Governmental Function in Wisconsin

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GOVERNMENTAL FUNCTION IN WISCONSIN

It is a firmly established principle of American jurisprudence that the rule "respondeat superior" does not apply to the state, a county, town or municipal corporation in the performance of a governmental function; in other words, that any such body is not liable for the negligence of its officers, agents or employees who are engaged in the performance of a governmental function. On this point the courts are practically unanimous. They are not unanimous, however, on what constitutes a governmental function.

The purpose of this article is to examine and discuss the application of the above stated principle in Wisconsin.

I.

WHAT CONSTITUTES A GOVERNMENTAL FUNCTION IN WISCONSIN.

In Evans vs. Sheboygan, 153 Wis. 287, there is a review of the Wisconsin cases on this point. Barnes, J., in the opinion on pages 288 and 289:

"It has been held that a city is not liable for damages for property destroyed by fire resulting from the negligence of the firemen employed, because they were performing a public or governmental duty. Hayes v. Oshkosh, 33 Wis. 314; Britton v. Green Bay & Ft. H. W. W. Co., 81 Wis. 48, 57, 51 N. W. 84. Nor for the negligence of a fireman in hauling coal for use by the city fire department. Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377. Nor for injury to a person caused by the negligence of a drunken fireman in driving a fire truck. Higgins v. Superior, 134 Wis. 264, 114 N. W. 490. Nor for the action of a city treasurer in selling the property of the wrong person to secure payment of delinquent personal property taxes. Wallace v. Menasha, 48 Wis. 79, 4 N. W. 101; Hurley v. Texas, 20 Wis. 634. Nor for injuries caused by a board of public works in disposing of city garbage. Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030. Nor for the death of a child caused by the negligence of a school board in permitting sewers to become clogged up.

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Folk v. Milwaukee, 108 Wis. 359, 362, 363, 84 N. W. 420. Nor for injuries resulting to a pedestrian from permitting children to coast on the streets with bob-sleds. Schultz v. Milwaukee, 49 Wis. 254, 5 N. W. 342. Nor for issuing a license to permit an exhibition of animals on the streets. Little v. Madison, 49 Wis. 605, 6 N. W. 249. Nor for the negligence of a health officer in performing the duties of his office. Kempster v. Milwaukee, 103 Wis. 421, 143, 79 N. W. 411. Nor for placing a manhole in a street in a negligent manner. Ziegler v. West Bend, 102 Wis. 17, 78 N. W. 164. On the contrary, it has been held that a city in constructing cisterns in which to store water for fire purposes is performing a municipal function and is liable for damages caused by the negligence of its employees. Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565. And that in the opening of streets and the assessments of damages and benefits resulting therefrom and in collecting the sums so assessed a city is performing a corporate as distinguished from a public duty, and is liable for the tort of an officer in seizing and selling property to pay a void assessment. Durkee v. Kenosha, 59 Wis. 123, 17 N. W. 677. And the same rule is held where a city in laying out or building a highway wrongfully invades the property of an abutting owner. Bunker v. Hudson, 122 Wis. 43, 54, 99 N. W. 448; Nicolai v. Verona, 88 Wis. 551, 60 N. W. 999. Also that a city in furnishing water to private consumers is performing a corporate function and is liable for the negligence of its agents. Piper v. Madison, 140 Wis. 311, 314, 122 N. W. 730."


In the light of the foregoing decisions, let us try to discover what is the criterion for a governmental function in Wisconsin.
Several definitions are given and several elements stated as requisite to this function. The decisions show, however, that all of these functions are not requisite.

In *Evans v. Sheboygan*, supra, page 288, Barnes, J., states:

"The reason of the rule is that the duty of opening and maintaining highways is enjoined on towns, cities, and villages by law and for the benefit of the general public, and that in the performance of these duties the municipalities are performing a governmental and not a municipal function."

Two elements are here included: "A duty enjoined or required by law," and, "for the benefit of the general public." Obviously there are governmental functions, the performance of which is not enjoined or required but is merely permitted by law. For example, the maintenance of school playgrounds. *Bernstein v. Milwaukee*, supra. The City of Milwaukee was authorized but not required to maintain school playgrounds. The disposal of garbage, *Kuehn v. Milwaukee*, 92 Wis. 263, was also a permissive and not a required act. A governmental function is, therefore, not necessarily one that is required by law to be performed.

The second element included in the foregoing statement of the court, to-wit: "for the benefit of the general public" is almost universally made a part of definitions of governmental functions. It is usually contrasted with benefit to the public corporation in its corporate capacity. Thus, in *Folk v. Milwaukee*, 108 Wis. 359, Winslow, J., at page 363, states:

"This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community."

"Public welfare," and "welfare of the general public," are very indefinite terms. Courts have been striving ever since their inception to define these terms. Clearly the function need not be
for the benefit of the inhabitants of the state as a whole. It may be for the benefit of the community, yet not in the corporate capacity of the community. Maintenance of a fire department, everywhere, except perhaps in Kansas, considered a governmental function, is generally local in its benefit in the sense that it is limited to the particular city or village which maintains the department. This is true also of garbage disposal. On the other hand, certain functions which are not governmental, benefit the public of the community. The furnishing of water to citizens is a public benefit. Nothing is of greater public importance than to have adequate water supply for the inhabitants of a city. While it is necessary, therefore, that a function to be governmental must be beneficial to the public, at least to the public in the community affected, not all functions of such a nature are governmental.

Turning now to Wisconsin cases holding certain functions to be private or corporate, we find further distinctions between the two classes of functions. In Piper v. Madison, 140 Wis. 311, where it was held that a city in selling and distributing water to its citizens is acting in its private or corporate capacity the court cited with approval Judge Dillon's oft-quoted statement as follows:

"Municipal corporations ** possess a double character: the one governmental, legislative, or public; the other, in a sense, proprietary or private ** In its governmental or public character the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself ** But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quoad hoc as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent."

1 Dill. Mun. Corp. Sec. 66
On pages 314 and 315, Siebecker, J., in the opinion continues:

"The function of a city in selling and distributing water to its citizens is of a private nature, voluntarily assumed by it for the advantage of the people of the city. Responsibility for the acts of persons representing it in such a business falls upon the city through the relation of master and servant, and the maxim of respondeat superior applies. Whenever this relation is established the city is liable in damages for the negligence of its agents and servants in the conduct of such business. The following adjudications uphold this liability upon the ground that the city in conducting such a business is acting in its proprietary capacity." (Citing cases).

Emphasis is here placed on the fact that the city is conducting a business from which revenue is derived. Is then the fact that revenue is derived from the performance of the function sufficient to take it out of the governmental class? In Morrison v. Fisher, 160 Wis. 621, the court decided that the holding of the Wisconsin state fair through the agency of the State Board of Agriculture including the giving of an aeroplane exhibition is a governmental function although revenue was derived through the medium of admission charges and concessions. The revenue derived was devoted to reducing the appropriation made by the state for conducting the fair. In Piper v. Madison, supra, the revenue derived was devoted to the maintenance of the waterworks. Obviously, therefore, the fact that revenue is derived in the performance of a function is not sufficient to render it a corporate function. If that were true, then whenever a city made a charge for use of a park privilege or for the collection of garbage, the function would cease to be governmental.

In Durkee v. Kenosha, 59 Wis. 123, it was held that a city is liable in an action of tort for the acts of its officers in seizing and selling property to pay a void special assessment for benefits from the opening of a street. The decision is based squarely on the ground that the laying out and opening of streets in a city, the assessment of damages and benefits resulting therefrom, and the
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collection of sums so assessed as benefits, are strictly municipal functions as distinguished from public or governmental. There is no discussion of the distinction between private and governmental functions. Taking this case together with Evans v. Sheboygan, 153 Wis. 287, we have the apparent contradiction that the laying out and opening of streets is a private or municipal function while the opening and maintenance of streets is a public or governmental function, and the Durkee case is cited without disapproval in the Evans case. There is, however, a real distinction between these cases and that is this: In the Durkee case the city was not performing as toward the private property owner a public function because he was in a different class from the traveling public for whom the highway was being opened. The acts of the officers amounted to trespass on private property. This distinction is pointed out in a dictum in Folk v. Milwaukee, 108 Wis. 359, where Winslow, J., in the opinion at page 364, states:

“In none of these cases (referring to three Wisconsin cases which later will be considered) were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity toward the person injured.”

This distinction is supported in Bunker v. Hudson, 122 Wis. 43. We have then another principle, to-wit: That a function which is strictly governmental as toward the general public may not be governmental toward private persons whose property rights are invaded.

Mulcairns v. Janesville, 67 Wis. 24, cited in Evans v. Sheboygan, supra, is an anomalous case. Here it was held that the city was liable for the negligence of workmen employed by the city in constructing a cistern for the storage of water for fire department purposes, and the court based its decision on the ground that the foreman who had supervision of the work was not a public officer or agent of the city but was specially employed for that purpose. The fact remains, however, that this foreman was an employee of the city and that the function was clearly governmental. Manske v. Milwaukee, 123 Wis. 172. The opinion carried to its logical conclusion would lead to absurd results, results squarely opposed to the great weight of authority in Wisconsin. While the Mulcairns case has been cited without disapp-
proval in later cases and has not been expressly overruled, it seems to be absolutely wrong, and if the question is again squarely presented the case should be overruled.

To sum up on this first point, as to what is a governmental function in Wisconsin, the careful examination of all the Wisconsin authorities forces us to the conclusion that we have not yet evolved a clear-cut line or demarcation between governmental and municipal functions; that there is still a hazy borderline between the two; that the best we can say is that those functions which are performed under the police power for the benefit of the public in the state or in the municipality from which the municipality derives no benefit in its corporate capacity, whether such functions are required or merely authorized by law, are governmental functions; that those functions performed by a municipality in the nature of quasi public business undertakings, from which revenue is derived and which are similar to functions performed by public utility companies, are, at least insofar as service is rendered to private persons for a charge, private or municipal functions. This latter class should include the maintenance of waterworks, electric light plants and distribution systems, gas plants and street railways; but it should not include functions which are strictly governmental such as the maintenance of parks merely because some revenue may be derived therefrom.

II. WHAT EXCEPTIONS ARE MADE IN WISCONSIN IN THE APPLICATION OF THE RULE OF NON-LIABILITY IN THE PERFORMANCE OF GOVERNMENTAL FUNCTIONS?

One such apparent exception is pointed out in the foregoing discussion, that where private property rights are invaded the rule of respondeat superior applies. However, as to the owners of such rights, the function is not properly governmental. This apparent exception has been made in the case of seizure of private property for illegal special assessment for opening a street. Durkee v. Kenosha, 59 Wis. 123. In the case of unlawful diversion of surface water collected in city drains and cast upon private land. Gilluly v. Madison, 63 Wis. 518. Schroeder v. Baraboo, 93 Wis. 95. In the case of discharge of sewage effluent from the city's septic tanks into a stream running through private prop-
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erty. Johns v. Platteville, 157 N. W. (Wis.) 761. These cases are not, however, real exceptions to the rule because they proceed upon the ground that as to these private property owners the function is not governmental.

One other exception is to be considered. In Bernstein v. Milwaukee, 158 Wis. 576, Barnes, J., in the opinion at page 578, after stating the rule of non-liability, says:

"The exception to this rule is that a municipality may not maintain a public nuisance even where it is performing a governmental duty."

In support of this statement four cases are cited, each of which we shall now consider.

Folk v. Milwaukee, 108 Wis. 359. In this case a pupil, attending one of the public schools in Milwaukee, contracted a disease caused by a defective sewer pipe in the school house which sewer pipe emitted gas and constituted a nuisance, and it was expressly pleaded in the complaint that the sewer pipe was a nuisance. It is obvious that this condition constituted the clearest kind of a public nuisance and yet the court held that the city was not liable. Winslow, J., at page 364 in the opinion states:

"We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or negligently turn water or sewage upon the lands of another, without liability. Gilluly v. Madison, 63 Wis. 518; Hughes v. Fond du Lac, 73 Wis. 380; Schroeder v. Baraboo, 93 Wis. 95. These cases all go upon the principle that the city cannot in the management of its corporate property create a nuisance injurious to the property or rights of others. In none of these cases were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity toward the person injured. In the present case, however, there can be no doubt that in the management of the school house the city officials were acting in a purely governmental capacity, as far as their relations to the deceased child were
concerned. This consideration is, we think, controlling, and results in affirmance of the ruling of the trial court.”

The *Folk* case, therefore, instead of being an authority supporting the statement of Barnes, J., in the *Bernstein* case, is directly contra to it.

In *Schroeder v. Baraboo*, 93 Wis. 95, the second case cited in support of Justice Barnes’ statement, a drain had been constructed in part by the city to connect with a number of privy vaults. After a number of years the outlet below the plaintiff’s property was walled up and the sewage catch basin was located at the corner of plaintiff’s lot to take care of surface water on the street. At the time in question there was a severe rain storm and the water from the surface above the plaintiff’s property flowed into the old drain which burst and flooded the plaintiff’s property. There is not a word in the opinion as to the performance of a governmental function. It is a clear case of trespass to private property and therefore falls within the apparent exception stated in the *Folk* case and is no authority in support of the statement for which it was cited.

In *Hughes v. Fond du Lac*, 73 Wis. 380, the third case cited in support of Justice Barnes’ statement, the plaintiff was driving a horse in the evening on a public street and the horse became frightened at a large wooden roller which had been left in the street by city workmen. The statutory notice required to be given under section 1339 was not given, but the action was sustained on the ground that the city was maintaining a nuisance, and the court stated that the injury to the plaintiff was caused not by nonfeasance or negligence on the part of the city, but by malfeasance by the performance of an act which was wholly wrongful. The court distinguishes between neglect to keep streets in repair and active malfeasance in placing obstructions in the same and decided the case on this ground. It is clear that the only ground upon which this decision can be sustained is that the city placed in this street something which was unlawful in itself, not a proper or lawful thing to be in the street. Hence, it is an authority merely that the city may be liable in the performance of a governmental function where it is doing a thing which is wholly unlawful, but not where the city is doing a lawful thing in a negligent or improper manner. If the statement of Justice Barnes means that a nuisance can only result where
the city is doing an act wholly unlawful, then the Hughes case supports it. If, on the other hand, the word “nuisance” in this statement has the common meaning, such that a nuisance may result from negligence, then the Hughes case does not support it.

The fourth and last case stated in support of Justice Barnes’ statement is Gilluly vs. Madison, 63 Wis. 518. This case is very similar to the case of Schroeder v. Baraboo and is explained exactly on the same grounds, to-wit: trespass on private property.

These are the only cases cited by the court in the Bernstein case in support of this statement. We think it is, therefore, clear that the dictum does not extend the principle farther than the statement of that principle in Folk v. Milwaukee, supra, and that a city would, therefore, not be liable for negligence of its servants in the performance of a governmental function although such negligence might result in what is commonly termed a “nuisance.” There are a number of cases in Wisconsin which decide clearly that where the city is performing a governmental function, even though the situation created or the acts done would amount to a nuisance, the city is not liable to those persons toward whom the function is governmental. Liermann v. Milwaukee, 132 Wis. 628. Higgins v. Superior, 134 Wis. 264.

III.

DOES THE EXEMPTION FROM LIABILITY FOR NEGLIGENCE OF AGENTS OR EMPLOYEES APPLY TO QUASI PUBLIC CORPORATIONS OR ORGANIZATIONS?

In Sutter v. The Milwaukee Board of Fire Underwriters, 160 N. W. (Wis.) 57, it was decided that the rule of non-liability does not apply to a quasi public corporation or organization although such organization is gratuitously performing a function which, if performed by a municipality, would be clearly governmental.

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