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Municipal Corporations -- Tort Liability -- Governmental and Proprietary Functions

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tion of a "separate and independent claim or cause of action" for the purposes of this statute, may lend certainty to this disputed area and serve to effectuate the original intent of the revisors.

J. C. JOHNSON, JR.

Municipal Corporations—Tort Liability—
Governmental and Proprietary Functions

A municipal corporation is legally limited in its acts to those which are for a public purpose. The liability of a municipality in tort depends upon whether the act complained of, even though committed in an undertaking for a public purpose, is characterized as governmental or proprietary. If the undertaking is characterized as governmental, then there is no liability unless imposed by statute; if it is characterized as proprietary, then the municipality is liable as any other corporation would be.

In the case of Rhodes v. Asheville, the Supreme Court of North Carolina was faced with the problem of determining in which of these two categories the operation of a municipally owned airport fell. Plaintiff's intestate had been fatally wounded by a watchman employed at the airport. In a resulting action for wrongful death, the municipal defendants maintained that N. C. GEN. STAT. §63-50 (Supp. 1947) declared such an operation to be a public, municipal, governmental function and that therefore no action would lie. Their demurrer was overruled and they appealed. The Supreme Court, in affirming the lower court's decision, held that the statute only declared such operation to be for a public purpose. The Court then classified the undertaking as proprietary.

4 "The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this article, shall are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity." N. C. GEN. STAT. §63-50 (Supp. 1947).
tory which would render the municipality liable under the doctrine of
respondeat superior.\(^5\)

The holding of the Court, excluding any consideration of the statute,
is in line with the weight of authority in this country. Of the ten courts
other than North Carolina which have passed upon this point, seven
have held the operation of an airport by a municipality to be a proprie-
tary function.\(^6\) Of these only one was faced with a statute pertinent
to the situation here considered. The statute involved provided for
municipal immunity, but the Texas court held this to be invalid under
both the Federal and state Constitutions.\(^7\)

In the other three jurisdictions the courts held the operation of an
airport was a governmental function.\(^8\) Each of these cases, however,
involved statutes which expressly gave immunity to the municipalities.
In Tennessee the court held that a statute granting municipal immunity
was constitutional.\(^9\)

The North Carolina Court was faced with an operation which in
and of itself had been classified as proprietary at common law, and yet
seemingly was declared to be governmental by statute. The Court
had previously held that in the final analysis the determination of
whether a particular undertaking is for a public purpose is for the
court and not for the legislature.\(^10\) It had also previously held that
the operation of an airport was for a public purpose.\(^11\) Therefore,
under the Court's ruling in the principal case, it would seem that
the statute adds nothing to the existing law in this state. As the statute
now stands, it is simply a legislative attempt to declare a particular
undertaking to be a public purpose, a function which the court has said
the legislature could not exercise. As was pointed out in the Court's
opinion, only in those jurisdictions having statutes has immunity been
granted. The statute in this state indicates that the undertaking is
"... a public, municipal, governmental function exercised for a public
purpose..." Granted that the statutes in the other jurisdictions were

\(^5\) The case was settled for \$9,000 and costs. The News and Observer, Nov. 15,
1949, p. 6, col. 1.

\(^6\) Mayor and Council v. Crown Cork & Seal Co., 122 F. 2d 385 (4th Cir. 1941);
Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257 (1930); Pignet v. Santa Monica,
715, 295 P. 59 (1930); Peavey v. Miami, 146 Fla. 629, 1 So. 2d 614 (1941);
Ore. 137, 8 P. 2d 783, 83 A. L. R. 315 (1932); Christopher v. El Paso, 98 S. W.
2d 394 (Tex. 1936).

\(^7\) Mayor and Aldermen v. Lyons, 54 Ga. App. 661, 189 S. E. 63 (1936); Abbott
v. Des Moines, 230 Iowa 494, 298 N. W. 649, 138 A. L. R. 120 (1941); Stocker

\(^8\) Mayor and Aldermen v. Lyons, 54 Ga. App. 661, 189 S. E. 63 (1936); Abbott
v. Des Moines, 230 Iowa 494, 298 N. W. 649, 138 A. L. R. 120 (1941); Stocker

\(^9\) Mayor and Council v. Crown Cork & Seal Co., 122 F. 2d 385 (4th Cir. 1941);
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715, 295 P. 59 (1930); Peavey v. Miami, 146 Fla. 629, 1 So. 2d 614 (1941);
Ore. 137, 8 P. 2d 783, 83 A. L. R. 315 (1932); Christopher v. El Paso, 98 S. W.
2d 394 (Tex. 1936).

\(^10\) Nash v. Tarboro, 227 N. C. 283, 42 S. E. 2d 209 (1947); Briggs v. Raleigh,
195 N. C. 223, 141 S. E. 597 (1928).

more specific, the use of the term governmental function usually carries with it a well defined meaning. Regardless, the Court in an unanimous decision held that the legislature intended the statute only as a declaration that such an undertaking was for a public purpose.

Following this decision the municipal defendants petitioned for a rehearing on the basis that neither of the parties sought a construction of the statute but that the defendants had merely asked the Court to give effect to the statute as plainly intended by the legislature. The Court in denying this petition said that "unquestionably" the legislature intended that such an undertaking was to be in furtherance of a governmental function, but that the determination of such was for the courts and not for the legislature. The Court in explanation of its prior opinion said that the construction placed upon the language used in the statute was "... to bring it within the legislative authority of the General Assembly and make it consistent with the validity of the statute in which it is used." The Court did not, however, attempt to explain why it suggested in its former opinion that it might be a wise policy to exempt municipalities from liability in such a situation but that this "... should be expressly granted by the Legislature, rather than by judicial decree." From these statements it would seem that if the General Assembly intends to grant immunity, it cannot do so by merely declaring a particular undertaking to be a governmental function; and whether an express legislative grant of immunity, though the function be proprietary, is constitutional, quaere?

KENNETH R. HOYLE.

Pleading—Wrongful Death Statute—Allegation That Action Is Brought within One Year

There has been considerable confusion, under the North Carolina Wrongful Death Statute, as to the necessity for a specific allegation in a complaint that the action is brought within one year from the death. In a long line of decisions the statutory requirement that an action for wrongful death must be instituted within one year after the death.

1 N. C. Gen. Stat. §28-173 (1943) ("... an action... to be brought within one year after such death.").
2 See N. C. Gen. Stat. §28-173 (1943), Anno.: II, Limitation of the Action ("Hence it must be alleged and proved by the plaintiff to make out a cause of action..."); McIntosh, N. C. Practice and Procedure §196 (1929) ("The plaintiff should allege and prove that the action is within the time specified."); 16 Am. Jur., Death §286 (1938); 107 A. L. R. 1049.