

Public Utility Immunity

Ross v. Consumers Power Company (1984)

420 Mich. 567

Ross v. Consumers Power Co. was actually a grouping of nine cases presented to the Michigan Supreme Court: *Ross v. Consumers Power Co.*, *Willis v Nienow*, *Willis v. Department of Social Services*, *Siener v. Department of Mental Health*, *Rocco v. Department of Mental Health*, *Regulski v. Murphy*, *Trezzi v. Detroit*, *Disappearing Lakes Assoc. v. Department of Natural Resources*, and *Zavala v. Zinser*. In each case, an issue of governmental immunity for tort liability was at stake.

Governmental, or sovereign, immunity is the doctrine that the government and its representatives cannot be sued when acting in a governmental capacity, and it existed in Michigan common-law until it was abolished by the Michigan Supreme Court in *Williams v. Detroit*, 364 Mich. 231, in 1961. While that case only abolished immunity for municipal corporations, leaving it in place for state and local governments, the Michigan Legislature decided to protect governmental immunity by establishing it in statute, enacting the governmental tort liability act. That act establishes immunity from torts for any governmental agency, with four exceptions. All agencies are liable (1) for damages arising from a failure to keep highways in reasonable repair, (2) for the negligent operation of a government-owned motor vehicle, (3) for the condition of public buildings under the agency's control, and (4) for any damages resulting from proprietary, or non-governmental (*ultra-vires*), functions.

According to a majority of the Michigan Supreme Court, the act does not address whether or when individual governmental actors are immune from tort. The court's *per curiam* opinion, signed by five Justices, ruled that upper level officials are immune from all tort liability when acting within their authority, while lower level officials are immune only when acting within their authority, in good faith, and while performing discretionary-decisional acts, as opposed to ministerial-operational ones. A discretionary-decisional act is one that involves significant decision-making, whereas a ministerial-operational act may involve minor decision-making but is mainly the execution of a previously made decision. Hence, if an officer were merely acting on orders and executed them poorly enough to be liable for tort in a normal circumstance, they would not be immune under the governmental tort liability act.

In eight of the nine cases represented by *Ross*, the Michigan Supreme Court found that the defendants were immune from tort liability due to acting in a governmental capacity, under express or implied mandate or authorization of constitution, statute, or other law. The Supreme Court allowed the plaintiff a cause of action in only one case, *Regulski v. Murphy*. The plaintiff in that case was a high school student enrolled in a building trades class, and while helping to build a house he inadvertently injured his eye. The Supreme Court found that the school qualified for governmental immunity, but that the official responsible for providing protective eyewear was liable for tort. Because the safety of the students was provided for by statute, providing safety measures was ruled to be a ministerial-operational act.

In a separate opinion, Justice Levin finds that the Court has gone too far in granting immunity. He believes that "governmental function" should not be defined as anything authorized by statute, because this gives agencies a way to dodge all torts by enacting statutes.