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MUNICIPAL CORPORATIONS - LIABILITY FOR NEGLIGENCE OUTSIDE THE CITY LIMITS

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MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OUTSIDE THE CITY LIMITS — The defendant, the city of Green Bay, without charge maintained and operated a toboggan slide outside the city limits. While using the slide, plaintiff was injured due to the alleged negligence of the city in failing to remove a snowdrift at the bottom of the slide. It was admitted that plaintiff would have stated a good case of actionable negligence had the slide been operated by a private person. Defendant's demurrer was overruled by the trial court. *Held*, reversed with direction to enter an order sustaining the demurrer. *Cegelski v. City of Green Bay*, (Wis. 1939) 285 N. W. 343.

It is well established that a municipal corporation is not liable for the negligence of its officers in the performance of sovereign or governmental functions.[1] However, there has been a tendency on the part of courts to hold a number of functions performed by a city proprietary in nature rather than sovereign, with the end in view of holding the city liable for negligence. This tendency is due to the realization of the hardship imposed by denying recovery to those injured by reason of negligence on the part of the city officers.[2] The difficulty comes, as in the principal case, in drawing the line between functions which are sovereign and those which are proprietary in nature. Most jurisdictions allow a city to hold land outside the city limits where necessary and proper to the corporate powers and within the power granted by the state either expressly or by implication.[3] However, municipalities are said to hold land outside the city limits in

[1] 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., § 2792 (1937); 42 A. L. R. 263 (1926); 34 MICH. L. REV. 1250 (1936).

[2] Angell, "Sovereign Immunity—The Modern Trend," 35 YALE L. J. 150 (1925); Doddridge, "Distinction Between Governmental and Proprietary Functions of Municipal Corporations," 23 MICH. L. REV. 325 (1925). The Wisconsin legislature has recognized this to some extent and has provided that the city shall be liable to any person suffering injury from city-owned vehicles in the performance of municipal business. Wis. Stat. (1937), § 66.095. See Shumacker v. Milwaukee, 209 Wis. 43, 243 N. W. 756 (1932), interpreting this statute.

[3] Hemingway, "The Extraterritorial Powers of a Municipality," 24 KY. L. J. 107 (1936); 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 1210 (1928); City of Coldwater v. Tucker, 36 Mich. 474 (1877); Lester v. City of Jackson, 69 Miss. 887, 11 So. 114 (1892); Becker v. City of La Crosse, 99 Wis. 414, 75 N. W. 84 (1898); Schneider v. City of Menasha, 118 Wis. 298, 95 N. W. 94 (1903); Hall v. Town of Calhoun, 140 Ga. 611, 79 S. E. 533 (1913).

their private or proprietary capacity.[4] Since this is true, as was assumed by the court in the principal case, it would seem to follow by *a priori* reasoning that where the city holds land outside the city limits it has the rights and liabilities attaching to ownership of property by a private person or corporation. But the court in the principal case, while granting that land outside the city limits need be held in the city's proprietary capacity, distinguishes between holding of the land and operations conducted thereon, deciding that though the holding be proprietary the operations may be sovereign in nature.[5] Granted that a city cannot affirmatively exert its sovereign power outside the city limits, it seems strange to attach other negative incidents of sovereignty to operations outside the city.[6] The court says that functions which are governmental when carried on within the city are of necessity governmental when carried on outside the city.[7] This might appear true at first glance, but need it necessarily follow? A function outside the city limits may be governmental in the sense that it is for a public purpose without entitling the city to all the privileges and immunities of sovereignty which it would have within the city. If we are to assume that the exercise of the sovereign power of a city normally exists only within the city limits, it would seem proper to treat functions carried on by a city outside its limits as if they were functions private in nature. This would further limit the doctrine of governmental immunity to tort liability, in accord with the more just and modern trend.

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[4] See cases cited supra, note 3.

[5] The Wisconsin court has held the operation by cities of public bathing beaches and playgrounds without profit to be governmental in nature, so that cities are immune from liability for negligence in their operation of the same. Berstein v. Milwaukee, 158 Wis. 576, 149 N. W. 382 (1914); Gensch v. Milwaukee, 179 Wis. 95, 190 N. W. 843 (1922). So also in the case of nuisance under such circumstances the city has been held immune. Virovatz v. City of Cudahy, 211 Wis. 357, 247 N. W. 341 (1933). The Wisconsin court has shown conspicuous lack of liberality on the issue of allowing recovery against a city for negligence by its refusal to make exceptions to the doctrine of immunity of the city in the performance of governmental functions.

[6] By "negative incidents" the author refers in particular to immunity from liability for negligence. See also, City of Somerville v. City of Waltham, 170 Mass. 160, 48 N. E. 1092 (1898), in which the court held that where one city owned property in another city and used the property for a public purpose that the property was exempt from taxation.

[7] Principal case, 285 N. W. at 344.