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HURRICANES AND MUNICIPAL LIABILITY

The liability of municipal corporations for the negligent acts of employees and officers has been the subject of much litigation. It is well settled that a municipal corporation is liable in tort for its proprietary acts and shares the immunity of the sovereign for its governmental acts.[1] It is equally well settled that maintenance of streets, while seemingly a governmental function, is a function for which municipal corporations may be liable.[2] The tests for distinguishing between the types of functions are numerous,[3] but they all seem to agree in principle with the test laid down in the Virginia case of *Fenon v. City of Norfolk*.[4]

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[1]Tillman v. District of Columbia, 29 F.2d 442 (D.C. Cir. 1928); City of Mobile v. Lartigue, 123 Ala. App. 479, 127 So. 257 (1930); Sanders v. City of Long Beach, 54 Cal. App. 2d 651, 129 P.2d 511 (Dist. Ct. App. 1942); Schwalb v. Connely, 116 Colo. 195, 179 P.2d 667 (1947); Barth v. City of Miami, 146 Fla. 542, 1 So. 2d 574 (1941); Merrill v. City of Wharton, 379 Ill. App. 504, 41 N.E.2d 508 (1942); Cox v. Board of Comm'rs of Anne Arundel Co., 181 Md. 428, 31 A.2d 179 (1943); Auslander v. City of St. Louis, 332 Mo. App. 145, 56 S.W.2d 778 (1932); Murphy v. Village of Farmingdale, 163, Misc. 221, 298 N.Y.S. 578 (Nassau County Ct. 1937); City of Tyler v. Ingram, 139 Tex. 600, 164 S.W.2d 516 (1942).

[2]Dormitory v. City of Montgomery, 232 Ala. App. 47, 166 So. 689 (1936); City of Phoenix v. Mayfield, 41 Ariz. 537, 20 P.2d 296 (1933); Gilmore v. Comm'rs of Rehoboth , 38 Del. 124, 189 Atl. 284 (1937); City of Miami Beach v. Quinn, 149 Fla. 326, 5 So. 2d 593 (1942); City of Dalton v. Joyce, 70 Ga. App. 557, 29 S.E.2d 112 (1944); Douglas v. City of Moscow, 50 Idaho 104, 294 Pac. 334 (1930).

[3]" 'Governmental functions' are those conferred or imposed upon a municipality as a local agency of limited jurisdiction, to be employed in administering affairs of the state, and promoting the public welfare generally." Green v. City of Birmingham, 241 Ala. App. 684, 4 So. 2d 394, 396 (1941).

"The test in determining whether a municipality is acting in exercise of a governmental function is not whether its act may sustain some relationship to police power, but whether the act is for the common good of all the people of the state as in maintenance of police, fire, and health departments, or relates to special corporate benefit or profit as in the operation of utilities to supply water, light, and public markets." Huffman v. City of Columbus, 51 N.E.2d 410 (Ohio Ct. App. 1943).

" 'Generally the governmental or public duties of a municipality for which it can claim exemption from damages for tort have reference to some part or element of the state's sovereignty granted it to be exercised for the benefit of the public whether residing within or without the corporate limits of the city'," City of Miami v. Oates, 152 Fla. 21, 10 So. 2d 721, 723 (1942).

"We take it to be the true rule, if the act or function involves, in any substantial degree or to any material extent, the serving of its own inhabitants, and therefore private purposes, in respect not undertaken by general law, that liability for ngligence exists." City of Fort Worth v. Wiggins, 5 S.W.2d 761, 764 (Tex. Com. App. 1928).

"This rule of municipal nonliability for torts is still recognized as to all functions whereby the municipality acts simply as an agency of the state for governmental purposes...." Lewis v. City of Miami, 127 Fla. 426, 173 So. 150, 152 (1937).

[4]203 Va. 551, 125 S.E.2d 808 (1962).

The plaintiff sued the city for personal injuries sustained when the automobile in which he was riding crashed into a tree. The tree had been blown down by Hurricane Donna and blocked one lane of a busy cross town street in the city of Norfolk. While the city attempted to remove the tree, due to inadequate personnel and equipment, it was unable to do so. Except for an unlighted sawhorse, the obstacle was left unmarked. The plaintiff alleged that negligence of the city in failing to remove the hazard was the proximate cause of his injury. However, the trial court granted the defendant's motion to strike the evidence and entered summary judgment for the defendant.

On appeal the Supreme Court of Appeals dealt with the single question of whether the city was performing a governmental function or a proprietary function in its efforts to clear the streets of debris.[5]

The court found the acts were performed by the city in its governmental capacity. The controlling test 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 may be liability."[6]

While *Fenon* seems to follow accepted principles, the case points up what is becoming an increasingly important problem.[7] The law of municipal corporations' tort liability is controlled in Virginia, as in most states,[8] by authority derived from a much less urban civilization. For example, *Fenon* cites the 1917 case of *Bolster v. City of Lawrence*[9] as authority for the rule applied. *Bolster* in turn draws its authority from *Tindley v. Salem*,[10] an 1883 case. While the total span is only 80 years in this case, it is easy to realize the tremendous change in the makeup and functions of municipal corporations that has taken place. While older precedents have some validity in other fields of law, they are of limited value in the field of municipal corporations. Modern municipal corporations are more proprietary in nature than their nineteenth century predecessors.[11] As they assume new functions, they must expect to assume new liabilities.

Due to the awareness of courts of the changing nature of municipal corporations, their decisions have resulted in a line of distinction

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[5]203 Va. 551, 554, 125 S.E.2d at 810.
[6]203 Va. 551, 555, 125 S.E.2d 808, 812 (1962).
[7]Antieau, Municipal Corporation Law 73-92 (Student ed. 1956).
[8]See notes 1 and 2 supra.
[9]225 Mass. 387, 114 N.E. 722 (1917).
[10]137 Mass. 171 (1883).
[11]28 Va. L. Rev. 360 (1942).

between governmental and proprietary functions that is thin and wavering. The basis of the rule of distinction is largely lost in history but seems to spring from a misconception of the ruling in the 1788 English case of *Russel v. Men of Dover*.[12] This case allowed total immunity from tort liability to an unincorporated community for lack of a corporate fund from which to pay tort judgments. The rule therefore, is artificial and without basis in this day of gigantic cities. Another objection to the rule involves the doctrine of sovereign immunity.[13] While the concept may have validity on the national and international level, it is of little persuasive force when applied to municipal corporations. The conclusion reached by at least one writer is that the distinction fails on a theoretical basis and should be abolished.[14]

As a final point of emphasis, the *Fenon* case points out one of the problems encountered by jurisdictions adhering to the old view. The tree that caused the accident was blown down by a hurricane. If the accident had been caused by a natural obstruction, such as a pot-hole, the problem would have been more easily solved. There is ample authority for holding cities liable for negligence in removing or attempting to remove obstructions from streets.[15] Thus, cities might also be liable for failing to mark these obstructions adequately. The emergency situation created by the hurricane seems to have been an important factor in the determination of the case.

The trial court refused the city's motion to strike the plaintiff's evidence until it was "satisfied of the emergency."[16] The Supreme Court of Appeals said, "The City, in the midst of the emergency... was engaged in removing from its streets the wreckage and debris

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[12]2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).

[13]City of Harlan v. Peavely, 224 Ky. 338, 6 S.W.2d 270 (1928); Gilman v. City of Concord, 89 N.H. 182, 195 Alt. 672 (1937); McCarthy v. City of Saratoga Springs, 269 App. Div. 469, 56 N.Y.S.2d 600 (1945); City of Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941); City of Tulsa v. Wheetley, 187 Okla. 155, 101 P.2d 834 (1940); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939).

[14]Antieau, Municipal Corporation Law 90 (Student ed. 1956).

[15]Redmond v. City of Burbank, 43 Cal. App. 711, 111 P.2d 375 (Dist. Ct. App. 1941); Storen v. City of Chicago, 300 Ill. App. 574, 21 N.E.2d 852 (1939); Town of Remington v. Hesler, 111 Ind. App. 404, 41 N.E.2d 657 (1942); City of Covington v. Keal, 280 Ky. 237, 133 S.W.2d 49 (1939); Whittaker v. Town of Brookline, 318 Mass. 19, 60 N.E.2d 85 (1945); Jablonski v. City of Bay City, 248 Mich. 306, 226 N.W. 865 (1929); Lowery v. Kansas City, 337 Mo. 47, 85 S.W.2d 104 (1935); Fisher v. Town of Nutley, 120 N.J.L. 290, 199 Atl. 40 (1938); Hayton v. McLaughlin, 289 N.Y. 66, 43 N.E.2d 813 (1942); City of Knoxville v. Baker, 25 Tenn. App. 36, 150 S.W.2d 224 (1940); Shufor v. City of Dallas, 114 Tex. 342, 190 S.W.2d 721 (1945).

[16]Record, p. 78, Fenon v. City of Norfolk, supra note 4.

thrown there by the hurricane."[17] Curiously, however, neither the trial court in its final ruling on the motion to strike, nor the Supreme Court in its statement of the rule to be applied, made further reference to the emergency.[18] Nevertheless, the logical conclusion is that the emergency situation was the factor which removed the acts of the city from the proprietary category.

Since the governmental–proprietary distinction has resulted in inconsistency and a variance in the decisions drawing the line of distinction,[19] it is worthwhile examining the measures taken in the United States to alleviate the problem. At least one state, South Carolina, has abolished municipal liability completely.[20] This has been done on the theory that a municipal corporation can perform all its functions more efficiently when the threat of tort suits is removed. At the opposite extreme is New York, which by its decision in the much discussed case of *Schuster v. City of New York*,[21] made its cities virtual insurers of the safety of persons using the streets. A few states such as California[22] and New Mexico[23] have adopted statutes specifically outlining and limiting the areas of liability. The limitations in these statutes, however, are frequently too stringent and fail to recognize the growing proprietary nature of municipal corporations. They are, in effect, mere codifications of the old law that makes up the "majority rule."

The best solution seems to be that adopted by the Florida courts. In *Hargrove v. Town of Cocoa Beach*,[24] after pointing out the lack of consistency and predictability of results, the Florida Supreme Court abandoned the governmental–proprietary distinction and announced that henceforth it would apply the usual rules of tort liability, without regard to the distinction. Since tort liability of other persons, both natural and corporate, is based on certain rules and precedents, it seems only logical that a municipal corporation can be made subject

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[17]203 Va. at 555, 125 S.E.2d at 811.

[18]Some reference is made at the close of each opinion. However, neither the trial court nor the Supreme Court of Appeals say that the emergency had any bearing on their decisions. They merely state that the city was performing a governmental function and use the emergency only as a means of identifying the case.

[19]Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

[20]Irvine v. Town of Greenswood, 89 S.C. 511, 72 S.E. 228 (1911). But see S.C. Code § 47-379 (1952).

[21]5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

[22]Cal. Govt. Code § 1953.

[23]N.M. Stat. Ann. § 15-17-11 (1953).

[24]96 So. 2d 130, 132 (Fla. 1957).

to the same rules and precedents. One modern authority seems to agree with this conclusion.[25]

Due to the lack of case law in the facts presented by *Fenon,* the court was in the unusual position of having to remove the acts of the city from the proprietary category where they would normally have fallen. The emergency situation proved to be the factor needed. If Virginia were following the Florida view, the *Fenon* case could have been easily disposed of. Under the usual rule of tort law,[26] a sudden emergency is taken into consideration and the city would have been entitled to an instruction on the emergency. The court could have relieved the city from liability without recourse to an artificial distinction.

Fenon points out the basic problem which jurisdictions adhering to the old rule encounter. It may be extremely difficult to establish an act by a municipal corporation as within one or the other category. As a result, applications of the rule tend to be arbitrary. It seems likely that courts frequently determine the result first and then try to fit the facts into the appropriate category.

The present rule, as applied in *Fenon v. City of Norfolk,* is subject to criticism on several grounds. First, the historical precedent is weak,[27] the rule should never have been as it is. Secondly, the differing nature of municipal corporations today makes the application of the rule difficult.[28] Thirdly, when application of the distinction is made, the result is often arbitrary and unjust.[29] Fourthly, even if a fair result is reached in one case, it is often inconsistent with prior decisions and defies future predictability of another plaintiff's rights in a similar case.[30] The Florida view makes disposition of municipal tort liability cases relatively easy and has none of the disadvantages listed above. Also, it recognizes the availability of liability insurance at reasonable cost. The modern municipal corporation should assume increased responsibility to correspond to advances made in other areas. Therefore, the adage that the disappearance of the reason or justification of a rule causes the disappearance of the rule itself, should certainly be followed in the changing field of municipal corporation law.

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[25]Antieau, Municipal Corporation Law 90 (Student ed. 1956).
[26]Prosser, Torts 137 (2d ed. 1955).
[27]54 Harv. L. Rev. 438 (1940).
[28]48 Mich. L. Rev. 41 (1949).
[29]See note 25 supra.
[30]12 Rutgers L. Rev. 526 (1957).