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Municipal Law - Liability of Municipal Corporations in Tort - Wisconsin's Changing Law of Liability of Municipal Corporations for Negligence and Nuisance

William Smith Malloy

WISCONSIN'S CHANGING RULE OF MUNICIPAL LIABILITY FOR NEGLIGENCE AND NUISANCE

Important questions concerning the liability of a municipal corporation for the negligence of its servants and for the creation and maintenance of a nuisance in the performance of governmental function seem to be raised anew by the recent decision of the Wisconsin Supreme Court in the case of *Robb* v. *City of Milwaukee*.[1] Apparently, the effects of the decision are to re-define the phrase "relationship between governor and governed," to add broad new restrictions to the doctrine that the sovereign can do no wrong, and to carry Wisconsin tacitly into the ranks of the majority of jurisdictions which look with disfavor upon governmental immunity from liability for tortious acts attributable to it.

In the case, a woman passerby was allowed to recover for injuries sustained when she was struck by a ball while using the public way adjoining a municipally maintained baseball field. Though the field had been in use nine years, no proof was made of any injury or property damage other than that occasioned in the present instance. The lower court entered judgment for the plaintiff on a jury verdict which found the city negligent as to the manner in which the field was fenced, and that the field constituted a nuisance. In its decision, the Supreme court, two justices dissenting, based its affirmance solely on the latter theory.

Upon what basis does such a decision rest? Concededly, in operating a play field the city was performing a governmental function;[2] and consequently, by standards heretofore applied, between it and the injured party the relationship of governor and governed existed.[3] Previously in such a situation, if the theory of action were negligence, Wisconsin courts applied the doctrine which Stason calls the "strict" or "logical"[4] view of governmental immunity:

> "in the absence of a statute imposing liability, the municipality was not liable for the tortious acts of its officers or servants in connection with the gratuitous performance of strictly public functions imposed by mandate of the legislature or undertaken voluntarily by its permission from which it obtained no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefitted."[5]

If the theory of the action were that the playfield was a nuisance (and the dissenting justices were of the opinion that it was not as a matter of law)[6] the case would seem to fall well within the rule of *Virovatz* v.

[1] 6 N.W. (2d) 222 (Wis. 1942).
[2] Hennessey v. City of Boston, 265 Mass. 559, 164 N.E. 470 (1929).
[3] Gianfortore v. New Orleans, 61 F. 64 (1894).
[4] STASON, MUNICIPAL CORPORATIONS (1935) p. 564.
[5] Bolster v. City of Lawrence, 225 Mass. 387, 114 N.E. 722 (1917).
[6] Robb v. City of Milwaukee, 6 N.W. (2d) 222 (Wis. 1942). Dissenting opinion.

City of Cudahy,[7] where it was held that the city in conducting a swimming pool was engaged in a public activity, and did not become liable for the death of a swimmer even though the pool constituted a nuisance. While not overruling the *Virovatz* case, the court presently admitted that its former judgment "came close to ruling that even though a thing maintained by a municipality constitutes a public nuisance, the exemption from liability would apply where the nuisance is created in the course of performing a governmental function."

Assuming that the *Robb* case and the Virovatz case are both law, the decisions are reconcilable only on the premise that the concept of the governor-governed relationship is a shifting one, dependent not on the nature of the service which is being performed but rather on the benefits which the "governed" is deriving from the service. Consequently, the municipality would sustain no liability to a person injured while using the ball field, while to the mere passerby, it would become liable. If this is to become the basis of future decisions, the haphazard manner in which the rule has developed will become apparent in its application to persons who, while they are on the premises, are deriving no actual benefit from the function performed; as for instance, would be true in the case of a party injured while a spectator at a ball game at a municipal field.

Further than this, as the court points out in its latter decision, there appears to be arising out of the tendency of the courts to inquire more closely into the nature of the governor-governed relationship a new rule analogous to the one which in this jurisdiction curtails the non-liability of the city for injuries done when the municipality and the injured party stand in the further relationship of adjoining property owner to ajoining property owner.[8] Such curtailment applies whether the injury is one to the property[9] or to the person.[10]

Thus though the *Virovatz* case may still be the law, its effect is confined by the Robb decision to a smaller class of cases than the language used would reasonably encompass. That such a restriction was not in the minds of the justices at the time that the former decision was rendered is apparent from the fact that in the earlier opinion, the court posed the hypothetical case of an injury to a traveler on the public way as an example of a situation in which the corporation would not become liable under the doctrine of exemption for the maintenance of a public nuisance where the relationship of governor to governed existed.

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[7] Virovatz v. City of Cudahy, 211 Wis. 357, 247 N.W. 341 (1931).
[8] Harper v. Milwaukee, 30 Wis. 365 (1872).
[9] Hasslinger v. Hartland, 234 Wis. 201, 290 N.W. 647 (1940).
[10] Matson v. Dane County, 172 Wis. 522, 179 N.W. 774 (1920).

It is to be noticed that the appeal in the instant case was apparently decided solely on the jury finding of nuisance. If this be true, the decision, while in conflict with the *Virovatz* case, does not represent a radical departure from the law as it was conceived to be prior to 1931. As early as 1914, Wisconsin, in *Bernstein* v. *City of Milwaukee*,[11] held that a city was liable for an injury done to a citizen when caused by the creation or maintenance of a public nuisance, regardless of the fact that the nuisance was created in the performance of a public function; and similar rules have been laid down by the courts of other jurisdictions.[12] But the implications of the present case seem wider than a mere return to its former position, for there seems to be no case which has defined "nuisance" as broadly as is here construed.[13] As the dissenting opinion points out, it is extremely doubtful that in its widened scope, "nuisance" does not include most negligence as well. Measured by traditional standards, it would seem that an isolated injury occurring in the extended period in which the field was maintained would be insufficient proof of the element of continuing damage and annoyance which are or were previously accepted as the characteristics of the tort of nuisance.[14] Either this doctrine is to be applied to purely negligent acts akin to the misfeasance which unquestionably was present in the *Robb* case, or it will be restricted to nuisances as the court presently uses the term; in either event the court seems to have created a distinction more academic than real, and by a fiction analogous to that of adjoining property owners, singularly extended municipal tort liability.

The original doctrine of municipal non-liability arose as an extension to its subdivisions of the immunity with which the sovereign states were invested.[15] The rule has been defended at varying times and in various jurisdictions on the ground that to allow recovery would be to sanction a diversion of public funds to a purpose which the state never intended the municipality to bear;[16] that the inconvenience occasioned the public would outweigh the redressing of the wrong;[17] and that the rule encouraged the city to engage in the gratuitous rendition of allowable public services.[18]

Nevertheless, courts have been reluctant to give wholehearted support to the rule. While paying homage to it in general terms, they have engrafted onto the rule exceptions based on theories of pecuniary

[11] Bernstein v. City of Milwaukee, 158 Wis. 576, 149 N.W. 382 (1914).
[12] Hoffman v. City of Bristol, 113 Conn. 386, 155 A. 499 (1931).
[13] Compare fact situation in Hennessey v. Boston, supra.
[14] 3 COOLEY, TORTS, § 450.
[15] 38 AM. JURISPRUDENCE, § 573, note 20.
[16] Devers v. Scranton, 308 Pa. 13, 161 A. 540 (1932).
[17] Chafor v. Long Beach, 174 Cal. 478, 163 P. 670 (1932).
[18] Baltimore v. State, 168 Md. 619, 179 A. 169 (1935).

profit, special advantage, public nuisance, and adjacent property ownership for the purpose of reaching an equitable result in individual instances. In speaking of the exception in favor of situations arising where the corporation anticipated the return of a profit from its activity, Justice Butler said it was court made law "adopted to escape difficulties, in order that injustice may not result from technical defenses based on the governmental character of such corporations."[19]

At the present time, the doctrine of non-liability on whatever theory it rests ,and the tendency to restrict such immunity by insensible degrees seem hopelessly in conflict. It would seem that the time is ripe for a judicial reexamination of the subject which will in the light of public policy, unequivocally affirm exemption in all cases or impose liability wherever, as Justice Fairchild says, the "governed can be said not to have assumed the risk of injury."

WILLIAM SMITH MALLOY.

[19] Trenton v. New Jersey, 262 U.S. 182, 67 L.Ed. 937, 43 S.Ct. 534, 29 A.L.R. 1471 (1922).