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Municipal Corporations--Liability for Tort--Swimming Pools

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some purposes, and that the wife was not entitled to attorney's fees.

In applying suit money statutes to petitions for modification of divorce decrees, courts occasionally distinguished between situations in which the change in custody is necessary to the welfare of the children,[14] and those in which the change is not a necessary one,[15] for example, where the change was asked entirely for the pleasure of the petitioning mother. This distinction is of little importance in a case such as the principal one where the petitioner is the father. In such case the mother is forced to defend, so the possible evil of the father's being forced to pay costs of any needless and unwarranted petition the mother might wish to bring does not here exist. The holding of the principal case would not preclude a use of this distinction in West Virginia.

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MUNICIPAL CORPORATIONS — LIABILITY FOR TORT — SWIMMING POOLS. — The city of Clarksburg maintained a public swimming pool just below a municipal dam. A guard, who was on duty only certain hours of the day, had orders not to permit diving from the dam or its wing wall. Plaintiff, ignorant of this prohibition and before the guard had come on duty, dived from the wing wall thereby permanently injuring his knee either on a jagged rock or on an underwater apron of the wing wall. Judgment for plaintiff affirmed. *Held,* that a municipality exercises a proprietary function in the maintenance of a public swimming pool, and hence is liable for injuries caused by failure to use ordinary care. *Ashworth v. City of Clarksburg.*[1]

It is a well-settled rule that a municipality is liable for injuries or damages due to failure to use ordinary care in the exercise of "so-called" proprietary functions.[2] It has been determined in West Virginia that the following activities of a municipality are proprietary: operation of a water system,[3] maintenance of an electric plant[4] and the maintenance of parks.[5] The following have

14 Worthington v. Worthington, 215 Ala. 447, 111 So. 224 (1927).
15 Gerson v. Mathes, 252 Ill. App. 607 (1929).
1 190 S. E. 763 (W. Va. 1937).
2 Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375 (1925); Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914).
3 Prager v. City of Wheeling, 91 W. Va. 597, 114 S. E. 155 (1922); Wigal v. City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914).
4 Hyre v. Brown, 102 W. Va. 505, 135 S. E. 656 (1926).
5 Warden v. City of Grafton, 99 W. Va. 249, 128 S. E. 375 (1925).

been held to be "so-called" governmental functions with resultant immunity from liability: maintenance of a jail,[6] supplying water for fire protection[7] and the operation of schools.[8] To the group of proprietary functions in whose exercise the municipality is liable for want of ordinary care is added the statutory liability for injuries caused by defective streets and sidewalks.[9]

In arriving at the conclusion that the maintenance of a public swimming pool is a proprietary function, our court classified swimming pools as within the definition of public parks. As indicated above it was held in *Warden v. City of Grafton*[10] that the maintenance of a public park by a municipality was a proprietary function.

In other jurisdictions there are two lines of authority, as to parks and public swimming pools, one holding that their maintenance is a governmental function,[11] the other a proprietary function,[12] but the tendency of late cases is to classify this activity as a proprietary function.[13] The principal case and *Warden v. City of Grafton* demonstrate that West Virginia is definitely in accord with the modern trend.

J. G. McC.

QUASI CONTRACTS — RIGHT OF CONTRACTOR TO RECOVER RENT FROM COUNTY FOR USE OF PROPERTY OBTAINED UNDER A CONTRACT VOID BECAUSE NOT IN COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS. — The County of Arlington, Virginia, attempted to purchase fire apparatus. The contract of purchase was held void and recovery on an implied agreement to pay reasonable value was

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[6] Shaw v. City of Charleston, 57 W. Va. 433, 50 S. E. 527 (1906); Brown's Adm'r v. Guyandotte, 34 W. Va. 299, 12 S. E. 707 (1890).

[7] Mendel v. City of Wheeling, 28 W. Va. 233 (1886).

[8] Krutili v. Board of Education, 99 W. Va. 466, 129 S. E. 486 (1925). See Price, *Governmental Liability for Tort in West Virginia* (1931) 38 W. VA. L. Q. 101 for municipal liability for tort in general.

[9] W. VA. REV. CODE (Michie, 1937) c. 17, art. 10, § 17.

[10] 99 W. Va. 249, 128 S. E. 375 (1925).

[11] Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917). It is interesting to note that this case was cited in the case commented upon as authority for the proposition that a public swimming pool is within the definition of a public park. 6 MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1937) § 2850.

[12] Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304 (1893); 6 MCQUILLAN, MUNICIPAL CORPORATIONS § 2850.

[13] 6 MCQUILLAN, MUNICIPAL CORPORATIONS §§ 2850, 2859; Notes (1935) 99 A. L. R. 686; (1928) 57 A. L. R. 406; (1927) 51 A. L. R. 370; (1926) 42 A. L. R. 263.