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MUNICIPAL CORPORATIONS-LIABILITY FOR NEGLIGENCE IN MAINTENANCE OF SWIMMING POOLS AND PARKS-GOVERNMENTAL AND PROPRIETARY FUNCTIONS

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE IN MAINTENANCE OF SWIMMING POOLS AND PARKS—GOVERNMENTAL AND PROPRIETARY FUNCTIONS—The plaintiff sued to recover damages for the death of his son by drowning, which he alleged was caused by the negligence of the defendant city in the maintenance of a public swimming pool. In upholding the overruling of

the defendant's demurrer, the court *held* that on the authority of an earlier South Dakota case,[1] the maintenance and operation of a public swimming pool or park is the exercise of a proprietary function of the municipality, and therefore, the city is liable for the negligence of its servants in maintaining and guarding the pool. *Glirbas v. City of Sioux Falls*, (S. D. 1935) 264 N. W. 196.

Practically every court in the country [2] determines municipal liability for tort by means of the time-honored formula that a municipal corporation is not liable for torts committed in carrying out a governmental or public function but is liable for those committed in performing a proprietary or private function.[3] But the courts are very much disagreed as to whether the maintenance of a public park, swimming pool, bathing beach or playground (for they are all treated the same) is an exercise of a governmental or proprietary function. The older, and probably still the majority, rule is that of non-liability, holding that the maintenance of parks is a governmental function looking to the improvement of public health.[4] But many cases, and especially the more recent ones, have found the city liable, even in the absence of statutes imposing liability, by one of several methods: (1) In most cases where a charge is made for the use of the park or pool, the city is held on the ground that it is operating the project as a private corporation.[5] (2) Some courts have spelled out a nuisance in these fact situations in order to bring the case under that well-known exception to the rule of governmental immunity.[6] (3) A few earlier cases and a great many recent ones have held the city liable solely on the basis that it is exercising a proprietary function.[7] The

[1] Norberg v. Hagna, 46 S. D. 568, 195 N. W. 438 (1923).

[2] South Carlina abolished the distinction between governmental and proprietary functions but went the wrong way and decided to restrict liability to cases where statutes imposed it. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911). In the signal case of Fowler v. Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919), the Ohio court abolished the distinction and applied the same rules of liability to municipal corporations as to private corporations; but three years later this case was overruled by Aldrich v. Youngstown, 106 Ohio St. 342, 140 N. E. 164 (1922).

[3] 6 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., 758 (1928). See Tooke, "The Extension of Municipal Liability in Tort," 19 VA. L. REV. 97 at 106-7 (1932).

[4] 6 McQUILLIN, MUNICIPAL CORPORATIONS, 2d. ed., 770, 892 (1928). 4 DILLON, MUNICIPAL CORPORATIONS, 5th ed., 2890 (1911). Note in 15 MICH. L. REV. 180 (1916). Collections of cases on swimming pools and bathing beaches in 51 A. L. R. 370 (1927) and 57 A. L. R. 406 (1928), and on parks and playgrounds in 29 A. L. R. 863 (1924) and 42 A. L. R. 263 (1926). Recent cases: Gebhart v. Village of LeGrange Park, 354 Ill. 234, 188 N. E. 372 (1933); Stuver v. City of Auburn, 171 Wash. 76, 17 P. (2d) 614 (1932); Toft v. City of Lincoln, 125 Neb. 498, 250 N. W. 748 (1933).

[5] Collection of cases in 51 A. L. R. 370 (1927). But see Hannon v. Waterbury, 106 Conn. 13, 136 A. 876 (1927); Mocha v. Cedar Rapids, 204 Iowa 51, 214 N. W. 587 (1927); and St. John v. City of St. Paul, 179 Minn. 12, 228 N. W. 170 (1929), in all of which a small fee was charged but still the court failed to find liability.

[6] Collection of cases in 75 A. L. R. 1196 (1931); 30 MICH. L. REV. 471 (1932). But see Gilliland v. Topeka, 124 Kan. 726, 262 P. 493 (1928), where the court said definitely that a swimming pool without a life-guard was not an attractive nuisance.

[7] Collections of cases in 29 A. L. R. 863 (1924); 42 A. L. R. 263 (1926); 43 C. J. 1170, 1173 (1927); 19 R. C. L. 1129 (1917). Among the recent cases are: Paras-

principal case is the most recent of these decisions. The idea of governmental immunity from tort liability in any case has been vigorously and soundly attacked by practically all writers on the subject.[8] But the courts are still unwilling to throw over entirely the doctrine of immunity. The greatest inroads into the immunity of municipal corporations have been made by means of the distinction between governmental and proprietary functions, which allows the court to find liability merely by deciding that the function in question is proprietary. The principal case exemplifies the movement in this direction in the field of public parks and swimming pools.

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ka v. City of Scranton, 313 Pa. 227, 169 A. 434 (1933), noted 19 ST. LOUIS L. REV. 257 (1934), and 33 MICH. L. REV. 313 (1934); City of Sapulpa v. Young, 147 Okla. 179, 296 P. 418 (1931), and cases cited therein; Augustine v. Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928), noted 3 UNIV. CIN. L. REV. 183 (1929), and 14 CORN. L. Q 351 (1929); City of Waco v. Branch, (Tex. Comm. App. 1928) 5 S. W. (2d) 498; City of Longmont v. Swearingen, 81 Colo. 246, 254 P. 1000 (1927); Ramirez v. Cheyenne, 34 Wyo. 67, 241 P. 710 (1925); Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925); Boise Development Co. v. Boise City, 30 Idaho 675, 167 P. 1032 (1917); Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375 (1925).

The courts use various methods of reasoning in determining that the maintenance of public parks is a proprietary function: (1) Many say that the function is proprietary because it is one exercised by the municipality primarily for the benefit of its own inhabitants and by reason of its nature as a municipal corporation; and not for the benefit of the public at large. (2) Others say that since the city assumed the duty of maintaining a park under its general powers (which is the usual case) and did not have the duty imposed upon it by the legislature, it assumed it as a corporate function. (3) Some draw an analogy between maintenance of public streets and parks and conclude that since it is generally accepted that the city is liable for negligence in taking care of its streets, the same rule should apply to parks. (4) And the following general language was used in Ehrgott v. Mayor, 96 N. Y. 264 at 273 (1884): "To determine whether there is municipal responsibility, the inquiry must be, whether the department whose *misfeasance* or *nonfeasance* is complained of, is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality."

[8] Borchard, "Government Liability in Tort," 34 YALE L. J. 129, 229 (1924-1925). For an excellent list of articles on the subject, see Borchard, "State and Municipal Liability in Tort—Proposed Statutory Reform," 20 A. B. A. J. 747 at 748 (1934). The attitude of most writers is ably expressed in 75 A. L. R. 1196 (1931), where the following statement is made: "It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'The King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed on the single individual who suffers the injury, rather than distributed among the entire community constituting the government. . . ."