# (Mis)construing the Governmental Liability Act

## Using *Ross v Consumers Power*

BY JOHN A. BRADEN

# STRUING

## The Eve of Construction

As of 1964, the common law considered the state and its agencies (including counties and school districts) *totally* immune from tort liability. Municipal corporations (cities, villages, and townships) were immune when engaged in "governmental," as opposed to "proprietary," functions (though the latter proposition was in doubt because of *Williams v Detroit,*[1] which purported to abolish municipal immunity).

There were several statutory exceptions. Municipalities[2] and counties[3] were liable for defective streets, highways, and sidewalks. In addition, certain governmental units were liable for negligent operation of motor vehicles and airplanes.[4]

## The Governmental Liability Act

In 1964, the Governmental Liability Act (the Act) was passed. The Act:

- *Reinstated* the governmental/proprietary test of municipal immunity, but *extended* that test to *all* governmental agencies.[5] Since the state and its agencies had formerly enjoyed immunity regardless, this had the effect of *limiting* sovereign immunity.
- *Extended* defective highway liability to all highway authorities (including the state), but also *limited* liability for the state and counties to the traveled portion of highways under their jurisdiction.[6]
- *Extended* automobile liability to all governmental entities (i.e., municipalities in addition to the state).[7]
- Created a *new* basis of governmental liability—defective public buildings.[8]

## Construing Governmental Function

The statute did not define "governmental function." Since the phrase is not used by laymen, but on the contrary, is a term of art with an established meaning at common law, Michigan statutes *require* that it be defined as it was at common law.[9]

At first, the Supreme Court did so;[10] however, in a fractured decision, a majority of justices departed from the common law definition.[11]

Without a majority for a new definition of governmental function, the courts would have been justified in ignoring this definition. Nevertheless, in *Ross v Consumers Power Co,*[12] a majority held that the courts were not bound by the common law definition, but could invent their own definition. This amazing display of judicial chutzpah—in essence, rewriting the statute to suit themselves—should have drawn condemnation. However, because the pro-government definition created by the Court coincided with the pro-government bias of those who controlled the Legislature at the time, the Act was amended to incorporate *Ross*'s definition of governmental function.

## Construing the Exceptions

Since 1858, it has been settled that remedial statutes are entitled to a broad and liberal construction, so as to effectuate the remedy.[13] Since the exceptions to governmental immunity are remedial in every sense of the word (in that they create a remedy that would not otherwise exist, and correct an evil in the common law), it follows that the exceptions are entitled to a broad and liberal construction in favor of liability.

At first, the exceptions were given such a construction. However, more recent cases have held that the exceptions are to be *narrowly* construed, with any ambiguities resolved in favor of the governmental defendant. How the Court got to that point is an interesting illustration of how rights can die "the death of a thousand cuts."

### *Ross v Consumers Power*

The case usually cited in favor of narrowly construed exceptions is *Ross v Consumers Power Co.* However, *Ross* was concerned with

**The Supreme Court has been narrowly construing exceptions to governmental immunity. However, since the exceptions are remedial, they should be liberally construed in favor of liability.**

defining governmental function, and because no exception was urged on the Court, the question of how to construe the exceptions was not presented, making whatever *Ross* might say on the topic dictum.

*Ross* also said that "governmental function" was to be broadly construed, and that the exceptions were narrowly drawn.[14] However, how the exceptions were *drawn* is a different question than how they are to be *construed. Ross* said nothing about the latter point.

Even if *Ross* had said that the exceptions should be narrowly construed because governmental function is broadly construed, it would be a non sequitur. There is nothing illogical about broadly construing *both* governmental function and its exceptions; construing one one way does not logically compel construing the other another way.

*Ross*'s premise that the Legislature intended to broaden governmental immunity betrays an ignorance of the scope of governmental immunity when the statute was passed. As noted, the state and agencies were *totally* immune, yet the Act limited their immunity to governmental functions. Moreover, existing statutory exceptions were extended to all types of governmental agencies. Finally, entirely new exceptions to governmental immunity were created. It is therefore clear that the Act was intended to broaden liability, not immunity.

## Proprietary Functions

In *Hyde v UM Regents,*[15] the Court cited *Ross* for the proposition that exceptions to governmental immunity (in *Hyde,* the proprietary function exception) are narrowly *drawn.* As noted, the statement in *Ross* was dictum, and the statement begs the question of how the exceptions should be *construed.* In addition, *Hyde* held that the provision was unambiguous, thus obviating any need to apply rules of construction. This renders whatever *Hyde* says about how the exceptions are construed dictum.

## Public Buildings

In *Reardon v MDMH,*[16] the Court cited *Ross*'s statement about "narrowly drawn" exceptions, but went further, noting that it was the Michigan Municipal League that drafted the Governmental Immunity Act. The Court held that the defective building exception must be narrowly construed.[17] This is a remarkable method of construing a statute:

- It presumes that the Michigan Municipal League would never draft a statute that would respect the rights of the citizens by preserving their rights to sue—a rather insulting presumption.
- It ignores established rules of statutory construction (e.g., liberal construction of remedial statutes) in favor of a highly speculative presumed intent.
- It is not apparent how an intent to *limit* liability can be divined from a statute that *creates* a liability unknown at common law.

Nevertheless, *Reardon* has been followed, holding that the public building exception is narrowly construed.[18]

## Hospital Exception

In addition to enacting *Ross*'s definition of "governmental function," in 1986 the Legislature created a *new* exception from governmental immunity for hospital liability.[19] It was noted in *Hyde v UM Regents*[20] that this section was enacted with the realization that, without it, victims of hospital negligence would be barred by *Ross*'s definition of governmental function. As such, the remedial purpose of this exception is even clearer than with the other exceptions. Nevertheless, in *Vargo v Sauer,*[21] the Court held that this hospital exception is narrowly construed.

## Defective Highways

*Mason v Wayne County*[22] was a defective highway decision, which cited *Ross*'s statement that exceptions to governmental immunity are narrowly *drawn.* As noted, *Ross*'s statement was dictum, and begged the question of how the exceptions are to be *construed.*

In *Hatch v Grand Haven Twp,*[23] after citing *Ross*'s "narrowly drawn" dictum, the Court cited *Scheuerman v MDOT*[24] for the proposition that coverage of the defective highway exception must be clear. However, there was no opinion of the court in *Scheuerman,* making it authority for nothing.

In *Nawrocki v Macomb CRC,*[25] after citing *Ross*'s "narrowly drawn" dictum,[26] the Court held that the highway exception is narrowly construed to follow the plain language.[27] This latter statement is an oxymoron; if the language of a statute is plain, there is no basis for applying rules of construction (including any rule that exceptions to governmental immunity are narrowly construed).

*Hanson v Mecosta CRC*[28] cited *Ross*'s "narrowly drawn" dictum. However, *Hanson*'s discussion of rules of construction was itself dictum, since the Court held that the case could be disposed of based on the plain language of the statute.[29]

Perhaps the most radically narrow construction of one of the exceptions to governmental immunity is *Chandler v Muskegon*

*County.*[30] In that case, although both the dictionary and the Motor Vehicle Code defined "operator" to include anyone exercising control over a vehicle (whether behind the wheel or not), the Court exploited an ambiguity in the owner liability statute to hold that one injured by the door of a bus while the bus was being cleaned could not recover, because the bus was not being "operated" at the time.

## Automobiles

In *Robinson v Detroit,*[31] the Court held that the automobile exception is to be narrowly construed. The Court cited only the building cases of *Kerbersky, Horace,* and *Wade.* As noted, in *Kerbersky* the statement was dictum; *Horace* and *Wade* relied on *Reardon,* a case criticized above.

## *Rakestraw*

Most recently, the Supreme Court in *Rakestraw v General Dynamics,*[32] said, by way of dictum, that the remedial construction rule does not necessarily apply to an entire statute, but rather only to portions of the statute relating to a remedy. Applying that rule to the Governmental Immunity Act, it would be immaterial whether the Act *in general* is a broad grant of immunity, or whether "governmental function" was broadly worded. Instead, the question is whether the *specific section at issue* is remedial.

Thus, because the defective building and hospital liability exceptions create a liability that was unknown before, those exceptions are remedial in every sense of the word (both in creating a new remedy, and in remedying a defect in the common law), and entitled to a liberal construction.

The highway, proprietary function, and automobile exceptions were not new in 1964, but are plainly remedial insofar as they *extend* such liability to governmental entities formerly immune for such activities (such as the state for highways). Moreover, the prior statutes that they carried forward were themselves remedial when first passed, since they created a remedy where none formerly existed, and remedied a defect in the common law.

In short, if *Rakestraw*'s comment that the purpose of the particular section determines whether it is liberally construed is good law, then cases narrowly construing the exceptions to governmental immunity may no longer be valid.

## Conclusion

Until *Rakestraw,* the courts gave exceptions to governmental immunity a miserly construction. This narrow construction rule has a dubious lineage (being based on mere dictum in *Ross* that the exceptions are narrowly drawn) and cannot be reconciled with the ancient rule that, in order to effectuate the remedy, remedial statutes are entitled to a broad and liberal construction. It also contradicts *Rakestraw*'s suggestion that parts of a statute can be liberally construed without construing the entire statute that way. ◆

*John A. Braden is the research and appellate lawyer for the Muskegon firm of Evans, Portenga & Slater, PLC.*

## Footnotes

1. 364 Mich 231 (1961).
2. MCL 242.1 et seq.
3. MCL 224.21.
4. MCL 600.2904(1) (political subdivisions), 600.6475, 691.141, 691.151, 691.152.
5. MCL 691.1407 (immune for governmental function), 691.1413 (liable for proprietary functions).
6. MCL 691.1402, 691.1403, 691.1404. MCL 242.1 (regarding municipalities) was repealed, but MCL 224.21 (regarding counties) was left on the books, and simply incorporated by reference.
7. MCL 691.1405.
8. MCL 691.1406. At common law, governmental agencies were liable for defective public buildings only if a) it amounted to a nuisance, or b) it was being used by a municipality for a proprietary purpose.
9. MCL 8.3a.
10. *Thomas v Dept of State Highways,* 398 Mich 1 (1976).
11. *Parker v Highland Park,* 404 Mich 183 (1978).
12. 420 Mich 567 (1984).
13. *Shannon v People,* 5 Mich 36, 48 (1858).
14. 420 Mich 618.
15. 426 Mich 223, 260 (1986).
16. 430 Mich 398, 407 (1988).
17. 430 Mich 409.
18. *Wade v MDOC,* 439 Mich 158, 170 (1992); *DeSanchez v MDMH,* 455 Mich 83, 90 (1997) (dictum, since the exception was construed so that the plaintiff won); *Horace v Pontiac,* 456 Mich 744, 749 (1998); *Kerbersky v NMU,* 458 Mich 525, 529 (1998) (dictum, since exception construed in plaintiff's favor).
19. MCL 691.1407(4).
20. Supra at 426 Mich 245–246.
21. 457 Mich 49, 57–58 (1998).
22. 447 Mich 130, 134 (1994).
23. 461 Mich 457, 464 (2000).
24. 434 Mich 619 (1990).
25. 463 Mich 143 (2000).
26. 463 Mich 149.
27. 463 Mich 150.
28. 465 Mich 492, 498 (2002).
29. 465 Mich 501, 503. The Court's calling the language plain was rather disingenuous, since a statute requiring road authorities to repair and maintain highways *in a condition safe for travel* hardly "unambiguously" excludes a duty to design a safe highway. After all, conveyance technology changes, such that a rutted dirt road perfectly adequate for a horse and buggy may no longer be in a condition safe for travel once automobiles arrive; which in turn means that "maintaining" a road in a condition safe for travel may require upgrading it.
30. 467 Mich 315, 320 (2002).
31. 462 Mich 439, 455 (2000).
32. 469 Mich 220, 233 (2003).

**THIS NARROW CONSTRUCTION RULE HAS A DUBIOUS LINEAGE (BEING BASED ON MERE DICTUM IN *ROSS* THAT THE EXCEPTIONS ARE NARROWLY DRAWN) AND CANNOT BE RECONCILED WITH THE ANCIENT RULE THAT, IN ORDER TO EFFECTUATE THE REMEDY, REMEDIAL STATUTES ARE ENTITLED TO A BROAD AND LIBERAL CONSTRUCTION.**