Hastings Law Journal

Volume 9 | Issue 1 Article 8

1-1957

Torts: Are Public Officials who Conspire with Outsiders Acting within the Scope of Their Authority

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The two words, "without more," were taken by the dissenters to mean that had the defendant offered physical and forceful resistance to the blood alcohol test, and had his resistance been overcome, the whole procedure to obtain the blood sample would then be unconstitutional. In his dissent Mr. Chief Justice Warren said:

> "I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights."[34]

Mr. Justice Douglas in a separate dissent stated that as he understood the decision by the majority the ruling would have been the direct opposite if there had been a struggle with the police. He was of the opinion that "the sanctity of the person is equally violated . . . where the prisoner is incapable of offering resistance."[35]

While it may remain an open question in other states whether the accused has the right to resist the taking of his blood for an alcoholic content test, in California, because of the *Duroncelay* decision, this question should be strongly answered in the negative. The accused cannot refuse to submit to the blood taking on the grounds of self-incrimination; he cannot refuse to submit on the grounds of violation of due process; nor can he refuse to submit on the grounds that the taking of his blood would be an unreasonable search and seizure. May the accused refuse to submit to any other lawful and reasonable search? Why, then, should he be allowed to resist the blood alcohol test?

The blood alcohol test is the most accurate of the chemically administered tests to determine whether the accused is under the influence of intoxicating liquor.[36] Its usefulness in reducing highway fatalities by detection of inebriated drivers is plainly apparent. A statutory enactment to promulgate the legality of the blood alcohol test, administered with or without consent, and to formally answer the issue of whether an accused person can resist the test, would be desirable. Kansas has such a statute which might well be used as a model.[37] It provides that anyone who operates a motor vehicle on public highways within the state shall be deemed to have given consent to a chemical test of his breath, blood, urine or saliva for the purpose of determining alcoholic content.

But regardless of whether or not the state legislature deems it desirable to pass such a statute, the legality of the nonconsensual blood alcohol test is a dead issue in California, and the case of *People v. Duroncelay*[38] stands as notice to the driver that his resistance to the blood alcohol test will not be looked upon with favor in the state courts.

John A. Burke

TORTS: ARE PUBLIC OFFICIALS WHO CONSPIRE WITH OUTSIDERS ACTING WITHIN THE SCOPE OF THEIR AUTHORITY?

In order to assist them in the fearless performance of their duties and to protect them from vexatious litigation, public officials are clothed with an immunity from civil liability.[1] Though the first class of officials to receive this protection was the

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[34] *Id.* at 441.
[35] *Id.* at 443.
[36] See note 1 *supra.*
[37] KAN. GEN. STAT. § 8-1001 to § 8-1007 (1949 Supp. 1955).
[38] 48 Cal. 2d 766, 312 P.2d 690 (1957).
[1] PROSSER, TORTS § 109 (2d ed. 1955); HARPER, TORTS § 298 (1933).

judiciary,[2] it has been extended to other public officers exercising discretionary powers.[3] A long line of cases point out that a public official will be protected by this immunity even if he acts with malice and without probable cause.[4] However, the act in question must be within the scope of the official's authority. Once he acts beyond the scope of his authority, the cloak of immunity vanishes and he is subject to the same standard of liability as other citizens would be under similar circumstances.[5] Though this "scope of authority" requirement is simply stated, its application in particular cases can be very difficult.

In *Hardy v. Vial*,[6] a recent California case, the plaintiff alleged that the defendant public officials acted beyond the scope of their authority by conspiring with outsiders and aiding them in the making and filing of affidavits containing false charges against the plaintiff for the purpose of procuring his dismissal from Long Beach State College, where he was employed as a professor. Four of the defendant public officials were affiliated with Long Beach State College and three held official positions with the California State Department of Education. Following his dismissal from the college, the State Personnel Board ordered the plaintiff's reinstatement after finding the charges against him untrue and the grounds for his dismissal not sustained by the evidence. Thereafter, the plaintiff commenced an action for damages for malicious prosecution.

The Supreme Court of California had to determine whether public officials, motivated by malice, are acting beyond the scope of their authority when they conspire with outsiders and aid them in the making and filing of affidavits containing false charges against an innocent professor. In holding that the defendant officials did not act beyond the scope of their authority, the court said:

> "The underlying theory of absolute immunity is equally applicable whether the employee acts by himself or with others who are not immune."[7]

Four cases were relied upon by the court to support the above holding. In the first case, *White v. Brinkman*,[8] decided by a California District Court of Appeal, the plaintiff alleged that the defendants, public officers and outsiders, maliciously engaged in a conspiracy to injure the plaintiff in his business and social relations. Though the court held that the public officials were protected by the immunity rule, it did not discuss the question of whether a public official acts beyond the scope of his authority when he conspires with outsiders. In the second case, *Yaselli v. Goff*,[9] the plaintiff complained that the defendant official *with others* maliciously charged the plaintiff with conspiring to defraud the United States. Other than mentioning the fact that the complaint stated that the defendant was accused by the plaintiff of the alleged acts "with certain other defendants not now

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[2] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

[3] 67 C.J.S., *Officers* § 127 (1950); 21 Cal. Jur., *Public Officers* § 90 (1925).

[4] Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 643 (1938); White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951); 32 Cal. Jur. 2d, *Malicious Prosecution* § 8 (1956).

[5] Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Stiles v. Morse, 223 Mass. 174, 123 N.E. 615 (1919); 43 Am. Jur., *Public Officers* § 277 (1942); 67 C.J.S. *Officers* § 126 (1950).

[6] 48 Cal.2d ....., 311 P.2d 494 (1957).

[7] *Id.* at ....., 311 P.2d at 497.

[8] 23 Cal. App.2d 307, 73 P.2d 254 (1937).

[9] 12 F.2d 396 (2d Cir. 1926).

before this court,"[10] the court did not discuss the fact that the defendant acted *with others* in bringing the charges. In both cases, the particular officials involved were shielded from liability by the immunity doctrine, but in neither case was there any discussion or rule laid down as to whether an official goes beyond the scope of his authority when he conspires with outsiders.

Hoppe v. Klapperich[11] was the third case relied on by the California Supreme Court for its holding. Though the defendant officials in this case were found to have acted beyond the scope of their authority on other grounds and were therefore liable, the Minnesota Supreme Court stated that the immunity rule ". . . is not to be scuttled or avoided by pleading that the acts complained of resulted from a conspiracy previously entered into."[12] But the case is weak authority since this statement is apparently dicta for which no specific authority is cited by the Minnesota court. The last case cited by the California Supreme Court, *Linder v. Foster*,[13] was clearly not in point since it involved public officials who conspired *among themselves* and not with outsiders.[14]

When these cases are analyzed, it is found that only three of them have any relation at all to the issue of conspiracy with outsiders, and two of these do not even discuss, much less properly reason, the point for which they are cited as authority by the California Supreme Court. The only case that discusses this point at all, does so merely by way of dicta which is unsupported by authority. The court might as easily have held that the officials in the *Hardy* case acted beyond the scope of their authority by conspiring with outsiders and thus deprived themselves of the protection of the immunity doctrine. But the officials were shielded from liability by the application of the immunity doctrine. If the holding is not based upon strong case authority, then where does it find support?

The answer seems to be given in the following passage from Judge Learned Hand's opinion in *Gregoire v. Biddle*[15] which the court quoted with approval. In commenting on the immunity rule, the judge states:

> "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[16]

But will *all* officers be subjected to "the constant dread of retaliation" if in cases where a *few* conspire with outsiders these few are held liable? The answer is necessarily *no,* since only those who conspire with outsiders need fear being held liable. The immunity doctrine is too well established to try to overthrow it, or, for that matter, even to attack it. But its overthrow is not being advocated, nor is the doctrine as such being attacked, when it is suggested that in *particular cases* public officials are to be deprived of its protection when they act beyond the scope of their authority. A case like *Hardy v. Vial,* where public officials conspired with outsiders, seems to be one of these special cases. The doctrine's protection has

[10] *Id.* at 397.

[11] 224 Minn. 224, 28 N.W.2d 780 (1947).

[12] *Id.* at 232, 28 N.W.2d at 788.

[13] 209 Minn. 43, 295 N.W. 299 (1940).

[14] Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Jones v. Kennedy, 121 F.2d 40 (D.C. Cir. 1941), *cert. denied,* 314 U.S. 665 (1941); Fletcher v. Wheat, 100 F.2d 432 (D.C. Cir. 1938).

[15] 177 F.2d 579 (2d Cir. 1949).

[16] *Id.* at 581.

always been denied to officials who act beyond the scope of their authority.[17] The California Supreme Court has recognized this limitation on the application of the immunity doctrine.[18] *Hardy v. Vial* seems to be a case which called for such a limitation of the immunity rule.

When are officials deemed to be acting beyond the scope of their authority? This query can best be answered by reference to a few illustrative cases. Where the law grants authority to the members of a city council to remove from office the city treasurer *provided* they proceed in accordance with the law regulating the civil service, they are subject to liability as individuals for attempting a removal without complying with the provisions of that law.[19] In such a case, they deprive themselves of the shield of immunity by their failure to stay within the scope of their authorized powers. Likewise, a municipal judge who is required by statute to have a complaint reduced to writing and subscribed by the complainant before issuing a warrant, is acting wholly beyond the scope of his authority by issuing a warrant before these statutory requisites are fulfilled.[20] Where a county sheriff uses a warrant for a purpose for which it was not designed (using it to extort property), he is deemed to have acted entirely outside the scope of his authority and thus to have deprived himself of the immunity which would have protected him if he executed the process for the purpose for which it was intended.[21] These cases illustrate that officials must perform their authorized duties in accordance with and in a manner intended by the authority under which they act.

Chief Justice Gibson, in writing the majority opinion in the *Hardy* case, stated:

> "The alleged purpose of the conspiracy, and, accordingly, the purpose of the school defendants in aiding the non-school defendants in making the affidavits, was to accomplish the dismissal of plaintiff from his employment. This purpose, of course, was clearly within the scope of the official duties of the school defendants and within the protection of the immunity rule."[22]

Certainly the duties of the school officials include weeding out those *unfit* to teach. But they do not include procuring the dismissal of those *qualified* to teach. The acts the officials were authorized to do were to be done by them singly or acting together, but there was no authority whatsoever to do their particular duties in concert with outsiders who had no connection with and for all purposes were complete strangers to the school and department. However, it is not denied that if such officials *severally* or *among themselves* act with malicious motives and without probable cause to procure the dismissal of a qualified instead of an unfit professor, much authority can be cited to the effect that they are acting within the scope of their authority and are under the protection of the immunity doctrine.[23] But when these same officials do the same acts *in conspiracy with outsiders*, they are not only acting beyond the scope of their authority, but beyond any contemplation of authority. In such a case, they are neither performing their duties in accordance with nor in a manner intended by the authority vested in them.

It was further argued by the learned Chief Justice that:

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[17] See note 5 *supra*.

[18] White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951).

[19] Stiles v. Morse, 223 Mass. 174, 123 N.E. 615 (1919).

[20] Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947).

[21] *Ibid.*

[22] 48 Cal.2d .....at....., 311 P.2d at 497.

[23] See note 4 *supra*.