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John J. Coffey

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LEGISLATION AND ADMINISTRATION

LEGISLATION — MUNICIPAL ORDINANCES — CITY OF MOBILE PASSES ORDINANCE OUTLAWING USE OF SPIKE-HEELED SHOES UNLESS WAIVER IS SIGNED RELEASING CITY FROM LIABILITY FOR INJURIES INCURRED BY WEARER — The ordinance here considered, currently in effect in Mobile, Alabama, prohibits the wearing of spike-heeled women's shoes on the public streets and walks of the city.[1] However, section two of the ordinance permits the wearing of such shoes if the wearer secures a permit from the city. Permits are issued without cost upon the signing of a release absolving the city from any liability for injury incurred by the wearer or another resulting from a fall while wearing the shoes.[2]

Courts seem to be adopting a more liberal attitude toward plaintiffs in actions against municipal corporations. The narrow liability of a city or town which once prevailed has been greatly expanded. With it has come a heavy burden upon the finances of the municipalities. Numerous and high judgments seriously deplete the funds available for city government, bring sharply increased taxes, and cause a decline in the services afforded by the municipalities.[3] Presumably this Mobile ordinance, prompted by these considerations, is an attempt to defend that city against expensive litigation and costly judgments.

For purposes of tort liability courts usually divide the functions of municipal

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1 *AN ORDINANCE*

To prohibit the wearing of shoes with heels in excess of certain limitations upon the public streets of the City of Mobile and to provide for permits for the wearing of such shoes under certain conditions.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MOBILE AS FOLLOWS:

SECTION 1. That the wearing of shoes with heels which measure more than one and one-half inch in height and less than one inch in diameter on the wearing surface upon the public streets and sidewalks of the City of Mobile is hereby prohibited.

SECTION 2. Any person desiring to wear shoes with heels in excess of the limitations set out in section one above may do so by obtaining a permit from the City of Mobile and by agreeing that upon the issuance of such permit that they thereby relieve the City of Mobile from any and all liability for damages to themselves or to others caused by their falling upon the public streets or sidewalks of the City of Mobile while wearing such shoes.

Duly adopted this the 13th day of October 1959.

ATTEST: 10/15/59

/s/ Jos. N. Langan
MAYOR

/s/ S. H. Hendrix
City Clerk

2 STATE OF ALABAMA)
)
COUNTY OF MOBILE)

The undersigned, in consideration of a permit granted by the City of Mobile to allow the undersigned to wear shoes with heels which are in excess of 1½ in. in height or less than 1 in. in diameter upon the streets of the City of Mobile, does hereby release the City of Mobile from any and all claims of damages which may be caused by the undersigned falling upon the streets or sidewalks in the City of Mobile while wearing such shoes.

IN WITNESS WHEREOF I have executed this release on this the..... day of.....19.....

.....

..... having released the City of Mobile from any claims for damages arising from her wearing shoes with heels thereon which are prohibited by City ordinance, the City of Mobile does hereby grant a permit to said person allowing her to wear shoes with heels in excess of the limits set by ordinance upon her assuming all liability therefor.

Date: .....

.....
City Clerk

3 Walsh, *Trends in Municipal Tort Liability,* INS. L.J. (1958).

government into two categories, governmental and proprietary. Activities which are properly the concern of the governmental body, acting in the interest of the public alone, are termed governmental. The enacting and enforcing of laws, the operation of public institutions, and planning for the orderly operation and expansion of the municipality are instances of governmental activity. As a general rule the municipality incurs no tort liability for negligence or breach of duty in regard to these activities.[4] On the other hand, the municipality performs certain functions which might also be conducted by private persons. Such functions are termed proprietary and are the types of activities for the negligent conduct of which the government might incur liability.[5] Various reasons are advanced for the distinction and the writers seem to agree that no certain or strictly logical basis can be found.[6] Equally obscure is the line which marks the distinction between those activities which are governmental and those which are proprietary. However, this is the usual dividing line drawn by legislatures and courts to separate municipal immunity and liability as to tort claims. Municipalities are generally liable for defects in streets and sidewalks.[7] In Alabama, towns and cities are made liable for injuries caused by defective streets by state statute.[8]

Municipal tort liability is based on negligence and thus involves the violation of a duty. Interestingly enough, the elements necessary for recovery against a city in Alabama, applicable in almost every state, were set down by the Supreme Court of Alabama in a case involving the City of Mobile. In *City of Mobile v. McClure,* the court said: "Every action in tort consists of three elements: (1) The existence of a legal duty by defendant to plaintiff; (2) a breach of that duty; and (3) damage as a proximate result." [9] To this must be added the reminder that the plaintiff must be free from contributory negligence. Also, the negligence of a municipality is of such a nature that certain formal requirements are often stipulated as prerequisites to a valid claim. For example, the city may require notice of the defect or it must have existed for such a length of time that the city can be charged with notice.[10]

As has been stated, the duty to care for the streets is present — in Alabama by statute, and in most states by statute and/or judicial interpretation.[11] The general rule, uniformly supported by judicial decision, is that this duty is adequately discharged if the municipality exercises ordinary care to keep the streets and sidewalks in a reasonably safe condition for travel in the usual mode.[12]

Having set out the duty which is imposed on the city of Mobile, the next step is to consider the purpose and effect of the statute in order to test its validity. By means of this ordinance, Mobile attempts to declare the wearing of high-heeled shoes a separate and distinct mode of travel. Having declared this a particular mode of travel, the ordinance then makes it illegal. Thus the city is no longer under a duty to keep the streets safe for the wearers of high-heeled shoes because the duty imposed upon municipalities does not extend to modes of travel which are unlaw-

4 18 McQuillan, Municipal Corporations § 53.24 (3d ed. 1950); 2 Harper, The Law of Torts § 29.6 (1956).

5 18 McQuillan, *op. cit. supra* note 4, § 53.23; 2 Harper, *op. cit. supra* note 4, § 29.6.

6 2 Harper, *op. cit. supra,* § 29.6. See texts cited in n. 1.

7 19 McQuillan, *op. cit. supra* note 4, 54.01; 2 Harper, *op. cit. supra* note 4 § 29.6. The question as to whether this is so because their upkeep is regarded as a proprietary function or because they are treated as an exception to the general rule regarding governmental activities is beyond the scope of this comment. It is interesting to note that the conditions of streets and walks has been singled out as sufficiently important to regard as a ground for liability irrespective of the rationale.

8 Ala. Code tit. 37, § 502 (1940).

9 City of Mobile v. McClure, 221 Ala. 51, 127 So. 832, 833 (1930).

10 Ala. Code tit. 37, § 502 (1940). The "written prior notice" rule has been upheld. See Fullerton v. City of Schenectady, 138 N.Y.S.2d 916 (1955), *aff'd,* 309 N.Y. 701, 128 N.E.2d 413 (1955), *appeal denied,* 350 U.S. 980 (1956).

11 2 Harper, *op. cit. supra* note 4, § 2916.

12 18 McQuillan, *op. cit. supra* note 4, § 54.11, and cases cited in n. 62.

ful.[13] By reason of its governmental function Mobile has changed or lessened the duty which it owes in its proprietary function.

The question which presents itself is the power of the city to do this. It is submitted that high-heeled shoes are a regular item of dress for a woman making any kind of public appearance. While the height and width of the heel may vary with the age and physical characteristics of the wearer, many heels are of the spike variety and would be covered by the provisions of this ordinance. The most casual observation would support these contentions and statistics could provide incontrovertible evidence. Accepting the contentions, the argument becomes that, as high-heeled shoes are now an accepted part of a woman's attire, municipalities, rather than banning their wear, ought to provide that they may be worn safely. Just as there is technological growth in our society, as evidenced by the use of the automobile rather than the horse and buggy, so too there is growth or change in costume or fashion. The government which has responded to one change with wider and better paved highways ought to respond to the other with more defect-free pavements. The government should exist for the promoting of the good life for its citizens. If the women have expressed a preference for this type of shoe and the men a desire to see them so attired, the government should not hinder but provide for the trend.

Yet the matter is not so simply stated. The proper response of government is not always ascertained on a numerical basis. That which many might wish done is not always the best policy. Involved here is the often debated question of the individual and society and the role which government should play in regulating the activities of the individual. Presumably ethical and moral considerations are not raised in this context, but a number of practical considerations are involved, of the type which lie behind many local ordinances. Ordinances prohibit many kinds of activities, not because they are inherently wrong, but because under existing conditions, and in order to further greater goods which are common to all, they are properly sacrificed. Consider as an example the ordinances which require that dogs be leashed, or those which prohibit the sale and use of fireworks, or those which regulate the parking of cars on city streets. The instant situation may be somewhat analogous. It is indeed good that women wear high-heeled shoes if they desire to do so. But it is of paramount importance that the women of the municipality be of sound body and that pedestrians be spared possible injury as a result of the stumble and fall of a fellow pedestrian. It is a fact that a city may have miles of pavement, that a constant check for defects would be impossible, that the cost of repairing such a slight defect as may catch a slim heel could be prohibitive, and that the gratings and trap doors which probably cause many of the accidents serve a very functional purpose. Viewed in this way, there may be just cause for the prohibition despite the general desire of women to wear this type of shoe.

However, the legality of the specific provisions of this ordinance is questionable. Section one forbids the wearing of spike-heeled shoes. But section two promptly reverses this and permits the wearing of these heels upon condition that the wearer release the city from all possible liability arising from a fall. What, then, is the purpose of the ordinance? Is it reasonable and proper in the public interest and in conformity with state law?[14] If the wearing of such shoes is so dangerous to public interests that it must be forbidden by law, can it be any less dangerous when the wearer has signed a release? It is readily apparent that the danger is not the threat of harm to the individual but the threat of financial harm

13 Hunt v. St. Louis, 278 Mo. 213, 211 S.W. 673, 677 (1919).

14 An ordinance must be a reasonable exercise of the power to enact it and must not conflict with the existing laws of the state. While the presumption is in favor of the validity of the ordinance, it is subject to challenge. Giglio v. Barrett, 207 Ala. 278, 92 So. 668 (1922). See 5 McQUILLAN, *op. cit. supra* note 4, ch. 18.

to the city. Granting that the preservation of city funds is a legitimate goal, yet how does it compare with the aforementioned municipal responsibilities?

A state statute has imposed upon the municipality a rather strict duty to keep its streets and walks in reasonable condition. For the breach of this duty the city will incur financial liability. The city may limit its duty by limiting the modes of travel which are permissible upon the streets. Yet, the *criterion* for limiting travel must be something other than the likelihood that this type of conduct will produce damage claims against city funds, for city funds have been subjected to damage claims by statutory provision. It has been suggested that a legitimate reason for limiting the mode of travel is the public interest in the physical well-being of its citizens, which, in the practical order of things, cannot be assured other than by prohibiting this type of activity. If this is the standard, the ordinance defeats itself for it fails to achieve its purpose by the terms of its own provisions. Upon the signing of a release it permits the conduct which is declared to be dangerous to physical well-being. Obviously, then, no reason exists to support this limitation upon personal conduct other than the desire to spare the city liability. Since liability is imposed by statute this reason should not suffice and the ordinance should be struck down as unreasonable.

A more interesting situation would have been presented if the ordinance had simply forbidden the wearing of spike-heeled shoes, making no provisions for permits and waiver of liability. The city need not enforce the ordinance but when a pedestrian is injured while violating it, the city would defend on the grounds of per se contributory negligence. It seems fairly well settled that non-enforcement of an ordinance does not destroy its effect as law.[15] Of course, the plaintiff could still argue that the law was unreasonable. But the city in replying to such an argument would not be met with the inconsistency so apparent on the face of this ordinance. In considering the argument that such an ordinance was unreasonable the court could take notice of all the surrounding factors. In light of the statute fixing liability upon a municipality for improper care of the streets, and upon a showing that high-heeled shoes were the usual footwear, coupled with the fact that the ordinance was never enforced, a court might decide that the sole purpose of the ordinance was to enable the municipality to evade its responsibilities. Certainly, however, a plaintiff's case would lack the force which it would have in attacking the present ordinance.

The inconsistency on the face of this ordinance, which might have been avoided, prompts a query as to why it was drawn in this manner. The only answer would seem to be that the legislative body was hoping people would avail themselves of the permit provisions and sign the waivers. Since the ordinance sets no penalty for violation of section one, this is very unlikely unless people are motivated by sheer respect for the law. Those who sign releases would give up all chance of recovery. Unlikely as it is that people will sign the waivers, it seems to be the only reason for the present form of the ordinance. If waivers are signed, and upheld in court, the city has achieved a great deal. First, those who have signed are not as likely to institute any proceedings, especially on small claims. Far more important than this, the waiver is a "catch-all." In order to successfully plead the affirmative defense of contributory negligence by violation of a statute the city must prove certain facts. It must show that the ordinance was designed to protect the plaintiff, and to protect her from the type of injury which she sustained.[16] In short, the city must establish a causal relationship between a violation of the ordinance and the injury incurred. The release disregards causal relationships. It provides for release of *all* claims against the City of Mobile arising from falls upon the streets and sidewalks "while wearing such shoes." If the release is literally construed the signer has no claim even though her fall was not caused by the wearing of the high-heeled shoes.

15 Hayne v. Wurstener, 63 N.E.2d 229 (Ohio App. 1945).

16 This is the general rule for per se negligence. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920). It has been extended to cover contributory negligence when the plaintiff is in violation of the law. Le Tourneau v. Johnston, 185 Minn. 46, 239 N.W. 768 (1931).

The chance which the municipality took of compromising the validity of the entire ordinance in order to insert this release provision, and the broad release which is demanded, gives rise to suspicions as to whether the ordinance was aimed at high-heeled shoes at all. Rather, it seems that it was aimed at destroying the claims of all women injured upon the city streets. The attack centers around these shoes, not because they cause the injuries, but because women are usually wearing them when they are injured. Note in this regard that the claimant whose injury is traceable to the fact that she was wearing spike heels already bears a heavy burden. Undoubtedly the city will charge that the plaintiff was guilty of contributory negligence. To refute this defense the plaintiff must show that she exercised due care for her own safety commensurate with the prevailing conditions. Obviously, a woman wearing high-heeled shoes is in a somewhat more precarious position than her sister traveler in flat shoes. She is charged with the knowledge that every sidewalk contains a number of small crevices, that there are at least slight variations in grading between sidewalk blocks and that gratings are not infrequent. She must exercise a degree of care commensurate with this situation. The fact that thousands of women in high-heeled shoes negotiate these minor obstacles each day with unbroken stride is some evidence that it can be done with a minimum of care. It is probably enough evidence to show that the woman who falls prey to one of these pavement pitfalls peculiar to high-heeled shoe wearers was guilty of contributory negligence. It seems then, that in most of the cases in which relief is granted, the wearing of high-heeled shoes did not play a major role. Though the victim may have been so attired, the defect was probably serious, such as would catch a pedestrian regardless of her footwear. For the courts to condone this attack upon high heels is to succumb to a clever dodge. Injuries directly attributable to high heels can be handled on the basis of contributory negligence without the aid of such ordinances. Legitimate damage claims, arising as a result of the city's own negligence, should not be imperilled by directing attention to the victims' shoes. To permit this is to permit the municipality to disregard its responsibility to the citizen.

John J. Coffey