12-1-1957

Municipal Corporations -- Tort Liability of Municipal Corporations

Karl N. Hill Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol36/iss1/16

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Municipal Corporations—Tort Liability of Municipal Corporations

In *Glenn v. City of Raleigh* the North Carolina Supreme Court has raised anew the question of whether the maintenance of a city park is a governmental or proprietary function. Plaintiff sought recovery for injuries sustained while picnicking in a park which is maintained and operated by the city for profit. While eating, he was struck on the head with a rock which was thrown from the ground by the blade of a rotary lawn mower being operated by a city employee in the park. The city's negligence was shown by the fact that the mower did not have a guard around the front of it and that the city knew of this defect. Testimony of the park maintenance superintendent showed that he had seen rocks thrown by a rotary mower travel "... maybe 50 feet before it hit the ground." In the trial the defendant made a motion for nonsuit at the close of the evidence on the ground that the city was immune from suit since the maintenance of a park is a governmental function. The motion was overruled and defendant appealed, contending that the motion should have been granted. The supreme court granted a new trial because of errors in the instructions to the jury, but it did not answer the question of law as to whether or not the maintenance of a park is a governmental function.

The rule is well settled that a municipal corporation is immune from suit for negligence if performing a governmental function but liable

1 246 N. C. 469, 98 S. E. 2d 913 (1957).
2 Id. at 471, 98 S. E. 2d at 914.
3 See Millar v. Town of Wilson, 222 N. C. 340, 23 S. E. 2d 770 (1942) (court answered question of whether governmental or proprietary function where case involved the question of whether or not defendant's demurrer should have been overruled); Hodges v. Charlotte, 214 N. C. 737, 200 S. E. 889 (1939) (plaintiff appealed from motion of nonsuit, court holding a governmental function); Lowe v. Gastonia, 211 N. C. 564, 191 S. E. 7 (1937) (question of whether a proprietary or governmental function raised by defendant's motion for nonsuit at end of plaintiff's evidence, court held proprietary function).
if performing a proprietary function. Recent decisions of nearly every state give a variety of expression in an effort to distinguish governmental functions from proprietary functions. "The liability or non-liability of a municipality for its torts does not depend upon the nature of the tort, the relations existing between the city and the person injured, or whether the city was engaged in the management of tangible property but depends upon the capacity in which the city was acting at the time." While many tests have been used to distinguish governmental from proprietary functions, the test used in the principal case "... is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is there is no liability, if it is not there is liability." 

Under this test, the question of whether or not a city derives revenue from its parks may have an effect as to the liability for negligence of its employees. However, it has been held that the fact that a municipality has the authority to charge for the use of the park or its apparatus does not make the municipality liable unless the charges were in fact made. Nor does the mere fact that a city makes an incidental charge for a small service rendered in connection with the park necessarily mean that the city is performing a proprietary function in the maintenance and operation of its parks. 

Augustine v. Brant, 249 N. Y. 198, 163 N. E. 732 (1928); Broome v. Charlotte, 205 N. C. 729, 182 S. E. 325 (1935); Zangerle v. City of Cleveland, 145 Ohio St. 347, 61 N. E. 2d 720 (1945); Wold v. City of Portland, 166 Ore. 455, 112 P. 2d 469 (1941); City of Houston v. Quionones, 142 Tex. 282, 177 S. W. 2d 259 (1944); Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926); Robb v. Milwaukee, 241 Wis. 432, 6 N. W. 2d 222 (1942). The duty to maintain streets and sidewalks in good repair has been generally held to be a corporate duty. Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630 (1901); Gatewood v. Frankfort, 170 Ky. 292, 185 S. W. 847 (1916); Warren v. Booneville, 151 Miss. 457, 118 So. 290 (1928); Millar v. Town of Wilson, 222 N. C. 340, 23 S. E. 2d 42 (1942); Radford v. Asheville, 219 N. C. 185, 13 S. E. 2d 256 (1941); Speas v. Greensboro, 204 N. C. 239, 167 S. E. 807 (1933); Bunch v. Edenton, 90 N. C. 431 (1884); Whiteside v. Benton County, 114 Wash. 463, 195 Pac. 519 (1921).


18 McQuilpen, Municipal Corporations § 53.29 (3d ed. 1950).

17 Kokomo v. Loy, 185 Ind. 18, 23, 112 N. E. 994, 996 (1916).


21 Cornelisen v. Atlanta, 146 Ga. 416, 91 S. E. 415 (1917); Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917); Caughlan v. Omaha, 103 Neb. 726, 174 N. W. 220 (1918); Blair v. Granger, 24 R. I. 17, 51 Atl. 1042 (1902).

22 Hannon v. Waterbury, 106 Conn. 13, 136 Atl. 876 (1927) (small charge made for use of pool partially covering expense of maintenance); Jones v. Atlanta,
According to the majority view in this country, the maintenance of a public park is a governmental function and the city is not liable for injuries caused by the negligence of its employees unless such liability is imposed by statute. The two basic reasons given for this rule are that parks protect the public health, and that it would be contrary to public policy to impose liability.

The minority view is that the municipality is exercising a proprietary function and must use ordinary care in maintaining the park and in making it reasonably safe for use. The courts holding that liability is imposed upon a city have arrived at their conclusions for the following reasons: (a) a power is given to operate the parks and, by analogy to the liability imposed in the maintenance of streets, a duty is raised to exercise due care; (b) since an individual has an implied invitation to visit a park, a duty arises to exercise reasonable care in keeping the premises safe; (c) where a city has a duty cast upon it, either mandatory or permissive, it is exercising a proprietary function as long as the duty is not in nature governmental and as long as the particular activity could be carried on by an individual; and (d) since many of the people in the parks and playgrounds are children of the poor whom

35 Ga. App. 370, 133 S. E. 512 (1926) (bather had to pay a charge of ten cents to use the pool). But see Pickett v. Jacksonville, 155 Fla. 439, 20 So. 2d 484 (1945) (court reversed sustaining of demurrer where declaration alleged negligence of city in operation of pool where deceased had paid for use of the pool); Burton v. Salt Lake City, 69 Utah 186, 253 Pac. 443 (1926) (city held acting in private capacity when admission charged for use of swimming pool).


parents let them run free while they work, there is a duty upon the city to maintain reasonably safe premises.20

In North Carolina, a governmental function has been found in the collection of trash21 and garbage,22 the operation of an incinerator,23 the transmission of electricity solely for street lighting,24 the erection of a water tank;25 police26 and fire27 protection, the maintenance of public buildings28 and traffic light operation.29 However, maintenance of an electric power line which ran to a consumer,30 operation of a golf course31 and maintenance of an airport32 have all been held to be proprietary functions. Liability is imposed on municipalities for wrongful acts committed in maintenance of streets,33 sidewalks,34 and bridges.35 This liability is imposed on the ground that there is a duty to provide reasonably safe facilities, even though the functions are governmental. Liability for the failure to have reasonably comfortable jails is set out by constitutional provision,36 but a city is not liable for the negligence of its jailers since it is in the exercise of a governmental function.37

The question of a city's liability for its negligence in the operation of a public park was left unanswered in an earlier North Carolina case38 where the supreme court sustained the overruling of a demurrer. The

20 Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913).  
22 James v. Charlotte, 183 N. C. 630, 112 S. E. 423 (1922) (although a small charge was made for the service, court held not a proprietary function).  
26 Lewis v. Hunter, 212 N. C. 504, 193 S. E. 814 (1937); Hobbs v. City of Washington, 168 N. C. 293, 84 S. E. 391 (1915); McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187 (1900).  
27 Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849 (1912); Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853 (1902).  
34 Radford v. Asheville, 219 N. C. 185, 13 S. E. 2d 256 (1941); Rollins v. Winston-Salem, 176 N. C. 411, 97 S. E. 211 (1918); Revis v. Raleigh, 150 N. C. 348, 63 S. E. 1049 (1909).  
37 Parks v. Princeton, 217 N. C. 361, 8 S. E. 2d 217 (1940); Nichols v. Town of Fou ntain, 165 N. C. 166, 80 S. E. 1059 (1914) (intoxicated man locked up in unconscious state, jail burned); Moffitt v. Ashe ville, 103 N. C. 237, 9 S. E. 695 (1899) (prisoner contracted illness due to improperly heated jail).  
defendant's demurrer contended that the maintenance of a public park is a governmental function, but the court held that the facts alleged in the complaint were not sufficient to enable it to determine as a matter of law that the defendant was engaged in a governmental function. At a later appeal, defendant's motion of nonsuit was affirmed on the ground that there was no evidence at the trial tending to show that plaintiff's intestate's death was caused by defendant's negligence. In this case the court said that if it was conceded that the operation of the park was a governmental function, "... it does not follow as a matter of law that defendants owed no duty to . . . exercise reasonable care to provide facilities which were reasonably safe, or that defendants would not be liable to plaintiff for a breach of such duty."40

In the principal case, the court intimated that the operation of the city park was a proprietary function. This idea was based on the fact that the city received a net revenue of over $18,000 for the fiscal year which it used for the capital maintenance of park area, building items, paying salaries, buying fuel, etc. Accordingly, the court reasoned that this might remove it from the category of incidental income and import such primary benefit to the city as to make this a proprietary function.41 The court seems to be implying that it will use the pecuniary advantage test but it does not say how much revenue is necessary to produce sufficient pecuniary advantage on which to impose municipal liability. Perhaps the court would have been on sounder ground to have held that operation of public parks raises a duty on the city to exercise due care under the circumstances as it has held in the cases of streets and sidewalks.42 This would eliminate the difficulty of applying the pecuniary advantage test and by a definite holding would let the bar and the courts know the North Carolina position as far as municipal liability for maintenance of parks is concerned.

KARL N. HILL, JR.

40 Id. at 188, 189 S. E. at 493.
41 246 N. C. at 477, 98 S. E. 2d at 919.
42 246 N. C. at 478, 98 S. E. 2d at 920. In the concurring opinion, Mr. Justice Denny took the view that municipalities may be liable in tort even if the city is engaged in a governmental function. He rejects the pecuniary advantage test used by the court, pointing out that the total receipts for Raleigh's two parks was not sufficient to operate all the parks. A recent Florida case, Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957), followed the reasoning of the concurring opinion. The court reversed its previous position and held that a municipal corporation is liable in tort for the negligence of a police officer under the doctrine of respondeat superior.