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# Municipal Corporations- Tort Immunity - Liability for Personal Injuries Caused by Nuisance Maintained by City

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MUNICIPAL CORPORATIONS — TORT IMMUNITY — LIABILITY FOR PERSONAL INJURIES CAUSED BY NUISANCE MAINTAINED BY CITY—Plaintiff, while in the bathhouse of a municipally owned and operated swimming pool, was injured by a shock received from an electric hair dryer. In sustaining plaintiff's claim against the city for damages, the trial court recognized liability for personal injuries caused by a nuisance created and maintained by a city as an exception to the common law doctrine of municipal immunity from tort liability. On appeal, *held,* reversed. The nuisance exception from a municipality's common law immunity extends only to injuries to real property occasioned by a municipally created and maintained nuisance. *City of Decatur v. Parham,* 268 Ala. 585, 109 S. (2d) 692 (1959).

The common law concept of a municipal corporation's immunity from tort liability has in most jurisdictions been evaded, narrowed or destroyed through legislative enactments,[1] judicial decisions[2] and the development of the governmental-proprietary function distinction.[3] Under the last theory, the municipality engaged in the performance of an act for the public benefit, and not for its own proprietary corporate profit, is immune from liability for injuries inflicted while performing such governmental activities.[4] This "governmental function" immunity, however, has been further narrowed by the development of the strict "nuisance exception" under which a city is liable for damages to real property caused by a nuisance maintained by it, even though in a governmental capacity.[5] This narrow exception, originally concerned with the relationship between a municipality as a land owner and contiguous property owners, had its origin in an attempt by the courts to reconcile the immunity doctrine with the constitutional prohibition against the taking of private property for public use without just compensation.[6] The concept then became embodied, in a number of jurisdictions, in a more broadly stated nuisance doctrine, rationalized in terms of some supposed "principle of universal application—that every man shall transact his lawful business in such a manner as to do no unnecessary injury to another."[7] Here the courts found that a municipality in the use of its land owed the same duties with respect to neighboring property as did private land owners. To avoid extension of this concept to its logical conclusion of a comparable duty to do "no unnecessary injury" to the person, a fiction developed that any use of real estate by the municipality which resulted in injury to private property interests was deemed a

1 See, e.g., Ill. Rev. Stat. (1959) c. 122, §§821-831, codifying the rule of Molitor v. Kaneland Community Unit Dist. 302, note 2 infra, but limiting school district liability to $10,000; 11 N.Y. Consol. Laws (McKinney, 1950) §53. But see Ill. Rev. Stat. (1959) c. 34, §301.1 (counties), c. 57½, §3a (forest preserve districts), c. 105, §§333.2a (Chicago Park District) and 491 (park districts), codifying the common law immunity of those governmental corporations, and apparently precluding operation of the nuisance exception.

2 See Hargrove v. Town of Cocoa Beach, (Fla. 1957) 96 S. (2d) 130, note, 56 MICH. L. REV. 465 (1958), restricting municipal immunity to injuries caused in the performance of judicial, legislative, quasi-judicial and quasi-legislative functions. See especially Molitor v. Kaneland Community Unit Dist. 302, (Ill. 1959), 27 U.S. Law Week 2608 (judicially abrogating common law immunity of school districts). The case was approved and explained on rehearing, (Ill. 1959) 163 N.E. (2d) 189, but without noting passage of the Illinois statutes cited in note 1 supra. But see Maffei v. Incorporated Town of Kemmerer, (Wyo. 1959) 338 P. (2d) 808, refusing to abrogate the common law immunity by judicial decision.

3 See, e.g., Krantz v. Hutchinson, 165 Kan. 449, 196 P. (2d) 227 (1948); Hannon v. Waterbury, 106 Conn. 13, 136 A. 876 (1927).

4 See, e.g., Glenn v. Raleigh, 248 N.C. 378, 103 S.E. (2d) 482 (1958); Houston v. Shilling, 150 Tex. 387, 240 S.W. (2d) 1010 (1951); Hannon v. Waterbury, note 3 supra; Mayor and Alderman of Savannah v. Jones, 149 Ga. 139, 99 S.E. 307 (1919).

5 See, e.g., District of Columbia v. Totten, 5 F. (2d) 374 (1925); Mootry v. Danbury, 45 Conn. 550, 29 Am. Rep. 703 (1878); Mayor of New York v. Bailey, 2 Denio (N.Y.) 433, 38 Am. Dec. 699 (1845).

6 See, e.g., Mansfield v. Balliett, 65 Ohio St. 451, 63 N.E. 86 (1902).

7 Mootry v. Danbury, note 5 supra, at 556.

matter within the control and observation of the corporation itself, whereas any personal injury resulting from improper use of this property was attributable to the negligence of the individual custodian for which the municipality was not to be liable.[8] But with the growing dissatisfaction with the entire concept of municipal immunity, and particularly with the artificial governmental-proprietary distinction, the nuisance exception was often extended to encompass personal injuries caused by a municipally created and maintained nuisance. This extension was usually undertaken without consideration of the real property relationship upon which the nuisance exception was based,[9] with the result that actions that were actually based on negligence soon came to be classified as nuisance for the purpose of further narrowing municipal tort immunity.[10]

The principal case, while recognizing municipal liability for damage to real property occasioned by a true nuisance,[11] refused to extend the rule to include injuries to the person. This position, although subscribed to by relatively few jurisdictions,[12] was correctly averred to be one consistent with the basic rationale upon which the nuisance exception was grounded. That this position is probably the desirable one is shown by the confusion and inconsistency resulting in jurisdictions which have attempted to make further inroads on municipal immunity by torturing the law of nuisance. For example, Michigan, fearful of classifying negligent acts as nuisance, has permitted recovery for personal injuries only in cases where nuisance per se has been established,[13] while in New Jersey active wrongdoing is the criterion for assessing personal injury damages occasioned by nuisance.[14] In Wisconsin, liability is not imposed if the relationship of governor and governed exists between the municipality and the injured party.[15] Of those uncommitted jurisdictions which have not yet joined the trend toward extension of the nuisance exception to include personal injuries, some already allow nuisance actions against the municipality to recover damages for injury to real property, and because of their tacit recognition of possible

8 See David, "Municipal Liability in Tort in California," 7 So. CAL. L. REV. 214 (1934). See also 19 R.C.L. 1085 (1917).

9 See, e.g., Hoffman v. Bristol, 113 Conn. 386, 155 A. 499 (1931); Renstrom v. Nampa, 48 Idaho 130, 279 P. 614 (1929); Knoxville v. Lively, 141 Tenn. 22, 206 S.W. 180 (1918). But see Mullins Hospital v. Squires, 233 S.C. 186, 104 S.E. (2d) 161 (1958).

10 See, e.g., Caldwell v. Island Park, 304 N.Y. 268, 107 N.E. (2d) 441 (1952); Warren v. Bridgeport, 129 Conn. 355, 28 A. (2d) 1 (1942).

11 Principal case at 590.

12 See, e.g., Vater v. County of Glenn, 49 Cal. 815, 309 P. (2d) 844 (1958); Bojko v. Minneapolis, 154 Minn. 167, 191 N.W. 399 (1923).

13 Curtis v. Grand Trunk R. Co. of Canada, 178 Mich. 382, 144 N.W. 824 (1914).

14 Casale v. Housing Authority of City of Newark, 42 N.J. Super. 52, 125 A. (2d) 895 (1956).

15 For example, in Champeau v. Village of Little Chute, 275 Wis. 257, 81 N.W. (2d) 562 (1957), the use of a garbage dump as a play area by the injured plaintiffs was completely outside the purpose of the village in maintaining the dump. Since the plaintiffs were not availing themselves of the intended purpose of the dump, the governor-governed relationship did not exist and liability was imposed.

extension of the exception,[16] may be expected to include personal injury within the nuisance exception when the opportunity arises. But the observation of the present confusion in the law of nuisance and negligence when municipal liability is in question should make any uncommitted jurisdiction think twice before finding that the policy of indemnifying the injured party justifies the extension of the nuisance exception to include personal injuries.

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[16] See, e.g., Pearson v. Kansas City, 331 Mo. 885, 55 S.W. (2d) 485 (1932).