrust of the *Haverlack* decision was its attempt to avoid the need to classify a municipal corporation’s activities into either a governmental or proprietary category.<sup>12</sup> However, the court recognized in *King v. Williams*<sup>13</sup> that it might not be as easy to dismiss the classifications as it had hoped. The presence of Ohio Revised Code § 701.02,<sup>14</sup> which affords immunity to a municipal corporation under certain circumstances, required the court to reconsider the governmental-proprietary distinction in order to conclude that the “operation of a city fire department is a governmental function”<sup>15</sup> and that the statute provided the municipal corporation with a complete defense to the negligence claim. While not an expansion of the *Haverlack* rule, *King*’s importance lies in the court’s indication that the only limits to the potential liability of the municipal corporation were those statutorily created.<sup>16</sup>

<sup>9</sup>*Haverlack*, 2 Ohio St. 3d at 29, 442 N.E.2d at 752.

<sup>10</sup>*Id.* at 30, 442 N.E.2d at 752. *Haverlack* involved a complaint by petitioners over odor and noise caused by a sewage treatment plant that was operated by the city of Aurora for the benefit of a residential complex known as Walden.

<sup>11</sup>Justice Locher noted in his dissent that the holding in *Haverlack* failed to provide guidance to other political subdivisions (i.e., counties, townships, school districts) as to whether those governmental units were no longer protected by the sovereign immunity defense. He stated that “the majority opinion, therefore, provides neither explanation as to why it singled out this particular governmental function nor guidance as to what is next to fall.” *Id.* at 32, 442 N.E.2d at 753 (Locher, J., dissenting).

<sup>12</sup>*Id.* at 30, 442 N.E.2d at 751.

<sup>13</sup>*King v. Williams*, 5 Ohio St. 3d 137, 449 N.E.2d 452 (1983). In *King*, the driver of an emergency medical vehicle operated by the city of Akron struck an automobile driven by the defendant while en route to an emergency. As a result of the accident, the plaintiff sued both the driver and the city of Akron for damages for the alleged negligent conduct of the driver. *Id.*

<sup>14</sup>OHIO REV. CODE ANN. § 701.02 (Baldwin 1982) provides:

The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a complete defense as to the negligence of:

. . .

(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.

Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.

<sup>15</sup>*King*, 5 Ohio St. 3d at 140, 449 N.E.2d at 455.

<sup>16</sup>*Id.* at 140, 449 N.E.2d at 455.

In *Dickerhoof v. Canton*<sup>17</sup> the court recognized that where the presence of a statute could afford a municipal corporation immunity<sup>18</sup> it could also afford a basis for liability for failing to keep the shoulder of a highway in repair and free from nuisance.<sup>19</sup> The court in *Dickerhoof* reduced the issue to “whether appellant had a duty, imposed by statute or the common law, to keep the shoulder of the highway in repair and free from nuisance.”<sup>20</sup> Thus, it is clear that the court will utilize statutory interpretation in determining both the existence and absence of a duty owed by the municipal corporation.

The case of *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*<sup>21</sup> presented the Ohio Supreme Court with the issue of whether the doctrine of government immunity from tort liability for municipalities should be sustained in Ohio.<sup>22</sup> *Enghauser* involved a claim that the city of Lebanon had negligently planned, designed, and constructed a new bridge and roadway which proximately resulted in the flooding of appellant’s abutting industrial property. Appellants also alleged nuisance, trespass, and appropriation of property.<sup>23</sup>

In *Enghauser*, the court unequivocally stated that “henceforth, so far as municipal governmental responsibility for torts is concerned, the rule is liability — the exception is immunity.”<sup>24</sup> The court rejected the argument that if a departure from a longstanding rule of public policy is warranted, then the extent of liability should be fixed by the legislature.<sup>25</sup>

Acknowledging that the doctrine of municipal immunity was judicially created and thus a “creature of the courts,”<sup>26</sup> the court proceeded to “evaluate

<sup>17</sup>*Dickerhoof v. Canton*, 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983). See also *Strohofer v. Cincinnati*, 6 Ohio St. 3d 118, 451 N.E.2d 787 (1983). *Strohofer* concerned whether the city of Cincinnati had acted negligently and created a nuisance by erecting and maintaining traffic control lights in a manner which confused motorists at an intersection where a collision occurred.

<sup>18</sup>*Dickerhoof*, 6 Ohio St. 3d at 129, 451 N.E.2d at 1194.

<sup>19</sup>*Id.* at 129, 451 N.E.2d at 1194. The court relied on construction of OHIO REV. CODE ANN. § 723.01 (Baldwin 1982) and OHIO REV. CODE ANN. § 305.12 (Baldwin 1982) in concluding that the General Assembly had imposed a statutory duty and provided a basis for actions against municipalities concerning highways.

<sup>20</sup>*Id.* at 131, 451 N.E.2d at 1194. Recent Ohio cases have emphasized the issue of how far the *duty* of a municipal corporation extends: in particular, the standard of care owed motorists traveling the public highways and streets. *Strohofer* established that statutorily-based duty of care is imposed upon the municipal corporation, extending even to the chuckholes in the shoulder of a road. However, in *Strunk v. Dayton*, 6 Ohio St. 3d 429, 453 N.E.2d 104 (1983) the court declined to extend the boundaries of municipal liability to property adjacent to a roadway. See also *Geideman v. Bay Village*, 7 Ohio St. 2d 79, 218 N.E.2d 621 (1966); *Dickerhoof v. Canton*, 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983); *Royce v. Smith*, 68 Ohio St. 106, 429 N.E.2d 134 (1981).

<sup>21</sup>6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

<sup>22</sup>See, e.g., *State v. Franklin Bank of Columbus*, 10 Ohio Repr. 91 (1840); *Dayton v. Pease*, 4 Ohio St. 80 (1854); *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375 (1861); *Thacker v. Board of Trustees of Ohio St. Univ.*, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973).

<sup>23</sup>*Enghauser*, 6 Ohio St. 3d at 31, 451 N.E.2d at 229.

<sup>24</sup>*Id.* at 32, 451 N.E.2d at 230.

<sup>25</sup>*Id.* at 33, 451 N.E.2d at 230. The court stated that “[t]his type of argument begs the whole question of the desirability of the doctrine and relegates the whole problem to a discussion of who should change the doctrine.” *Id.*

<sup>26</sup>*Id.* at 33, 451 N.E.2d at 230.

the doctrine of municipal immunity in light of reason, logic, and the actions, functions, and duties of a municipality in the twentieth century.”<sup>27</sup> The court considered the doctrine of municipal immunity from liability in tort from its genesis in *Russell v. Men of Devon*,<sup>28</sup> concluding that “it would be a sad commentary on our concept of justice if this court continued to endorse the belief that an individual should sustain an injury rather than the municipality be inconvenienced,”<sup>29</sup> and that “the widespread availability and use of insurance or other modern funding methods render an argument based on economics invalid.”<sup>30</sup> Further, the court maintained that *stare decisis* was not a compelling reason to retain immunity:

The judicial conscience must no longer permit us to tolerate a principle of human behavior which, out of hand, denies the injured, the maimed, and representatives of the deceased a right of action against a wrongdoing simply because the wrongdoer is an employee or agent of the municipality. If municipalities are to expose the people and their property to negligent acts, then they must expect to respond to suit. Municipal corporations in Ohio should no longer receive protection from a doctrine whose only claim to judicial integrity is that it is ancient.<sup>31</sup>

The court did, however, proceed to clarify the limitations of the holding: “This court’s abrogation of municipal immunity does not mean that a municipal entity is liable for all harm that results from its activities; *it is only to those harms which are torts that municipalities may now be held liable.*”<sup>32</sup> The court carefully reemphasized its *Haverlack* holding, stating, “Nor will a municipality be subject to liability where a statute provides for immunity.”<sup>33</sup> And the most critical limitation of the holding:

Accordingly, this court holds that no tort action will lie against a municipal corporation for those acts or omissions involving the exercise of a legislative or judicial function, or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion; however, once the decision has been made to engage in a certain activity or function, municipalities will be held liable, the same as private corporations and persons, for negligence of their employees and agents in the performance of the activity.<sup>34</sup>

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<sup>27</sup>*Id.* at 33, 451 N.E.2d at 231.

<sup>28</sup>Municipalities were first extended immunity from suit in tort in 1788 in *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788) where the court held that immunity was warranted because there were not corporate funds out of which the judgment could be satisfied and because “it is better that an individual should sustain an injury than that the public should suffer an inconvenience.” *Id.* at 362.

<sup>29</sup>*Enghauser*, 6 Ohio St. 3d at 34, 451 N.E.2d at 231.

<sup>30</sup>*Id.* at 34, 451 N.E.2d at 231.

<sup>31</sup>*Id.* at 34-35, 451 N.E.2d at 231-32.

<sup>32</sup>*Id.* at 35, 451 N.E.2d at 232 (emphasis added).

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 36, 451 N.E.2d at 232 (citations omitted).

The court's holding is adamant in maintaining that "this decision should not be interpreted as abolishing those essential acts which go to the essence of governing."<sup>35</sup> However, the dissenting opinion by Justice Holmes expressed concern that the language used by the majority was "ambiguous" and provides a municipal employee with little guidance as to which functions involve a high degree of discretion and which do not, "leaving the employee with little specificity and practical guidance as to when he will be second guessed," and finally characterizing the standards left to guide the municipal corporations as "slippery."<sup>36</sup> Indeed, broad statements by the court such as "the rule is liability — the exception is immunity"<sup>37</sup> do offer little guidance to municipal corporations who now face liability in tort.

*Enghauser* was most recently expanded in *Carbone v. Overfield*.<sup>38</sup> In that case the father of a six year old student who was severely burned when boiling water being carried in a cauldron by students was spilled on him, brought an action against the school district board of education to recover for his child's injuries. The board of education moved to dismiss the complaint on the ground that it was barred by the doctrine of sovereign immunity.<sup>39</sup> The trial court granted the board's motion and the court of appeals affirmed.

Refusing to "retreat" from its previous extensions of the abrogation of sovereign immunity, the court held that the defense of sovereign immunity was not available to a board of education in an action for injuries allegedly caused by the negligence of the board's employees; thus making boards of education liable for tortious acts in the same manner as private individuals.<sup>40</sup> The court dismissed the two justifications for retention of the doctrine advanced in *Enghauser*, finding them inapplicable in an action dealing with a board of education.<sup>41</sup>

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<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 38, 451 N.E.2d at 234 (Locher, J., dissenting). Justice Lochner approved the court's attempt to limit the abolition of municipal immunity.

<sup>37</sup>*Id.* at 33, 451 N.E.2d at 230.

<sup>38</sup>6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983).

<sup>39</sup>*See, e.g.,* Board of Education v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905). The court recognized a distinction between immunity from suit and immunity from tort liability, with the result that a statute granting a school district the right to sue or be sued did not affect its tort immunity. *See generally* 48 O. JUR. 2D *Schools* § 245 (1966).

<sup>40</sup>*Carbone*, 6 Ohio St. 3d at 213, 451 N.E.2d at 1230.

<sup>41</sup>In *Carbone*, the majority stated that it was more desirable for the local government entity to bear the loss than the injured individual. *Id.* at 214, 451 N.E.2d at 1230.

The majority also asserted that the General Assembly had already granted boards of education the authority to purchase liability insurance in order to protect themselves. OHIO REV. CODE ANN. § 3313.203 (Page 1980). However, the dissent by Justice Locher claimed that OHIO REV. CODE ANN. § 3313.203 only allows a board of education to purchase liability insurance for individuals in their official capacities as members or employees of the board. Justice Holmes also cited the Ohio Attorney General, who stated that "in the absence of [specific] statutory authority, a board of education has the power to purchase insurance for a liability arising out of risks other than ones pertaining to the operation of motor vehicles." 1971 Ohio Atty. Gen. Ops. No. 71-028, at 2-89 (cited in *Carbone*, 6 Ohio St. 3d at 214, 215, 451 N.E.2d at 1231).

Both *Enghauser* and *Carbone* stressed the availability of liability insurance to insure the municipal corporations and boards of education from tort liability. Indeed, obtaining liability insurance is the most viable course of action open to political subdivisions.<sup>42</sup> As a result of the expansion of *Haverlack*, municipal corporations will certainly be forced to obtain some type of insurance protection to prevent against a tremendous uninsured loss.<sup>43</sup>

A particular problem presented to political subdivisions, and noted by Justice Holmes in both *Enghauser* and *Carbone*, is that the court has failed to delineate whether the decision to abrogate sovereign immunity should be prospective or retroactive.<sup>44</sup> Justice Holmes advocated the prospective abrogation of the doctrine, with compelling reasons in support of his position. He noted that "we impose liability on municipalities without allowing them the opportunity to obtain liability insurance."<sup>45</sup> As noted above, the impact of a decision imposing liability on a municipal corporation or political subdivisions which is not protected by liability insurance could be catastrophic. Secondly, Justice Holmes emphatically urged that "this immunity should be annulled prospectively so that the General Assembly will be given an opportunity to act upon our decision. It is that branch of government which is best equipped to balance our competing considerations of public policy."<sup>46</sup> The Justice's statement is a continuing echo of earlier pleas to the General Assembly to enact a "practical, comprehensive solution"<sup>47</sup> before the court's decision became effective — regretful that such a potentially impacting decision on local governments was not left to the General Assembly.

Justice Holmes' pleas have not gone unheeded. As of this writing, House Bill 482<sup>48</sup> is being debated in the Civil and Commercial Committee of the Ohio House of Representatives. House Bill 482 would restore sovereign immunity

<sup>42</sup>Note, *supra* note 2, at 141. The writer argued that if the municipality operates or maintains injury-inducing activities or conditions, the cost of any resulting harm should be regarded as part of the normal operating costs of a public administration, rather than as a diversion of public funds. See also David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 UCLA L. REV. 1 (1959); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

<sup>43</sup>Note, *supra* note 2, at 141.

<sup>44</sup>*Enghauser*, 6 Ohio St. 3d at 41, 451 N.E.2d at 233. Justice Holmes noted that generally the decisions of the court which overrule former decisions are applied retroactively.

<sup>45</sup>*Id.* at 37, 451 N.E.2d at 233.

<sup>46</sup>*Id.* at 37, 451 N.E.2d at 234. Justice Holmes maintained that the prospective abolition of sovereign immunity would be in accord with the "overwhelming" weight of authority from other jurisdictions who have considered the issue. See, e.g., *Evans v. Bd. of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971); *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975); *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

<sup>47</sup>6 Ohio St. 3d at 38, 451 N.E.2d at 234. Justice Holmes stated that "this court's decision in the area of governmental immunity cries out for a legislative response. I, for one, hopefully anticipate that the General Assembly will proceed as have the legislative bodies in other states and enact comprehensive laws." *Id.*

<sup>48</sup>Ohio H.B. 482, 115th Gen. Assembly, Reg. Sess. (1983-84), to amend OHIO REV. CODE ANN. §§ 9.60, 133.27, 305.12, 505.43, 504.431, 505.50, 723.01, 723.54, 737.04, 737.041, 1343.03, 4731.90, 5511.01, to enact §§ 2744.01 to 2744.08 and to repeal §§ 505.05, 505.06, 701.02, 5571.10.

to political subdivisions and specify their liabilities. If enacted, this bill could restore the defense of sovereign immunity to political subdivisions, thus abrogating its judicial abolition and the subsequent extensions of liability imposed upon the political subdivisions.

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