

1939

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Recommended Citation

Arthur A. Greene Jr., *MUNICIPAL CORPORATIONS - LIABILITY TO ABUTTING PROPERTY OWNER FOR NEGLIGENCE IN SPRAYING TREES ON HIGHWAY*, 37 MICH. L. REV. 809 (1939).

Available at: <https://repository.law.umich.edu/mlr/vol37/iss5/19>

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MUNICIPAL CORPORATIONS — LIABILITY TO ABUTTING PROPERTY OWNER FOR NEGLIGENCE IN SPRAYING TREES ON HIGHWAY — The defendant, a municipal corporation, used a poison spray on the trees on the highway under the authority and express duty of certain statutes¹ that declared brown-tail moths and other insects a nuisance. This was done in such a manner that a part of the spray fell on the abutting land of the plaintiff, and caused the death of her poultry. The plaintiff instituted this action, relying on two counts, one alleging negligence and the other alleging an unreasonable use of the highway. *Held*, that the plaintiff could not recover on the first count because

¹ N. H. Pub. Laws (1926), c. 190, §§ 1, 3; c. 42, § 4(25).

the abatement of this nuisance as defined by the statute was a governmental function and hence, in accordance with the usual rule, the city was not liable for the negligence of its employees in the absence of express statutory recognition of liability; and there could be no recovery on the second count since a use of the highway authorized by statute could not be deemed unreasonable unless there was negligence, which was not alleged. *Gilman v. City of Concord*, (N. H. 1937) 195 A. 672.

That the municipal function in this case was governmental cannot be contradicted.² However, there is some authority for the proposition that a municipal corporation is liable for an injury to property caused by the negligence of its agents in the abatement of a nuisance.³ The court could have relied on this doctrine, had it been anxious to allow the plaintiff to recover in this case. Another basis of recovery suggested by the principal case is the application of the rule that where a city owns property it is liable for the negligent invasion of the property rights of the adjacent owner, regardless whether the use is considered governmental or proprietary in its nature.⁴ This general rule has been applied to the acts of the city in the maintenance and construction of streets.⁵ Thus it is arguable that the spraying of trees on the highway amounts

² 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., § 2796 (1937); 1 DILLON, MUNICIPAL CORPORATIONS, 5th ed., §§ 39, 109 (1911).

³ WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS, § 127 (1920), quoting with approval from *Orlando v. Pragg*, 31 Fla. 111 at 124, 12 So. 369 (1893): If acting under the general power to abate nuisances, "it is then under the obligation to exercise the power of abatement in a reasonable manner so as to do the least injury to private rights. And if, where the *fact* of nuisance is clear, it exercises the power of abatement in an unreasonable, careless, or negligent manner so as to produce unnecessary damage to private rights, it will be liable for the damage caused by such negligence." *Jones v. Town of Great Barrington*, 273 Mass. 483, 174 N. E. 118 (1930) (liability for failure to abate a nuisance); *City of Fournery v. Mounger*, (Tex. Civ. App. 1919) 210 S. W. 240 (city held liable for destroying a building as a nuisance, which was in fact not a nuisance).

⁴ 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., § 2844 (1937); WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS, §§ 111, 112 (1920), where the author quotes with approval from *Fort Worth v. Crawford*, 64 Tex. 202 at 203 (1885): "If the nuisance grows out of acts done exclusively in the interest of the public, such as the improvement of the sanitary condition of the city, then it would only be liable for a careless or negligent execution of the duty." *Clair v. Manchester*, 72 N. H. 231, 55 A. 935 (1903) (based upon the liability of a landowner for the maintenance of a nuisance on his own land to the injury of another). *New Hampshire* follows the general rule set out supra, even though it considers the acts governmental. *O'Brien v. Rockingham County*, 80 N. H. 522, 120 A. 254 (1923). The duty of lateral support exists between the city and adjacent owners. See WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS, §§ 184, 188 (1920); *Porter v. City of Los Angeles*, 182 Cal. 515, 189 P. 105 (1920); *Johnson v. Somerville*, 195 Mass. 370 at 374, 81 N. E. 268 (1907).

⁵ While the construction and maintenance of streets is considered governmental in nature, most courts have allowed recovery for injuries sustained from the negligent performance of these functions. 7 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 2901 and note, § 2903 (1938). *New England* and a few other states deny liability,

to either maintenance or improvement of that highway, and therefore recovery be allowed for injury to adjoining property caused by the negligence of the city's employees.⁶ However, it is suggested that it is difficult, if not impossible, to say as a matter of law that the destruction of insect pests in pursuance of a general statute applicable to all land in the state, with few exceptions, amounts to maintenance or improvement of the streets merely because in this particular instance the city was spraying trees on the highway.⁷ However, it does afford a way for a court to escape the harsh rule protecting the municipality from tort liability in the exercise of governmental functions.⁸

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except by statute. 6 *ibid.*, 2d rev. ed., §§ 2805, 2806 (1937) (municipality acts ministerially in the construction and repairing of streets, hence persons injured by negligence of the city can recover in all but a few of the states). *Persons v. Valley City*, 26 N. D. 342, 144 N. W. 675 (1913) (city held liable for trespass of its agents on abutting property in the exercise of power to build sidewalks); *Adams v. City of Frankford*, (Mo. App. 1923) 251 S. W. 125 (city in clearing street of weeds, brush, etc., negligently started a fire in close proximity to the plaintiff's barn, with resulting damage; the city was held liable, since its agents were acting in a ministerial capacity).

⁶ *Ibid.*

⁷ It is self-evident that this use was not concerned with the highway as such. See references to applicable statute, note 1.

⁸ It is submitted that the doctrine could be more readily applied in the case where no statute exists comparable to that of the principal case, and where the spraying is carried on to protect the trees on the highway particularly.