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## MUNICIPAL CORPORATIONS-TORT LIABILITY-FAILURE TO REPLACE DAMAGED TRAFFIC SIGNAL

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MUNICIPAL CORPORATIONS—TORT LIABILITY—FAILURE TO REPLACE DAMAGED TRAFFIC SIGNAL—A city failed to replace a damaged traffic signal. A motorist entered the intersection against the inoperative light and injured a driver who had entered the intersection relying on a functioning green signal. *Held*, the city was negligent in the exercise of a corporate duty, as distinguished from a governmental function, and, as the negligence was the proximate cause of the injury, was liable. *Johnston v. City of East Moline*, 405 Ill. 460, 91 N.E. (2d) 401 (1950).

In determining the tort liability of a municipal corporation the courts invariably distinguish between the city's governmental and corporate functions.<sup>1</sup> If it is determined that negligence arose in the performance of a governmental function, immunity is granted the municipality; if it arose in the performance of a corporate or proprietary function, liability is fixed.<sup>2</sup> It has been suggested that if the function is judicial or political rather than merely ministerial, then no lia-

<sup>1</sup> For historical development of the distinction see Barnett, "The Foundations of a Distinction between Public and Private Functions," 16 ORE. L. REV. 250 (1937). For a concise statement of the law on the subject see PROSSER, TORTS 1066-75 (1941).

<sup>2</sup> COOLEY, MUNICIPAL CORPORATIONS 357 (1914). Apparently, *Irvine v. Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911), discards the test.

bility for negligence will attach.<sup>3</sup> Thus, when a municipal corporation fails completely to light a public bridge, no liability is found; though if the city undertakes the task, but does so negligently, it is held responsible.<sup>4</sup> Other cases have held that if the function is proprietary in nature, as distinguished from governmental, liability may be incurred.<sup>5</sup> Faithful application of this doctrine led one court to the paradox that a plaintiff injured by negligence relating to current supplied by the city for street lamps could not recover, while a plaintiff injured by negligence relating to current supplied by the city to its residents could.<sup>6</sup> As a result of the hardship imposed by such an arbitrary standard, the reports contain many concurring and dissenting voices.<sup>7</sup> Legal writers have urged vast expansion of municipal corporation tort liability. Some argue that it should be almost as sweeping as that of private corporations.<sup>8</sup> The Illinois court does not quarrel with the majority of jurisdictions which have found the municipality liable for negligent failure to repair streets and sidewalks,<sup>9</sup> nor which, on the other hand, have granted immunity for negligent acts of its policemen engaged in regulatory acts,<sup>10</sup> but in deciding that negligent failure to repair traffic signals is similar to failure to repair a damaged street and thus is a breach of a corporate duty, this court is sharply departing from the unanimous decisions of other courts which hold that the signal in function is akin to the policeman who regulates traffic, and which, consequently, impose no liability.<sup>11</sup> It is submitted that if the premise is accepted, the deduction of the majority is the more sound. The Illinois court,

<sup>3</sup> WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS 47 (1920).

<sup>4</sup> *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 412 (1866); *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407 (1876). The net result is that the plaintiff who could see nothing is shunned by the court, but the person who could see somewhat is favored. While it is a proposition in the law of torts generally that a duty to act will not be imposed, though action voluntarily undertaken requires care [PROSSER, TORTS 191 (1941)], the distinctions in this area are treated in terms of judicial or ministerial functions.

<sup>5</sup> WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS 29 (1920).

<sup>6</sup> *Hodgins v. Bay City*, 156 Mich. 687, 121 N.W. 274 (1909).

<sup>7</sup> See the excellent dissenting opinion of Clarkson, J., in *Hodges v. City of Charlotte*, 214 N.C. 737, 200 S.E. 889 (1939).

<sup>8</sup> Borchard, in "Government Liability in Tort," 34 YALE L.J. 129 (1926), says, "In few, if any, branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology, with the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy." Smith, "Municipal Tort Liability," 48 MICH. L. REV. 41 (1949); Harno, "Tort Immunity of Municipal Corporations," 4 ILL. L.Q. 28 (1921); Lloyd, "Municipal Tort Liability in New York—a Legislative Challenge," 23 N.Y. UNIV. L.Q. REV. 278 (1948); Tooke, "The Extension of Municipal Liability in Tort," 19 VA. L. REV. 97 (1932); Seasongood, "Municipal Corporations: Objections to the Governmental or Proprietary Test," 22 VA. L. REV. 910 (1936).

<sup>9</sup> 43 C.J. 998 (1927).

<sup>10</sup> 43 C.J. 964 (1927).

<sup>11</sup> *Avey v. West Palm Beach*, 152 Fla. 717, 12 S. (2d) 881 (1943); *Auslander v. St. Louis*, 332 Mo. 145, 56 S.W. (2d) 778 (1933); *Vickers v. Camden*, 122 N.J.L. 14, 3 A. (2d) 613 (1939); *Parsons v. New York City*, 273 N.Y. 547, 7 N.E. (2d) 685 (1937); *Hodges v. Charlotte*, supra note 7; *Tolliver v. Newark*, 145 Ohio St. 517, 62 N.E. (2d) 357 (1945). See also *Martin v. Winchester*, 278 Ky. 200, 128 S.W. (2d) 543 (1939); and *Baker v. Waco*, (Tex. Civ. App. 1939) 129 S.W. (2d) 499. See cases collected in 161 A.L.R. 1404 (1946).

while accepting the test of the majority, has strained the fact situation to fit a category which gives the desired result.<sup>12</sup> While the end obtained is desirable, nothing but confusion is added to an already clouded picture, for it is impossible to predict when the court will again depart from the recognized principles by means of circuitous reasoning. The case suggests again the necessity for a re-examination of the traditional basis of municipal corporation tort liability.

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<sup>12</sup> Green, in "Freedom of Litigation: III," 38 ILL. L. REV. 355 at 363 (1944), points out that the Illinois court has consistently extended municipal tort liability whenever the injury resulted from negligence having to do with "streets."