

1959

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Recommended Citation

Ernest L. Marx, *Governmental Tort Liability for Operation of Airports*, 26 J. AIR L. & COM. 173 (1959)
<https://scholar.smu.edu/jalc/vol26/iss2/4>

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GOVERNMENTAL TORT LIABILITY FOR OPERATION OF AIRPORTS

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THE general problem of governmental tort liability, especially municipal tort liability, is one that has long vexed the courts.¹ As indicated by a substantial number of recent cases, the law of governmental tort liability for operation of airports is no exception. Most airports are municipally owned and operated, and most of the cases involve municipalities; thus it is necessary to focus primarily on these governmental bodies. The fact situation in "municipal airport" cases usually follows a basic pattern—a municipality owns and operates an airport; as a result of the negligence of an agent or employee of the municipality, plaintiff is personally injured or his property (usually an airplane) is damaged.²

The liability of a municipality depends on whether the activity out of which the injury arose was governmental or public on the one hand or proprietary, private, or corporate on the other hand.³ Liability is not imposed if the function is governmental or public, that is, where the act is performed for the common good. On the other hand, if the function is deemed to be private or proprietary, that is, for the special benefit of the municipal corporation or the people who compose it, then the municipality is liable in tort to the same extent as a private corporation would be under like circumstances.⁴

The courts have applied the governmental-proprietary test in determining whether or not municipalities are liable for torts committed in the operation of airports. The overwhelming majority of the cases hold that, in the absence of any statute on the point, an airport is a proprietary, private, and corporate function, and that the municipality may be liable for torts in connection therewith.⁵

This rule, laid down in the earlier airport cases decided in the 1930's, is

¹ A 1788 case, *Russell v. Men of Devon*, 100 Eng. Rep. 359. 2 Term Rep. 667, 16 East, 305, is generally considered the landmark case.

² E.g., *Stocker v. Nashville*, 174 Tenn. 483, 126 S.W. 2d 339 (1939); *Brasier v. Cribbett*, 166 Neb. 145, 88 N.W. 2d 235 (1958); *Christopher v. El Paso*, 98 S.W. 2d 394 (Tex. Civ. App. 1936) *error dismissed*.

³ One court has cautiously suggested a test for distinguishing governmental and proprietary functions in this manner: "In determining whether activities of a municipal corporation are governmental or proprietary, it is proper to consider whether the activity is primarily for the advantage of the state as a whole or for the special local benefit of the community involved, and to further consider whether such activity is in performance of a duty imposed upon the municipality by the sovereign power, or is in the exercise of a permissive privilege given by the sovereign power, but such tests are not conclusive to determine the capacity in which the city's activities are conducted." *Wendler v. City of Great Bend*, 181 Kan. 753, 316 P. 2d 265, 266 (1957).

⁴ See Annot., 120 A.L.R. 1376 (1939) for a representative collection of authorities on this subject. One excellent, scholarly article cited is *Borchard, Governmental Liability in Tort*, 34 Yale L. J. 1129, 143, 229 (1924); 36 Yale L. J. 757, 1039 (1927).

⁵ *City of Mobile v. Lartigue*, 23 Ala. App. 479, 127 So. 257 (1930); *Coleman v. City of Oakland*, 110 Cal. App. 715, 295 Pac. 59 (1930); *Peavey v. Miami*, 146 Fla. 629, 1 So. 2d 614, (1941); *Mollencop v. City of Salem*, 139 Ore. 137, 8 P. 2d 783; Notes and Comments, *The Liability of a Municipality for Operation and Maintenance of an Airport*, 32 Cornell L. Q. 272 (1946); Annot., 138 A.L.R. 126 (1942). For a like holding involving a county, see *Daniels v. County of Allegheny*, 145 F. Supp. 858 (W.D. Pa. 1956).

now often quoted. In justifying the classification of an airport as a proprietary function, the courts have analogized airports to other proprietary functions. One case compared an airport to a railway station or a bus terminal, and considered it to be essentially a part of the city's system of transportation facilities.⁶ The same case suggested that airports, being graded landing and taking off places for airplanes, are like streets which are graded surfaces traversed by land vehicles.⁷ And, since the work done by a city in building, repairing, and maintaining streets is a proprietary function, by analogy an airport is a proprietary function. Furthermore, it was held that a proprietary function does not lose its character as such because the operations of that function are not profitable.

An airport has been held to fall naturally into the same classification as such public utilities as electric light, gas, and water systems, all of which are generally considered to be proprietary functions.⁸ One court compared an airport, with its beacons, landing fields, runways and hangars, to a harbor with its lights, wharves, and docks. The one is a landing place and haven of ships that navigate the water, the other of those that navigate the air.⁹ Thus, the courts, arguing by analogy, have drawn airports into the proprietary classification of municipal activities.

Where there is no statute bearing on the point, the common law rule that airports are proprietary functions prevails, and the municipality is held liable for its torts arising from the operation of the airport.¹⁰ Some states, however, have passed statutes concerning municipal tort liability in the operation of airports and it is in the construction and interpretation of these laws that the courts have reached divergent results.

Usually these statutes are patterned in part on the Uniform Airports Act¹¹ and generally fall into two broad classifications, which for convenience are herein referred to as "Type I" and "Type II." Section 2 of the Uniform Act provides the language for the first type of statute. It reads:

Airports a Public Purpose—Any lands acquired, owned, leased, controlled, or occupied by such counties, municipalities or other political subdivisions for the purpose or purposes enumerated in Section 1¹² of this act, shall

⁶ *City of Mobile v. Lartigue*, 23 Ala. App. 479, 127 So. 257, 260 (1930).

⁷ *Ibid.*

⁸ *Coleman v. City of Oakland*, 110 Cal. App. 715, 295 Pac. 59, 61 (1930).

⁹ *Dysart v. St. Louis*, 321 Mo. 514, 11 S.W. 2d 1045, 1049 (1928). This case presented the question of whether an airport is a governmental or proprietary function in a different setting—whether a city had the power to issue bonds for the purpose of acquiring an airport.

¹⁰ See note 5, *supra*.

¹¹ This law was adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association at Los Angeles, in July 1935. In 1943, the act was withdrawn pending further study by the Commissioners. Since then, variations of it have been adopted in numerous states. The act has sometimes been referred to as the Municipal Airports Act. It is set out in its original form in 6 J. Air L. & Com. 589 (1935). Generally the act has been used as a model for those states enacting an airport law, but provisions vary considerably from state to state.

¹² Section 1 of the act reads:

Municipalities May Acquire Airports—Municipalities, counties, and other political subdivisions of this state are hereby authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties, or other political subdivisions; but no county shall exercise the authority hereby conferred outside of its geographical limits except in an adjoining county and this only jointly with such adjoining county.

and are hereby declared to be acquired, owned, leased, controlled, or occupied for *public, governmental and municipal purposes*.¹³

This type of statute will be referred to as a "Type I" statute.

The second type of statute, herein referred to as Type II, contains a statement similar to the one found in Type I, to the effect that airports owned by municipalities shall be considered a public, governmental, and municipal purpose. In addition, however, the Type II statute contains a specific statement that no action shall be brought against any municipality on account of any act done in maintaining, operating or managing any municipal airport.¹⁴ Thus, the difference between the Type I and Type II statute is that the latter provides an *express* exemption from liability whereas the former does not.

In construing the Type I statutes, the courts have reached two different conclusions. One view is that the statute should be construed as an attempt by the legislature to declare the city immune from liability by making airports a governmental function.¹⁵ The other courts indicate that the statute really does not attempt to alter the common law, and that all the legislature sought to do was to declare that an airport is a public and governmental *purpose* in which a city is authorized to engage.¹⁶ In other

¹³ Italics by author. An example of a state statute patterned on § 2 of the Uniform Act is *N.C. Gen. Stat.* § 63-50 (1950);

Airports a public purpose.—The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this article, shall and are hereby declared to be acquired and used for public, governmental and municipal purposes and as matter of public necessity.

Other states having this type of statute, referred to as a Type I statute, include: *W. Va. Code Ann.* § 2786 (10) (1955); *Tex. Rev. Civ. Stat.* art. 46d-15 (1948); *Ga. Code Ann.* § 11-202 (1949); *Ark. Stat. Ann.* § 74-615 (1957); *Utah Code Ann.* § 2-2-4 (1953); *Nev. Rev. Stat.* § 496.250 (1) (1955), but see also (3) of the same section.

¹⁴ An example of a "Type II" statute is *Tenn. Code Ann.* § 42-310 (1955): Operation of airports declared governmental function—Suits against municipality barred.—The construction, maintenance, and operation of municipal airports is declared a public governmental function, and no action or suit shall be brought or maintained against any municipality, or its officers, agents, servants, or employees, in or about the construction, maintenance, operation, superintendence, or management of any municipal airport.

Other states having this type of statute include: *Neb. Rev. Stat.* §§ 3-206-207 (1954); *Mont. Rev. Codes Ann.* § 1-822, § 1-502; *N. H. Rev. Stat. Ann.* § 422.17 (1955); *Tex. Rev. Civ. Stat. Ann.* art. 1269 h, § 3 (1948), declared unconstitutional in *Christopher v. El Paso*, 98 S.W. 2d 394 (Tex. Civ. App. 1936). See also *Iowa Code Ann.* § 330.15 (1949).

¹⁵ *City of Corsicana v. Wren*, — Tex. —, 317 S.W. 2d 516 (1958), *rehearing denied*; *Kirksey v. City of Ft. Smith*, 227 Ark. 630, 300 S.W. 2d 257 (1957); *Van Gilder v. City of Morgantown*, 136 W. Va. 831, 68 S.E. 2d 746 (1949); *Imperial Production Corp. v. City of Sweetwater*, 210 F. 2d 917 (5th Cir. 1954); *Mayor, etc. of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63 (1936).

¹⁶ *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E. 2d 371, (1949), *rehearing denied*, 230 N.C. 759, 53 S.E. 2d 313 (1949); *Wren v. City of Corsicana*, 309 S.W. 2d 102 (Tex. Civ. App. 1957), *rev'd* — Tex. —, 317 S.W. 2d 516 (1958); *Caroway v. Atlanta*, 85 Ga. App. 792, 70 S.E. 2d 126 (1952); *Van Gilder v. City of Morgantown* 136 W. Va. 831, 838, 68 S.E. 2d 746, 750 (1949) (dissenting opinion, 1952); *City of Corsicana v. Wren*, — Tex. —, 317 S.W. 2d 516, 523 (1958) (dissenting opinion).

words, the purpose of the statute is merely to permit a city to operate an airport.

The courts which interpret the statute as declaring the city immune from liability find that the plain meaning of the statute is that airports are governmental functions; immunity then follows as a matter of course.¹⁷

At first glance, it must be admitted that this latter interpretation appears logical, perhaps so plainly so that no justification is needed therefor. However, a closer reading of the Type I statute suggests a different interpretation. It can be argued that the language really does no more than to authorize a municipality to acquire and operate an airport.¹⁸ The heading of the uniform statute, "*Airports a Public Purpose*," supports this construction. Furthermore, in the 1920's and 1930's, when airports began to be developed in great numbers, there was a genuine question as to whether municipalities had the authority to operate an airport.¹⁹ No doubt several of the earlier statutes were passed with the idea of declaring airports to be a public purpose, so as to settle, once and for all, the question of whether a municipality had the *authority* to operate an airport.

The words of the Uniform Act state that "(a)ny lands acquired . . . for the . . . purposes enumerated [operating, maintaining, constructing airports] . . . are hereby declared to be acquired . . . for *public, governmental and municipal purposes*."²⁰ The italicized portion of the statute suggests that the term "governmental" is used in its ordinary non-technical meaning, that is, not as a word of art—the converse of "proprietary," but rather as

¹⁷ E.g., *Mayor, etc. of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63, 66 (1936): "It is clear that this legislation vested the airports of the state with the character of governmental institutions."

¹⁸ E.g., *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E. 2d 371, 375 (1949); *Caroway v. Atlanta*, 85 Ga. App. 792, 70 S.E. 2d 126, 130 (1952). See also cases cited in note 15, *supra*.

¹⁹ In the late '20's, several cases were decided which held that a municipality was authorized to operate an airport. For an excellent study of earlier decisions on this question, see Rhyne, *Airports and the Courts* 20-29 (1944). *Dysart v. St. Louis*, 321 Mo. 514, 11 S.W. 2d 1045, 1047 (1928) involved a suit brought to prevent the city from issuing bonds payable from tax funds, for the purpose of developing an airport. A portion of this decision is quoted in Rhyne, *op. cit. supra* at 21, wherein plaintiff attacking the bond issue as for a "private" rather than a "public" purpose had said:

"It will afford a starting and landing place for a few wealthy, ultra-reckless persons, who own planes and who are engaged in private pleasure flying. . . . It will afford a starting and landing place for pleasure tourists from other cities, alighting in St. Louis while flitting here and yon. It will offer a passenger station for the very few persons who are able to afford, and who desire to experience, the thrill of a novel and expensive mode of luxurious transportation.

"The number of persons using the airports will be about equal to the total number of persons who engage in big-game hunting, trips to the African wilderness, and voyages of North Pole Exploration. . . .

"In the very nature of things, the vast majority of the inhabitants of the city a 99 per cent majority, cannot now, and never can, reap any benefit from the existence of an airport.

"True it may be permitted to the ordinary common variety of citizen to enter the airport free of charge, so that he may press his face against some restricting barrier, and sunburn his throat gazing at his more fortunate compatriots as they sportingly navigate the empyrean blue.

"But beyond that, beyond the right to hungrily look on, the ordinary citizen gets no benefit from the taxes he is forced to pay."

The foresighted court rejected plaintiff's contention, and held the airport to be a public purpose.

²⁰ Similar wording is used in *W. Va. Code Ann.* § 2786 (10) (1955); *N.C. Gen. Stat.* § 63-50 (1950), quoted in full note 13, *supra*; *Ga. Code Ann.* § 11-202 (1949).

a synonym for "public" and "municipal," and is in no way intended to shield the municipality from liability.²¹

As a general proposition, the view which holds that the statute does not exempt the city from liability appears to be more sound. In the last analysis, however, the problem is one of ascertaining legislative intent. If it should somehow be determined that the legislature did intend to exempt the city from liability, then the question is raised as to whether such a law is constitutional. This problem is germane to both the Type I and Type II statutes, and will be discussed in connection with the Type II statute.

In construing the Type II statute, the problem of ascertaining what the legislature intended does not arise, since the statute expressly grants the municipality immunity from liability.²² The main issue is whether or not the statute is constitutional; on this question there has been a division of opinion.²³ As regards municipal tort liability in general, as opposed to municipal tort liability for airports in particular, a majority of cases uphold the constitutionality of a statute relieving the municipality from liability.²⁴

Christopher v. City of El Paso,²⁵ a Texas Court of Civil Appeals case, was the first decision involving a test of the constitutionality of a Type II statute.²⁶ Though the city was held not liable because it was not negligent, the court nevertheless went into the question of constitutionality and held the act unconstitutional. The court said,²⁷ "That such a statute contravenes the equal protection clause of the Fourteenth Amendment to our Federal Constitution,"²⁸ and "(t)hat the provision violates the due process clause of our own [Texas] Constitution. . . ."

The reasoning behind the equal protection clause argument runs along these lines: It is settled at common law that airports are proprietary functions; a municipality acting in a proprietary capacity is treated as a private corporation; therefore, exempting municipal corporations from liability would be favoring part of a class, in that private corporations are not afforded a like benefit, and thus there is a violation of the equal protection clause of the Constitution.

The second argument relies primarily on the due process clause of the Texas Constitution.²⁹ A right to sue a municipality for a tort committed by its employee or agent is a vested right at common law; when the legislature

²¹ The italicized words in the statute (italics by author) suggest other redundancies used by lawyers to cover contingencies, although the words are in a sense synonymous, e.g., "right, title, and interest," or "give, bequeath, and devise."

²² A typical Type II statute is set forth in footnote 14, *supra*, and discussed in the text at that point.

²³ See note 14, *supra*, for an example of a Type II statute. Cases which have upheld the constitutionality of Type II statutes include *Stocker v. City of Nashville*, 174 Tenn. 483, 126 S.W. 2d 339 (1939); *Holland v. Western Airlines*, 154 F. Supp. 457 (D. Mont. 1957); *Opinion of the Justices*, — N.H. —, 134 A. 2d 279 (1957). Cases declaring the Type II statute unconstitutional include *Christopher v. El Paso*, 98 S.W. 2d 394 (Tex. Civ. App. 1936), *error dismissed*; *Brasier v. Cribbett*, 166 Neb. 145, 88 N.W. 2d 235 (1958). See also *Abbott v. Des Moines* (constitutional), 230 Iowa 494, 298 N.W. 649 (1941) and compare *Brown v. Sioux City*, 242 Iowa 1196, 49 N.W. 2d 853 (1951).

²⁴ 38 Am. Jur., *Municipal Corporations*, §§ 574, 593 (1941); *Annot.*, 124 A.L.R. 350 (1940).

²⁵ 98 S.W. 2d 394 (Tex. Civ. App. 1936) *error dismissed*. Here, plaintiff was injured while observing a stunt show held at the airport when a cyclist drove his motorcycle through a burning fence and struck him. Liability was urged because the city was negligent in failing to adopt rules for the protection of invitees.

²⁶ *Tex. Rev. Civ. Stat. Ann.* art. 1269 h, § 3 (1948).

²⁷ 98 S.W. 2d 394, 396.

²⁸ U.S. Const. amend. XIV, § 1. ". . . (No State shall) . . . deny to any person within its jurisdiction the equal protection of the laws."

²⁹ *Tex. Const.* art. I, § 19. "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land."

passes a statute depriving an injured person of this cause of action, it has denied him due process of law.

There is an additional argument, closely related to the due process idea, which the Texas court did not mention. This theory relies on a provision found in many state constitutions which assures an injured person his day in court.³⁰ Such a provision is interpreted as forbidding the legislature from arbitrarily abolishing or unreasonably restricting causes of action well established and well defined in the common law, among which are claims against cities for negligent performance of proprietary functions.³¹

In 1939, three years after the *Christopher* case, the constitutionality of a Type II statute was tested in *Stocker v. City of Nashville*.³² Plaintiff advanced the same arguments that were made in the *Christopher* case. But the Tennessee court refused to follow the Texas decision and upheld the constitutionality of the Tennessee law. It distinguished the Tennessee statute from the Texas statute on the ground that the latter did not expressly declare as does the former that a municipal airport was "a public governmental function." This does not appear to be a satisfactory ground for distinction. The Tennessee court sidesteps the conflict by saying that "it (*Christopher*) is not in point here."³³

The later cases follow either the *Christopher* or *Stocker* view. In these cases, as well as in cases involving Type I statutes, the courts have considered another point of controversy; that is, whether or not the determination of liability or non-liability of a municipality for certain acts is a "judicial" or a "legislative" question. Those cases which hold that the extent to which immunity from liability for torts of a municipality shall be preserved or waived is a purely legislative question uphold the constitutionality of the statute.³⁴ Cases holding that the question of immunity is a judicial question declare the statute unconstitutional.³⁵

One court,³⁶ attempting to justify its position that this is a legislative question, has said (a) "To be sure, courts may adjudge that a horse is still

³⁰ E.g., Tex. Const. art. I, § 13 (in part): "All courts shall be open, and every person for an injury done to him, in his lands, goods, person, or reputation, shall have remedy by due course of law."

³¹ See *Lebohm v. City of Galveston*, 275 S.W. 2d 951 (1954); 33 Texas L. Rev. 1099 (1955).

³² 174 Tenn. 483, 126 S.W. 2d 339 (1939). Plaintiff alleged that while walking along a path on airport grounds, she struck against a wire stretched along a grass plot close to the path, about six inches high, and was thrown to the ground and injured. Besides asserting that the statute in question was unconstitutional, plaintiff also sought to recover on a theory of nuisance. The court disposed of this argument briefly stating that such a precautionary provision (wire) is a matter of common practice and a recognized method of protection under such conditions. The statute construed was the present day *Tenn. Code Ann.* § 42-310 (1955), which is quoted note 14, *supra*.

³³ 126 S.W. 2d 339, 341 (1939). Criticism of the *Stocker* case may be found in 10 J. Air L. & Com. 422 (1939); 10 Air L. Rev. 310 (1939). See note 32, *supra*, for a brief statement of the facts in the *Stocker* case.

³⁴ *Opinion of the Justices*, — N.H. —, 134 A. 2d 279, 281 (1957); *Holland v. Western Airlines*, 154 F. Supp. 457, 460 (D. Mont. 1957); *City of Corsicana v. Wren*, — Tex. —, 317 S.W. 2d 516, 519-20 (1958).

³⁵ *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E. 2d 313 (1949); *Brasier v. Cribbett*, 166 Neb. 145, 88 N.W. 235 (1958).

³⁶ *City of Corsicana v. Wren*, — Tex. —, 317 S.W. 2d 516 (1958). Texas has provided a fertile area in the field of municipal airport tort liability. After *Christopher v. El Paso*, 98 S.W. 2d 394 (1936) held a Type II statute unconstitutional, a Type I statute was enacted in 1947. This was held valid in *Imperial Production Corp. v. City of Sweetwater*, 210 F. 2d 917 (5th Cir. 1954). Subsequently, *Wren v. City of Corsicana*, 309 S.W. 2d 102 (1957) decided that the statute did not intend to exempt a city from liability. This decision was reversed in *City of Corsicana v. Wren*, — Tex. —, 317 S.W. 2d 516, with three judges dissenting. The latter case purports to overrule *Christopher v. El Paso*, *supra*, on the question of constitutionality of a Type II statute, though a Type I statute is involved in the *Corsicana* Case.

a horse even when the legislature has called it a cow; (b) but if science should produce some doubtful animal resembling both, are judges necessarily better qualified than the legislature to say whether it is a horse or a cow?"³⁷ The court goes on to say that the legislature has an understanding of life and government quite as broad as that of the courts, and that in areas of *doubt*, such as classifying airports as a governmental or proprietary function, legislative classification of activities as governmental or proprietary ought to be respected by the court.

It is to be noticed that the court set out two rules; one applies if there is no doubt as to classification, and the second applies if there is doubt. Though the rules may well be sound, it appears that the court applied the wrong rule, for the common law left no doubt that airports are proprietary functions in absence of statute. Using the court's analogy, it is evident that airports are clearly "horses," i.e., proprietary functions under the common law,³⁸ and are not "doubtful new animals resembling both" (horses and cows).

On the basis of this analysis, query whether the court reached an incorrect result. The basic idea that the legislature has no power to arbitrarily change a clearly proprietary function into a governmental function is relied on by many of the cases which impose liability. Thus, a case from the same jurisdiction as *Christopher v. City of El Paso* which purports to overrule it may be said actually strengthen it.

There is one argument which is applicable only to the Type I statute, since this type is ambiguous and is capable of two possible interpretations. That is, it can be construed either as an exemption from liability or merely as an authorization to operate an airport. Serious doubts have been raised as to whether the legislature can constitutionally exempt a municipality from airport tort liability. It is a cardinal principle that the court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.³⁹ Thus, to avoid the constitutional question in interpreting the statute in question here, it would be necessary to construe the law as a mere authorization to operate an airport.

As one would suspect, the greatest number of cases dealing with airport tort liability involve municipalities, since most airports are municipally owned. However, some cases exist which involve other governmental bodies. In *Woodmansee v. Connecticut*,⁴⁰ it was held that the Connecticut Aeronautics Commission was an arm of the state government and under the doctrine of sovereign immunity would not be liable in suits arising out of its authorized functions, whether proprietary or governmental. There was no statute involved in the case.

As to the liability of counties, one Nevada case, *Granite Oil Securities v. Douglas County*,⁴¹ rejected the contention that the county is an arm of the state and found liability.

The problem of liability of the United States for federally-owned airports involves a consideration of the Federal Tort Claims Act. That act

³⁷ *City of Corsicana v. Wren*, *supra* note 34.

³⁸ "We have found no decision, and the appellants have cited none, in which any Court of last resort in this country, has held that the construction, operation, and maintenance of any airport by a municipality is a governmental function and that municipalities may not be held liable in tort for the negligent operation thereof, except where they have been expressly exempted from such liability of statute." *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E. 2d 371, 375 (1949), *rehearing denied*, 230 N.C. 759, 53 S.E. 2d 313 (1949). Virtually the identical remark was made in *Wendler v. City of Great Bend*, 181 Kan. 753, 316 P. 2d 265, 272 (1957).

³⁹ *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

⁴⁰ 18 Conn. Super. 370 (1953). Here, plaintiff slipped and was injured by falling on some snow and ice on airport grounds.

⁴¹ 67 Nev. 388, 219 P. 2d 191 (1950).

purports to waive, with certain specified exceptions, the federal government's sovereign immunity from suits for torts committed by federal employees. There is language in the act which presents a problem of interpretation. This reads, "The United States shall be liable . . . to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ." ⁴² The question is whether on the one hand the "governmental-proprietary" distinction is retained in the FTCA, thus immunizing the federal government from liability for torts committed by its agents in the performance of governmental functions, or whether on the other hand the act sought to abolish the distinction entirely so that liability would not depend on arbitrary pigeonholing of activities as governmental or proprietary. It would appear that the United States Supreme Court in *Indian Towing Co. v. United States* ⁴³ rejected the governmental-proprietary distinction as applied to the FTCA. ⁴⁴ To the same effect is *Rayonier v. United States*. ⁴⁵

The federal problem has arisen in at least two airport cases, *Air Transport Associates v. United States*, ⁴⁶ and *United States v. Union Trust Co.* ⁴⁷ Both cases involved federally-owned airports. ⁴⁸ In both cases, the court rejected the idea that the FTCA incorporated the governmental-proprietary distinction, and thus, the airports were not granted immunity from liability. ⁴⁹

But even if the FTCA were construed as adopting some sort of governmental-proprietary distinction, it is submitted that the federal government could still be held liable for torts committed in connection with airports. This is because historically airports at common law are considered as proprietary functions, from which tort liability flows. ⁵⁰

⁴² 62 Stat. 483 (1948), 28 U.S.C. § 2674 (1952).

⁴³ 350 U.S. 61 (1955).

⁴⁴ In this case, Coast Guard negligence in letting a lighthouse light go out resulted in plaintiff's tug being grounded and damaged. The court stated at page 65: ". . . (T)he Government in effect reads the statute as imposing liability in the same manner as if it were a Municipal Corporation . . . it would thus push the courts into the 'non-governmental-governmental' quagmire that has long plagued the law of Municipal Corporations. . . . The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts." But see Notes, *Federal Government Liability "As a Private Person" Under the Tort Claims Act*, 33 Ind. L. J. 339 (1958).

⁴⁵ 352 U.S. 315, 319-20 (1957).

⁴⁶ 221 F. 2d 467 (9th Cir. 1955). The Court rejected the government's contention that in order for there to be jurisdiction in the District Court of a claim against the government under the FTCA, the government must be equated to a private individual under 28 U.S.C. § 2674. In other words, the government contended that because a private individual cannot operate a military air base, as was being operated by the government here, the government cannot be equated to a private individual and hence jurisdiction does not lie. The court dealt with this point by saying that the accident did not arise because of the military character of the airbase and private persons do operate airports, and therefore the requirements of § 2674 were met.

⁴⁷ 221 F. 2d 62 (D.C. Cir. 1955), *aff'd per curiam*, 350 U.S. 907 (1955).

⁴⁸ In the *Air Transport Associates* Case 221 F. 2d 467 (9th Cir. 1955), the airport was an Alaska airfield operated by the federal government as an Air Force Base. The airfield was made available as a landing field for commercial planes paying compensation therefor. Plaintiff was a commercial user of the airport who suffered damages as a result of the negligent operation of the airfield. The *Union Trust Co.* case held the government liable for a tragic mid-air collision between a passenger plane and another plane as a result of the negligence of the tower operators at a controlled, federally owned, public airport.

⁴⁹ 221 F. 2d 467, 470 (9th Cir. 1955); 221 F. 2d 62, 73-78 (D.C. Cir. 1955).

⁵⁰ See note 5, *supra*.

In the area of governmental airports other than municipal airports, that is, state, county and federal airports, the rules of liability are well defined. Yet these rules must be accepted with caution. At the present, the cases decided are too few in number to permit an accurate forecast of what rule of liability will ultimately prevail. Different holdings may well arise in the future. As an illustration, one need only look at the early municipal airport cases, where liability was regularly imposed and contrast these with the later cases, complicated by the passage of statutes.

Having examined the law as it exists, it would now be appropriate to inquire as to what the policy of the law should be. Certainly it is a well-known and generally accepted fact that the modern trend is more and more toward holding municipalities responsible for their torts. And the courts generally express approval at the trend, although they are often reluctant to impose liability where none existed before.

One policy argument often advanced is that the loss from a large tort claim would bankrupt a small municipality. But one may ask why the imposition of liability is upheld for such operations as public transportation where the liability is potentially as great. Certainly the financial risk could be entrusted to an insurance company by the purchase of liability insurance.⁵¹ There is an old and still valid argument that it is more equitable to spread the cost of calamities over the population as a whole rather than make an injured plaintiff suffer a great loss individually. A non-liability statute naturally discourages the exercise of great care. A responsible airport is likely to receive greater use and revenue than one which is immune from liability.

CONCLUSION

Under the common law, as we have seen, it is well settled that municipalities are responsible for torts committed in the operation of airports. Some states have passed statutes which seek to supplement the common law. These fall into two basic types; the first merely declares that airports are declared to be public, governmental, and municipal purposes and the second contains language similar to that in the first type, but in addition, expressly exempts the municipality from liability for torts committed in the operation of the airports. The better view is that the first type of statute is not intended to free the municipality from liability, but if it should be so construed as granting immunity, then it, as well as the second type of statute, should be deemed unconstitutional.

The reasons for retaining municipal immunity, such as fear of an excessive tort burden and possibility of administrative abuse have long been discredited. The classification of airports as proprietary functions is essentially sound. And justification for converting airports by statute into governmental functions must indeed be hopelessly weak. Such statutes, where there is ambiguity, should be read by the courts as imposing liability, or declared unconstitutional.

⁵¹ What if the municipality carries liability insurance? Does this operate as a waiver of statutory immunity? Two recent cases, both coming from jurisdictions having Type II statutes, bear on the question. *Holland v. Western Airlines*, 154 F. Supp. 457 (D. Mont. 1957), involving a Montana statute, upholds its validity and indicates that the carrying of liability insurance does not waive immunity. But in *City of Knoxville, Tenn. v. Bailey*, 222 F. 2d 520 (6th Cir. 1955), the opposite result was reached. This is a minority holding and is severely criticized in Orr, *Tennessee Statute Making Airports Governmental Function*, 21 *Ins. Counsel J.* 77 (1954). The writer argues that the city never voluntarily waived its immunity, and that the Tennessee statute (the same one which was upheld in the *Stocker v. Nashville* case) expressly prohibited suit. Furthermore, it is argued, even if the Tennessee law were to be arbitrarily established as waiving immunity if liability insurance were secured, it would not be illegal to bring suit because suit is specifically prohibited.