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Municipal Corporations -- Tort Liability -- Parks and Playgrounds

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Plaintiff's intestate, a small child, died of injuries received while using a swing in the City of Charlotte's municipal park, and this action for damages was brought against the city for failure to exercise reasonable care in the maintenance of the park. The Supreme Court of North Carolina held the facts alleged in the complaint were insufficient to determine as a matter of law whether or not the maintenance of the park was in the exercise of a governmental function, and as a result the overruling of the defendant's demurrer was proper, since it was based on the contention that the maintenance of a public park was a governmental function for which the city would have no tort liability. As the question of a city's liability for negligence in the operation of a park was here presented to the Supreme Court of North Carolina for the first time, it still remains unanswered.

The legal proposition that a municipal corporation is not liable for its torts in the exercise of a governmental function but is liable for its torts in the exercise of a proprietary function is firmly established. Pursuant to this doctrine the Supreme Court of North Carolina has held as governmental functions: the enactment or enforcement of laws or ordinances, the maintenance and acts of the fire and police departments, the fire and police alarm systems, the collection of trash and garbage, the operation of incinerators, and the maintenance of pub-

1 White v. City of Charlotte, 209 N. C. 573, 183 S. E. 730 (1936).
2 This was first stated in Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Repr. 359 (1798); James v. City of Charlotte, 183 N. C. 630, 112 S. E. 423 (1922); Broome v. City of Charlotte, 208 N. C. 289, 182 S. E. 325 (1935); 6 McQuillen, MUNICIPAL CORPORATIONS (2nd ed. 1928) §2793. This rule of non-liability for torts in exercise of governmental functions does not apply to admiralty courts. Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314 (1899).
3 Meares v. City of Wilmington, 31 N. C. 74 (1848); Munich v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921); 6 McQuillen, MUNICIPAL CORPORATIONS (2nd ed. 1928) §2792.
4 Harrington v. Town of Greenville, 159 N. C. 632, 75 S. E. 849 (1912).
5 Hull v. Roxboro, 142 N. C. 453, 55 S. E. 351 (1906) (city did not enforce health ordinance); Goodwin v. City of Reidsville, 160 N. C. 411, 76 S. E. 232 (1912).
6 Peterson v. City of Wilmington, 130 N. C. 76, 40 S. E. 853 (1902); Harrington v. Town of Greenville, 159 N. C. 632, 75 S. E. 849 (1912) (not liable for negligent acts or omissions of fire department).
7 Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889) (not liable for injury to prisoner by negligence of jailer); McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187 (1900) (plaintiff was brutally arrested by a policeman for no offence, and court ruled policeman was an agent of the state); Hobbs v. City of Washington, 168 N. C. 293, 84 S. E. 391 (1915).
10 James v. City of Charlotte, 183 N. C. 630, 112 S. E. 423 (1922) (a small charge was made for service, and truck exceeded speed limit).
lic buildings. The Supreme Court has classified as proprietary functions to which liability attaches, the maintenance and operation of water and light companies, streets and highways, sidewalks, bridges, and jails. Difficulty and confusion arise when the court must decide the character of a new function assumed by municipalities. The two tests

See Pleasants v. City of Greensboro, 192 N. C. 820, 135 S. E. 321 (1926) (court assumed the maintenance of city hall was a governmental function). Woodie v. Town of North Wilkesboro, 159 N. C. 353, 74 S. E. 924 (1921) (city owes to its servants and the public the same duty as would a private corporation under like circumstances); Munich v. City of Durham, 181 N. C. 188, 106 S. E. 665 (1921) (superintendent of waterworks unjustifiably assaulted plaintiff). A city in no case is liable for failure to furnish a sufficient supply of either water or light. N. C. Code Ann. (Michie, 1935) §2807; Howland v. City of Asheville, 174 N. C. 749, 94 S. E. 524 (1917); Mack v. Charlotte City Waterworks, 181 N. C. 383, 107 S. E. 244 (1921).


Judge Pearson, in Meares v. Commissioners of Wilmington, 31 N. C. 74, 80 (1848) in imposing liability upon the city, stated "... When the sovereign grants power to a municipal corporation to grade the streets, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive, not by making money directly, but by making it more convenient for the individuals composing the corporation or town to pass and repass in the transaction of business and to benefit them by holding out greater inducements for others to frequent the town and thereby add to its business... the citizens of the town derive special benefit from the work, which is not shared by the citizens of the State..." Johnson v. City of Raleigh, 156 N. C. 269, 72 S. E. 368 (1911); Seborn v. City of Charlotte, 171 N. C. 540, 88 S. E. 782 (1916) (city does not warrant streets to be absolutely safe); Duke v. Town of Belhaven, 174 N. C. 95, 93 S. E. 472 (1917); Willis v. City of New Bern, 191 N. C. 507, 132 S. E. 286 (1926); Speas v. City of Greensboro, 204 N. C. 239, 167 S. E. 807 (1933) (unlighted "silent policeman").


Bell v. City of Greensboro, 170 N. C. 179, 86 S. E. 1041 (1915); Carter v. Town of Leakesville, 174 N. C. 561, 94 S. E. 6 (1917); Graham v. City of Charlotte, 186 N. C. 649, 120 S. E. 466 (1923); Michaux v. City of Rocky Mount, 193 N. C. 550, 137 S. E. 663 (1927).

While a municipal corporation is not liable for the negligence of its jailers, policemen or guards, it is liable for failure to furnish reasonably comfortable jails. Shields v. Town of Durham, 118 N. C. 450, 24 S. E. 794 (1896) (jail for months had been in a very filthy, wet, and frozen condition); Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482 (1897); see Moffitt v. City of Asheville, 103 N. C. 237, 9 S. E. 695 (1889); Nichols v. Town of Fountain, 165 N. C. 166, 80 S. E. 1059 (1914).

"Powers held to be governmental or public in one jurisdiction are held to be corporate or private in another, and it has often been said that it is impossible to state a rule sufficiently exact to be of much practical value in deciding when a
most frequently used to distinguish governmental from proprietary functions are: the function is proprietary if it is maintained for revenues and profit\(^{21}\) of for the private advantage and benefit of the locality and its inhabitants as contrasted with a benefit which enures to the state.\(^{22}\) Often the profit test is clear and its application easy, but it is too indefinite to suffice in a number of situations. While an incidental profit does not ordinarily change the character of a governmental function,\(^{23}\) there is a conflict among the cases where the function is conducted in part for profit and in part for public purposes.\(^{24}\) In *Pleasants v. City of Greensboro*\(^{25}\) the North Carolina Supreme Court held the fact that a portion of the city hall was rented for a profit did not change the maintenance of the building from a governmental to a proprietary function. But what would the North Carolina court rule when a city gratuitously collects ashes from its citizens but charges business establishments for the same service, and a person is injured by a truck making collection from both sources? Would the court deny recovery when an electrician is electrocuted from a wire to a street light and at the same time allow recovery if he comes in contact with a house line on the same pole? What would be the result were he killed by the main trunk line carrying current for both purposes? This profit test when carried to its logical conclusion is hardly satisfactory.

The application of the test of private advantage and benefit to the power is public and when private." Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 Pac. 710 (1925); see Johnston v. City of Chicago, 258 Ill. 494, 101 N. E. 960, 962 (1913); Mayne v. Curtis, 73 Ind. App. 640, 126 N. E. 699, 701 (1920); Hattiesburg v. Greig, 118 Miss. 676, 79 So. 846, 847 (1918). For a discussion of the confusion see, Borchard, *Government Liability in Tort* (1925) 34 Yale L. J. 129; 4 Dillon, Municipal Corporations (5th ed. 1911) §1643. In South Carolina the court will not undertake to determine whether a function is governmental or private but imposes liability for all functions in the absence of statutes. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911).


\(^{22}\) See Meares v. Commissioners of Wilmington, 31 N. C. 74, 80 (1848); Hull v. Town of Roxboro, 142 N. C. 454, 456, 55 S. E. 351, 352 (1906). 6 McQuillen, Municipal Corporations (2nd ed. 1928) §2795; Elliott, Municipal Corporations (3rd ed. 1925) §333.

\(^{23}\) Manning v. City of Pasadena, 58 Cal. 666, 209 Pac. 253 (1922); Taggart v. City of Fall River, 170 Mass. 325, 49 N. E. 622 (1898); Bell v. City of Cincinnati, 80 Ohio St. 1, 88 N. E. 128 (1899); see Bolster v. City of Lawrence, 225 Mass. 387, 114 N. E. 722, 724 (1917); Schiltia v. City of Philadelphia, 279 Pa. 549, 124 Atl. 273, 276 (1924).

\(^{24}\) Liability was imposed in the following cases: Judson v. Borough of Winstead, 80 Conn. 384, 68 Atl. 999 (1908); Moulton v. Town of Scarborough, 71 Me. 267 (1880); Oliver v. City of Worcester, 102 Mass. 489 (1869); Bell v. City of Pittsburgh, 297 Pa. 185, 146 Atl. 567 (1929). *Contra:* Edgerly v. Concord, 62 N. H. 8 (1882); Buchanan v. Town of Barre, 66 Vt. 129, 28 Atl. 878 (1894). 192 N. C. 820, 135 S. E. 321 (1926).
locality rather than to the state has led to many conflicting decisions and many distinctions which appear groundless. To hold as of benefit to the state, and thus a governmental function, the building or operation of a drawbridge, the maintenance of a city hall and other municipal buildings, flushing the streets, driving an ambulance, maintaining a city hospital, seems irreconcilable with holding as a benefit to the locality the construction of sewers, maintaining a city prison, sprinkling the streets and the driving of an ash cart. Accepting the test at its face value, it seems that that which is beneficial to a city must necessarily in part be beneficial to the state.

The inconsistencies of the courts can partially be explained by the fact that the tests, while sufficient a century ago when first applied, are today inadequate because of the ever increasing activity by both the municipalities and the states and the complexities and demands of advancing civilization. Also, there has been much unfavorable comment as to the equity of the immunity doctrine for governmental functions, and the courts whenever possible have tended to impose liability so as to reach a just result.

Evans v. City of Sheboygan, 153 Wis. 287, 141 N. W. 265 (1913).
Schwall's Adm. v. City of Louisville, 135 Ky. 570, 122 S. W. 860 (1909).
Maximilian v. Mayor of New York, 62 N. Y. 160 (1875).
Tallefson v. City of Ottawa, 228 Ill. 134, 81 N. E. 823 (1907).
Ely v. City of St. Louis, 181 Mo. 723, 81 S. W. 168 (1904).
McLeod v. City of Duluth, 53 S. D. 34, 218 N. W. 892 (1928).

"The cities, more and more, are entering into the economic life of their citizens, and are now undertaking private enterprises formerly conducted by private corporations, often enterprises not essential to good government, but which are more in the nature of convenience and places of amusement, and further since the rule of non-liability of municipal corporations for torts is based on an analogy to non-liability of the state for torts, the rule ought to be applied only when their functions are similar to those of the state... there is to be observed a distinct movement toward the doctrine that municipal corporations are under a duty of exercising reasonable care in the maintenance of parks and other public enterprises of like character, which we think is the more wholesome and equitable rule." Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375, 376, 378 (1925); in Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72, 77 (1919) (city was held liable for negligence of fire engine returning from a fire, and Judge Wanamaker, concurring, stated, "The whole doctrine of immunity given to a sovereign state was based upon the assumption of the divine right of kings—a king
For classification as either governmental or proprietary, municipal maintenance of parks and playgrounds has fallen midway, and is commonly said to be in the "twilight zone." Early cases and the greater weight of authority hold their maintenance to be a governmental function,\textsuperscript{3} justifying such position by saying that their essential value is the promotion of health, education, and social improvement, since they afford recreation, exercise, pleasure, and diversion; further, that their beneficial nature is not confined to the limits of the municipality. The minority view, as set out in more recent decisions, looking to the hardships which result from the denial of a recovery to the injured persons, rules that parks and playgrounds are a proprietary function and imposes liability on the following grounds: (1) that the benefits of such activities are limited to the particular locality;\textsuperscript{38} (2) that parks are private and exclusive property of the city, the city having absolute management and control thereof;\textsuperscript{39} (3) that the laws fixing municipal liability as to streets and highways are applicable to parks and playgrounds;\textsuperscript{40} (4) that as park establishment is permissive, rather than mandatory, the municipality is not an agent of the state when it exercises this permissive power.\textsuperscript{41}
Logically, and considering the similarity between park maintenance and the maintenance of health and schools, which are practically unanimously held to be governmental functions, the governmental classification seems to be the sounder of the two views if the distinction between governmental and proprietary function is to be strictly followed. However, as the immunity doctrine is apparently inequitable, as shown by the tendency of the courts to impose liability wherever possible, the imposition of liability by statutory enactment, and the opinions of writers on the subject, it appears that substantial justice will be more satisfactorily served if the Supreme Court of North Carolina rules the maintenance of a park a proprietary function.

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**Negotiable Instruments—Payment—Cashier's Check.**

Defendant, manufacturer of motor cars, notified plaintiff-distributor that "driveaways" must be settled for by cashier's check before the cars would be delivered. Dealer, ordering through plaintiff, procured cashier's check payable to defendant and delivered same to defendant coincident with delivery of cars. The account of distributor was credited with the amount of the check which was deposited with promptness in a Wisconsin bank for collection; thence it was sent to a Federal Reserve Bank and then to drawee bank. Drawee stamped check paid, charged the amount on its own books against its deposit with the Reserve Bank, and sent a credit memorandum to the latter bank which failed to credit same to drawee's account. Drawee became insolvent, and after successive charges back by the banks to its account, defendant charged the amount of the cashier's check back to plaintiff. Held, the check constituted payment.¹

With the exception of a few jurisdictions² the authorities are unanimous in support of the rule that the giving of a bank check by a debtor for the payment of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt. There is a presumption that the check is accepted on condition that it be paid, and the debt is not discharged until the check is paid or until it is accepted at the bank at which it is made payable.³ The reason sometimes assigned is that the paper is given and

² Dille v. White, 132 Iowa, 327, 109 N. W. 909 (1906) (a contrary rule has been announced in Massachusetts, Maine, and Indiana where the giving of a check, note, or draft for a debt or obligation to pay money is held to operate as a payment or extinguishment of the obligation).
³ Ketcham v. Hines, 29 Ga. App. 627, 116 S. E. 225 (1923) (bank checks are not payment until themselves paid, without an express agreement that they are to be accepted as such); Dille v. White, 132 Iowa 327, 109 N. W. 909 (1906);