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MUNICIPAL CORPORATIONS - IMMUNITY OF CITY FROM TORT LIABILITY - ATTRACTIVE NUISANCE

MUNICIPAL CORPORATIONS — IMMUNITY OF CITY FROM TORT LIABILITY — ATTRACTIVE NUISANCE — The minor plaintiff, a child of eleven, was injured when she fell from a swing in a playground maintained by the defendant, and struck a jagged stone which protruded from the surface of the earth about eight feet beyond the base of the swing. She and her parents joined as plaintiffs in this suit, alleging that the defendant was negligent in failing to keep the ground around the swing in a reasonably safe condition and free from dangerous objects upon which a child might fall. *Held*, the defendant is liable for its failure to keep the earth around the swing in a reasonably safe condition for children invited to use the playground. *Paraska, et al. v. City of Scranton*, 313 Pa. 227, 169 Atl. 434 (1933).

There is a sharp division of authority as to whether municipal corporations are liable for injuries sustained through the negligent management of their parks and playgrounds. One line of authority, which is favorable to cities, holds them immune from liability upon the ground that in maintaining a park the city is acting in a sovereign or governmental capacity.[1] The other line of decisions holds cities liable by reasoning that a park is the private property of the city, hence the city must at its peril maintain the park in a reasonably safe condition for those invited to use it.[2] In favor of their stand, the courts holding for immunity argue that parks are established to furnish people a place of recreation so that the public health may thereby be improved. Since the city, in looking after the health of its inhabitants, is admittedly acting in a governmental capacity, it is acting similarly in establishng and supporting parks.[3] However, where revenue is derived by the city from its maintenance of a park, courts are apt to call the function of maintaining it private and proprietary, and thus render the city liable.[4] But mere incidental profits derived by the city in its management of the park do not impose liability upon it, if the basic purpose in keeping up the park is not the revenue derived therefrom.[5] Sometimes courts will distinguish between the permissive and

[1] Cornelisen v. Atlanta, 146 Ga. 416, 91 S. E. 415 (1917); Hendricks v. Urbana Park Dist., 265 Ill. App. 102 (1932); Stuver v. City of Auburn, 171 Wash. 76, 17 Pac. (2d) 614 (1932); Volz v. City of St. Louis, 326 Mo. 362, 32 S. W. (2d) 72 (1930); Toft v. City of Lincoln, (Neb. 1933) 250 N. W. 748, and cases cited in note in 29 A. L. R. 863 at 863 and 864 (1924), and 42 A. L. R. 263 (1926).

[2] City of Sapulpa v. Young, 147 Okla. 179, 296 Pac. 418 (1931); Thayer et al. v. City of St. Joseph, (Kansas City App. 1932) 54 S. W. (2d) 442; Ramirez v. Cheyenne, 34 Wyo. 67, 241 Pac. 710 (1925); Norberg v. Hagna, 46 S. D. 568, 195 N. W. 438 (1923); Warden v. Grafton, 99 W. Va. 249, 128 S. E. 375 (1925); City of Kokomo v. Loy, 185 Ind. 18, 112 N. E. 994 (1916); Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925), and cases cited in note in 29 A. L. R. 863 at 868 (1924), and 42 A. L. R. 263 at 264 (1926).

[3] Pennell v. Mayor and Council of Wilmington, 7 Pennewill (23 Del.) 229, 78 Atl. 915 (1906); Board of Park Comm'rs v. Prinz, 127 Ky. 460, 105 S. W. 948 (1909); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722, L. R. A. 1917B 1285 (1917).

[4] Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485 (1869); Heino v. Grand Rapids, 202 Mich. 363, 168 N. W. 512, L. R. A. 1918F 528 (1918); Cornelisen v. Atlanta, 146 Ga. 416, 91 S. E. 415 (1917).

[5] Blair v. Granger, 24 R. I. 17, 51 Atl. 1042 (1902); Curran v. Boston, 151 Mass. 505, 24 N. E. 781 (1891).

the mandatory character of a municipality's maintenance of a park, and create liability only where the care and support of the park are permitted but not required of the city.[6] There seems to be one other ground upon which liability might be predicated, especially upon facts such as those in the instant case, and that is the ground of attractive nuisance. There are some cases in which the court has found liability upon the theory that the city was maintaining a nuisance, and in these it is evident that the court had in mind the idea of attractive nuisance.[7] However, no court in this country has as yet used the term "attractive nuisance" in holding the city liable in a case where the injury to the plaintiff arose in a park or playground. On the other hand, there are not lacking cases which have denied the validity of the application of this theory to a situation like the instant one. These cases distinguish between the fact set-up in the park situations and that in the attractive nuisance cases by pointing out that in the former the plaintiff was in a place where he had a perfect right to be, while in the latter he was always really a trespasser.[8] The tendency[9] is to depart from the bugaboo of immunity as much as possible, and so we have more and more courts calling the function of maintaining a park proprietary. Still, only recently there was a decision by a Nebraska court which took just the opposite view.[10] However, the better view would seem to be that there is no sound reason[11] for holding a city immune even when the injury arises from its performance of a governmental function. That being so, the result in the instant case is highly gratifying. Many authorities now agree that it would be most consonant with justice if, as Professor Borchard suggests in his keen analysis of the whole problem of municipal liability in tort cases,[12] legislation were passed both in Congress and in the several States abolishing immunity for cities under any circumstances.

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[6] Boise Development Co. v. Boise City, 30 Idaho 675, 167 Pac. 1032 (1917).

[7] Hoffman v. Bristol, 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191 (1931); Wiggins v. City of Ft. Worth, (Tex. Civ. App. 1927) 299 S. W. 468, and see also dissenting opinion of Wheeler, J., in Pope v. New Haven, 91 Conn. 79, 99 Atl. 51 (1916). See, too, Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 Pac. 710 (1925) (though the court denied it was deriving liability upon any nuisance doctrine).

[8] Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616, 46 L. R. A. (N. S.) 731, Ann. Cas. 1915C 245 (1913); Stuver v. City of Auburn, 171 Wash 76, 17 Pac. (2d) 614 (1932); Smith v. Iowa City et al., 213 Iowa 391, 239 N. W. 29 (1931).

[9] Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1928).

[10] Toft v. City of Lincoln, (Neb. 1933) 250 N. W. 748.

[11] The reasons ordinarily given are that a municipality in performing governmental functions is a mere agency of the State, and since the State is not liable in tort, neither is its agency; that the city ought not be liable for its torts arising from the performance of duties imposed upon it by the legislature; that the city cannot perform its functions properly if held liable for the torts of its employees; that the city receives no pecuniary benefit from its exercise of public functions.

[12] Edwin Borchard, "Government Liability in Tort," 34 YALE L. J. 229 at 258 (1925).