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Policemen's Indemnification Statute

POLICEMEN'S INDEMNIFICATION STATUTE

AFTER satisfying a judgment entered against him in a suit for false arrest[1] John Gaca, a Chicago policeman, brought suit against the City of Chicago, under the terms of the "policemen's indemnification statute,"[2] for reimbursement of the sums so expended. Against a challenge by the City of the statute's constitutionality, the Illinois Supreme Court held that the statute was constitutional, and that Gaca was entitled to indemnification.[3]

At common law, municipal immunity from liability for injuries to the person or property of individuals caused by agents of the municipality in the performance of "governmental" functions was firmly established.[4] This immunity was steadily contracted by the enactment of statutes reducing the scope of the common law exemption. In 1931, the Illinois General Assembly imposed direct liability on all municipalities for the negligent operation of motor vehicles by members of a municipal fire department, acting within the scope of their duties as firemen.[5] Twelve years later, the General Assembly passed a similar law regarding policemen.[6] And in 1945, the law was so amended that all municipalities whose populations exceed 500,000 were required to indemnify any municipal police officer who satisfied a judgment resulting from injuries to the person or property of another inflicted by the officer while en-

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1. Marian Mallory and Edward Mallory v. John Gaca and Alvin Goldstine, No. 45 S 23422, Superior Court of Cook County.

2. Gaca v. The City of Chicago, 411 Ill. 146, 103 N.E.2d 617 (1952). ILL. REV. STAT. c. 24, §1-15 (1951): "Indemnification for injuries caused by a policeman. In case any injury to the person or property is caused by a member of the police department of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his duties as policeman, and without the contributory negligence of the injured person or the owner, the municipality in whose behalf the member of the municipal police department is performing his duties as policeman shall indemnify the policeman for any judgment recovered against him as a result of such injury, except where the injury results from the wilful misconduct of the policeman."

3. Justices Schaefer and Hershey dissenting.

4. Johnston v. City of East Moline, 405 Ill. 460, 91 N.E.2d 401 (1950); Taylor v. The City of Berwyn, 372 Ill. 124, 22 N.E2d 930 (1939); Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355, (1944); Comment *Tort Claims against the State of Illinois and its Subdivisions*, 47 NW. U.L. REV. 914 (1953). This immunity has been interpreted as including within it the activities of the police department. City of Chicago v. Williams, 182 Ill. 135, 55 N.E. 123 (1899); Evans v. City of Kankakee, 231 Ill. 223, 83 N.E. 223 (1907).

5. ILL. REV. STAT. c. 24, §1-13 (1951).

6. ILL. REV. STAT. c. 24, §1-15 (1943): "In case any injury to the person or property of another is caused by the negligent operation of a motor vehicle by a member of the police department of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his duties as policeman and without the contributory negligence of the injured person or the owner of the injured property, . . . the municipality only . . . shall be liable for that injury."

gaged in the performance of his duties, provided that the injuries were not the result of the officer's willful misconduct.[7] It was under this amendment that Gaca brought his action.

The City contended[8] that the statute violated the Illinois Constitution in that it constituted a special or local law granting an exclusive privilege or immunity to Chicago policemen,[9] and that it imposed a special burden on the City without imposing a similar burden on other municipalities. Since Chicago is the only city in Illinois with a population in excess of 500,000,[10] and, since there is only one other city which might foreseeably reach the requisite size,[11] there can be little doubt that the statute was intended to apply exclusively to Chicago. But as interpreted by the majority of the court, the classification on the basis of population in the present statute is not unreasonable,[12] because Chicago's heavy vehicular and pedestrian traffic, the prevailing criminal elements, and the general social problems are conditions not found elsewhere in the state. Mr. Justice Schaefer's dissenting opinion, however, points out that criminal elements and social problems are *not* peculiar to Chicago, and that heavy traffic, while related to the size of a city, is in no way related to a statute providing indemnification for a police officer held liable for false arrest. It would seem that the dissent represents the better view, and that the statute repre-

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7. See note 2 *supra.*

8. While a city is not required to indemnify officers for injuries which are the product of their willful misconduct (see note 2 *supra*), this argument was not pursued by the City on appeal because of the failure of the jury to return a finding of malice when the question was presented to them in the lower court (see note 1 *supra*) in the instructions, and since "willfulness" is not a necessary element of false arrest. Shelton v. Barry, 328 Ill. App. 497, 66 N.E.2d 697 (1946). And see note 33 *infra.*

9. ILL. CONST. Art IV., §22: "The General Assembly shall not pass local or special laws in any of the following cases, that is to say: For . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." *Cf.* §34, *infra* note 13.

10. According to the 1950 census established by the United States Bureau of Census, Chicago had a population of 3,606,436. New York World Telegram, 1951 World Almanac.

11. Peoria is the second largest municipality in Illinois with a population of 111,523. *Ibid.*

12. Laws are not invalid merely because they apply only to a particular class, provided that the law affects all members of the class in the same manner [Kloss v. Suburban Cook County Tuberculosis Sanitarium District, 404 Ill. 87, 88 N.E.2d 89 (1949); Hansen v. Raleigh, 391 Ill. 536, 63 N.E.2d 851 (1945)], and the classification itself is not arbitrary [Bagdonas v. Liberty Land & Investment Co., 309 Ill. 103, 140 N.E. 49 (1923); L'Hote v. Village of Milford, 212 Ill. 418, 72 N.E. 399 (1904)]. Classification is said to be reasonable if it is based upon some substantial difference of situation or of conditions bearing a reasonable relation to the purposes and objects to be attained by the legislation. Giebelhausen v. Daley, 407 Ill. 25, 95 N.E.2d 84 (1950); Hunt v. County of Cook, 398 Ill. 412, 76 N.E.2d 48 (1947).

sents a thinly veiled effort to by-pass the Chicago City Council in enacting special legislation for the City of Chicago.[13]

Counsel for the City presented an additional argument not discussed in the opinion[14]—that the statute deprived the City of due process of law,[15] since the statute makes no provision for notifying the City of the action against the policeman. Thus it is possible that the City may be called upon to indemnify a police officer for a judgment secured in an action of which it had no notice at all. Admittedly the Chicago Municipal Code provision that policemen who are parties defendant in any suit may receive free legal advice and service from the Corporation Counsel's Office renders this quite unlikely.[16] Such probabilities, however, are not a proper test of due process; and, even though the City actually received notice, if the statute were construed to permit imposition of liability without notice, the validity of the law may be seriously questioned.[17] However, if indemnity, as used in the statute, is given its ordinary meaning,[18] and the well established rules of indemnity law are applied, the City, as an indemnitor, will not be bound to reimburse any officer unless it has received proper notice of the pendency of the action.[19] This view would seem to be the proper one, and, if it is adopted, the due process argument falls. A contrary interpreta-

13. The majority, however, concluded that the statute was a general law, thus avoiding the application of ILL. CONST. Art IV, §34, requiring the submission of local laws to the voters of the municipality affected.

A final contention made against the validity of the statute was that it constituted a tax upon a municipal corporation or the inhabitants thereof for corporate purposes and therefore violated §10 of Art. IX of the Illinois Constitution, prohibiting the imposition of such taxes by the General Assembly, unless such taxes are for the general welfare and security of the State. Littell v. City of Peoria, 374 Ill. 344, 29 N.E.2d 533 (1940); People v. City of Chicago, 351 Ill. 396, 184 N.E. 610 (1933). The majority replied that police protection in Chicago was a matter of general concern to the entire state, and that this statute was designed to increase the efficiency of such protection.

14. Brief and Argument for Appellant, pp. 17-21, Gaca v. City of Chicago, *supra* note 2.

15. ILL. CONST. Art. II, §2: "No person shall be deprived of life, liberty, or property without due process of law."

16. Municipal Code of Chicago, c. 6.

17. People v. Marquis, 291 Ill. 121, 125 N.E. 757 (1919). In the *Gaca* case, however, the City had actual notice of the suit. Whether or not a municipal corporation is protected by the due process clauses of the federal and state constitutions is another question. It has been contended that a city is not a *person* within the meaning of the due process clause of the Fourteenth Amendment. See 5 MCQUILLIN, MUNICIPAL CORPORATIONS §19.11 (3d ed. 1949). Thus it has been held that a city may not plead lack of due process against the state, when the reliance was upon the Fourteenth Amendment's protection. Shelby v. City of Pensacola, 112 Fla. 584, 151 So. 53 (1933). *But cf.* Sturges v. City of Chicago, 237 Ill. 46, 86 N.E. 683 (1908) (the City of Chicago was allowed to raise a due process argument under the federal and state constitutions).

18. Words having definite and technical meanings will usually be interpreted in the light of such meaning. People v. Friederich, 385 Ill. 175, 52 N.E.2d 120 (1943); Murrell v. Industrial Commission, 291 Ill. 334, 126 N.E. 189 (1920).

19. Sanitary District v. U.S.F. & G. Co., 392 Ill. 602, 65 N.E.2d 364 (1946).

tion of the statute might provide another opportunity for the City to attack it on constitutional grounds.

Aside from its constitutionality, the statute itself provides no guarantee of protection for the victim of police misconduct.[20] It undertakes only to provide for repayment to the policeman of a judgment,[21] not to provide funds for the satisfaction of the injured party's claim. A "judgment-proof" policeman could incur no loss, and, under the terms of the statute, there would be nothing for which the City could indemnify him.[22] However, the Chicago City Council has amended the Municipal Code so that the Corporation Counsel may certify such judgments for police misconduct to the city comptroller for payment by the City to the injured party if, in his opinion, the police officer was not guilty of "willful misconduct" and an appeal is not justified.[23] The primary purpose of the ordinance was to avoid circuity of action which would necessarily follow if a police officer were first required to pay the judgment and then sue the City for indemnification. As a result of the ordinance, his eligibility for indemnity does not require him to first liquidate his assets or subject his property to levy or garnishment. Another result of the ordinance is that the injured party looks to the City for compensation, rather than to the police officer, and may thus recover even though the judgment were otherwise uncollectible from a "judgment-proof" policeman. The City may participate in settling claims against officers in advance of trial, although a formal judgment against the policeman must be entered. No judgment is entered against the City.

The passage of the ordinance raises two serious questions: Is Chicago by means of this ordinance waiving its immunity from liability? And if so, can a city in Illinois validly waive its immunity? The ordinance does not allow injured parties to bring suit against the City, and in that respect the City still retains its immunity. But the immunity as it has traditionally existed was immunity from liability,[24] and not merely immunity from suit. Since the City of Chicago has assumed the obligation of paying

20. Any protection for the injured person under the statute is indirect. For instance, a police office might be more prompt in satisfying a judgment against him, or he may even borrow the money to pay the judgment, inasmuch as he knows that regardless of the extent of his loss he will be able to recover it from the City of Chicago under the Statute.

21. The statute also offers opportunity for collusion between an officer and a supposedly "injured" person. The machinery for fraudulent suits is within the control of the policeman, and there is little likelihood of discovery. While such cases would doubtless never be a major problem, the possibility should not be overlooked.

22. Erickson v. Fitzgerald, 342 Ill. App. 223, 96 N.E.2d 382 (1950).

23. Municipal Code of Chicago c. 6, §2(d), as amended April 28, 1952. City Journal of Chicago, p. 2306.

24. See note 4 *supra*.

these judgments, it would appear that such assumption of liability is equivalent to a partial waiver of its immunity.

In other states, a municipality's right to immunity from liability for torts committed by its agents acting in the performance of governmental functions is a right which cannot be waived by its officers.[25] The Illinois courts apparently have not directly passed upon the validity of such municipal largess, but the necessary implication in *Thomas v. Broadlands Community Consolidated School District Number 201*[26] was that, in the absence of statute, tort immunity can only be waived by the municipal corporation's obtaining insurance. New York has adopted a different view in *Evans v. Berry*,[27] but there a state statute specifically allowed cities to compromise claims which were equitably payable by the city, although not constituting legally binding obligations.[28] There is no similar provision in the Illinois laws and the City of Chicago probably does not have the right to waive its immunity; only the State can do so.[29]

The indemnification statute enacted by the state legislature does not remove Chicago's formal immunity from liability, but merely renders the City an indemnitor of the police officer. The ordinance, however, goes further by providing that the City pay a judgment entered in favor of an injured party, even though the judgment has not yet been paid or is in fact uncollectible from the policeman.

The ordinance serves a useful purpose in avoiding circuity of action, protecting the injured party, and facilitating settlements. Its validity, nonetheless, is in doubt. The General Assembly should amend the indemnification act to specifically authorize the City of Chicago to compromise and settle claims in advance of the trial of the claim against the policeman.

The question of the desirability of the statute still remains. The *Gaca* majority opinion observed that the indemnification statute enables the police officer to carry out his duties without being deterred by the knowledge that if he makes a mistake he may be called upon to pay a substantial judgment. This presumably is to produce public benefit by increasing the efficiency of law enforcement. But such "peace of mind" may have harmful effects as well. So long as the policeman is not guilty of "willful" misconduct—acts motivated by actual malice—he may receive the benefits of the statute regardless of the nature of that misconduct. The police-

25. 18 McQUILLIN, MUNICIPAL CORPORATIONS §53.28 (3d ed. 1950). Adams v. City of New Haven, 131 Conn. 552, 41 A.2d 111 (1945); Lambert v. City of New Haven, 129 Conn. 647, 30 A.2d 923 (1943).
26. 348 Ill. App. 567, 109 N.E.2d 636 (1952).
27. 262 N.Y. 61, 186 N.E. 203 (1933).
28. New York General City Law §20(5).
29. The state can remove the right of immunity. Hansen v. Raleigh, 391 Ill. 536, 63 N.E.2d 851 (1945).

man may qualify under the statute even when the injury is caused by his intentional act (such as false arrest). The result is to relieve the policeman of financial liability for failure to exercise reasonable care—*e.g.*, in arresting a "suspect" or in driving his police car. It is submitted that a police officer should be just as responsible, financially as well as in other ways, to the victim of his carelessness as is any other individual. (Whether the city should *also* be liable is another question.) The imposition of financial responsibility has as its foundation deterrence as well as compensation. While the public may be willing to accept a law protecting diligent policemen in the faithful and careful execution of their duties, it can have no interest in the encouragement of negligence and irresponsibility.

Conceivably the policeman might protect himself against the same financial risk by liability insurance. It has in fact been suggested that the statute was enacted to indirectly increase the wages of Chicago policemen by relieving them of the heavy cost of carrying such insurance.[30] If so, a direct increase would have been preferable. For, even assuming that a policeman could obtain the same broad coverage from a private insurer that is presently provided by the statute, the insured would be subject to important checks on potential police misconduct: (1) fear that the company may cancel out the policy; (2) awareness that such misconduct may increase premiums paid by the insured and by fellow policemen who hold similar policies. In contrast to protection by a private insurer, the protection afforded by the state under the indemnification statute is both free and irrevocable (barring, of course, legislative repeal).

Moreover, if this statute does provide a workable means of protecting the public, there does not seem to be any reason for limiting its application to Chicago municipal policemen. The duties of the municipal police are in large measure identical throughout the state. The present statute does not even apply to all policemen operating within the limits of Chicago. By limiting the application of the statute to "members of the municipal police department,"[31] such policemen as the Park District police and the Cook County Sheriff's police are not protected.[32]

In summary, any good points of the statute are far outweighed by its defects: (1) the discrimination against other police forces with similar duties; (2) possible increased carelessness on the part

30. Gaca v. City of Chicago, 411 Ill. 146, 154, 103 N.E.2d 617, 622 (1952).
31. See note 2 *supra*.
32. On the overlapping police forces in the Chicago area, see Comment, *The Effect of Decentralization in Metropolitan Law Enforcement: A Study of Cook County Illinois*, 47 Nw. U.L. Rev. 359 (1952).