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Municipal Corporations--Non-Liability for Wrongful or Negligent Acts or Omissions of Officers and Agents, Acting in a Public or Governmental Capacity

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MUNICIPAL CORPORATIONS—NON-LIABILITY FOR WRONGFUL OR NEGLIGENT ACTS OR OMISSIONS OF OFFICERS AND AGENTS, ACTING IN A PUBLIC OR GOVERNMENTAL CAPACITY.—A very important question it seems, for the consideration of lawyers and for future law makers, is the question of liability or non-liability of a municipality for wrongs and injuries caused by the wrongful or negligent acts or omissions of officers or agents of the town or city, while such officers or agents are engaged in a so called governmental function. From a review of the cases on this question, it would seem that the law is fairly well settled on the point in this, and in most of our states, but whether it is settled correctly and as it should be is quite another question. It is the purpose of this articles to attempt to show that the law on the question as apparently settled in this state, is not always satisfactory in its application to the cases, that it calls for arbitrary decisions from the courts as to just what is a governmental and what a private or proprietary function, that possibly it is wrong, or at least should be open to careful consideration by our courts and legislature.

The rule of law as generally applied is that, in the absence of statute, a muncipality is not liable for injuries received through the negligence or wrongful acts of its officers while acting in the capacity of governmental agents, while engaged in a governmental function.[1] But, a town or city is liable for the injuries caused by the wrongful act or negligence of its officers while engaged in the exercise of so-called private or proprietary function.[2] Such it seems is the general rule followed in this state and in almost all the states of this country. The question then is, what is a governmental act or function, and what a so called private or proprietary act or function, and when is an officer acting in a governmental capacity and when in a private capacity? Is there any real distinction between the governmental acts on the one hand, and the private acts on the other, such as will justify the application of two different rules

[1] Brown's Adm'r. *v.* Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707 (1890); Gibson *v.* City of Huntington, 38 W. Va. 177, 18 S. E. 447 (1893); Bentlett *v.* Town of Clarksburg, 45 W. Va. 393, 31 S. E. 918 (1898); Shaw *v.* City of Charleston, 57 W. Va. 433, 50 S. E. 527 (1905); Mendel and Company *v.* City of Wheeling, 28 W. Va. 233 (1886); Ritz *v.* City of Wheeling 45 W. Va. 262, 31 S. E. 993 (1898); Carder *v.* City of Clarksburg, 131 S. E. 349 (W. Va. 1926).

[2] Haley *v.* City of Boston, 191 Mass. 291, 77 N. E. 888 (1906); Tomlin v. Hildreth, 65 N. J. L. 348, 47 Atl. 649 (1900); Fisher *v.* City of Newbern, 140 N. C. 506, 53 S. E. 342 (1906); Wigal's Administratrix *v.* City of Parkersburg, 74 W. Va. 25, 81 S. E. 554 (1914).

of law? It is submitted that there is no real distinction between the so called governmental and the private acts of the city officers, and it is believed that a short review of some of the cases will serve to show how arbitrary the courts have been in deciding whether an act of a city officer is governmental or private, and into what confusion the courts have been thrown in an attempt to draw the distinction and apply the law, for the difficulty in applying the doctrine of liability or no liability, is in determining whether the function performed was of a governmental or a private nature.[3]

In a West Virginia case, a small son of the plaintiff had been injured and died because of having been confined in a filthy and unsanitary city jail, and because of negligent and inhuman treatment which he received from officers of the city, while so confined. In an action by his father against the city, the court held the city not liable, on the sole ground that the city officers in imprisoning the boy, were acting in a governmental capacity.[4] The court there admits that a grievous wrong had been done the plaintiff, and that his little son had suffered barbarous and inhuman treatment at the hands of the city officers, but it says that the hardship of the case cannot be permitted to overthrow fundamental principles of law.[5]

In another case, Mendel and Company lost a factory building by fire in the city of Wheeling. The city owned and operated its waterworks for the purposes of fire protection, and received water rents from those supplied with water. Mendel and Company were supplied with water and paid the charge. The property was destroyed because the supply pipes, through the negligence of the city, were suffered to become clogged with mud so that they would not supply any water. In a suit by Mendel and Company against the city, the court held the city not liable for damages for the loss, because it was acting in a governmental capacity in supplying the water.[6]

In still another very recent case, the city of Clarksburg owned and operated a motor tractor used for work in the construction of its streets. The agents of the city negli-

[3] Carder *v.* City of Clarksburg, 131 S. E. 349, at 350 (W. Va. 1926).
[4] Shaw *v.* City of Charleston, 57 W. Va. 433, 50 S. E. 527 (1905).
[5] Shaw *v.* City of Charleston, *supra*, n. 4, opinion by Mr. Justice Poffenbarger.
[6] Mendel and Company *v.* City of Wheeling, 28 W. Va. 233 (1886).

gently left this tractor parked on a certain street, in a populous part of the town, and on an incline, unlocked and unguarded. The plaintiff's intestate, a small boy, while playing in the street, climbed on the tractor, it ran down the incline with him, threw him off and killed him. In a suit against the city, the court held no liability on the ground that the tractor was so parked by the agents of the city in the exercise of a governmental function, and that being true, the city was not liable for the negligence of its officers. The court also refused to allow liability on the theory that the street was out of repair, under the West Virginia statute,[7] though the court says that if the tractor had run down the incline of its own weight, and the plaintiff's intestate had been injured by it, that the city would then have been liable under that statute.[8]

Such then are some of the decisions that excuse a municipality from liability for the results of its negligence or wrong, because the city was acting in the so called governmental capacity. What is the justification for such decisions? Why should a city or town be excused for wantonly or negligently causing the death of a small boy, or the destruction of a citizen's property, when an individual would not be excused under the same circumstances, merely on the theory that it is acting in a governmental capacity?

Now in looking to the decisions where liability is imposed on a city on the ground that it is acting in a private capacity, the confusion of the courts as to just what is private and what governmental will become apparent.

In a case, the city of Parkersburg was held liable for the death of the plaintiff's intestate caused by the bursting of a water tank which the city maintained for the purpose of supplying its citizens with water for domestic use.[9] Therefore, a city supplying water for domestic use is acting in a private capacity and so liable, while a city supplying water for the purposes of fire protection is acting in a governmental capacity, and so not liable for its negligence, according to the decisions.

In the following cases municipalities have been held liable for acts of negligence.

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[7] W. VA. CODE 1923, c. 43, §167.
[8] Carder *v.* City of Clarksburg, *supra* n. 3.
[9] Wigal's Administratrix *v.* City of Parkersburg, *supra* n. 2.

For injury to property by escaping smoke from a pumping station.[10] For placing a hydrant in the curb of a sidewalk so close that the wheel of a carriage, in passing, struck it.[11]

For negligently permitting its supply of water in its waterworks system to become polluted, so that the plaintiff's intestate contracted typhoid fever and died from using the water.[12]

For negligently laying mains and pipes under and across a public highway.[13] These have all been held to be private or proprietary acts of the city, for the negligent performance of which the city is liable just as an individual would be. Also, cleaning the streets,[14] constructing sewers,[15] maintaining a city prison,[16] or driving an ash cart,[17] have been held to be private or corporate acts, and so the city liable for their negligent doing, whereas, the building and operation of a drawbridge,[18] the maintenance of a city hall and other municipal buildings,[19] driving an ambulance,[20] and maintaining a city hospital[21] have been held to be governmental acts, excusing the city from any liability for injuries caused by their negligent performance.

Such seems at best, an unconvincing distinction. From this review of decisions in cases that have arisen, it becomes apparent that there is no uniformity among the courts as to just what is a governmental, and what a private act of the city. While the rule of law seems fairly well settled, it is seen that it is very difficult of application, and that each court must arbitrarily decide for itself, what is a governmental and what a private act. It is submitted that there is no real distinction between the two kinds of cases, and that the law, as it is, in its attempted application, works too many hardships and ought to be otherwise. After all, why should a town or city not respond in damages just as an individual, when by its wrongful or negligent act,

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[10] Gordon *v.* Silver Creek, 127 N. Y. App. Div. 888 (1886).
[11] St. Germaine *v.* City of Fall River, 177 Mass. 550, 59 N. E. 447 (1901).
[12] Keever *v.* City of Mankato, 113 Minn. 55, 129 N. W. 775 (1911).
[13] City Council of Augusta *v.* Mackey, 113 Ga. 64, 38 S. E. 339 (1900).
[14] Young *v.* Metropolitan Street Railway Company, 126 Mo. App. 1, 103 S. W. 135 (1907).
[15] Ely *v.* St. Louis, 181 Mo. 723, 81 S. W. 168 (1904).
[16] Edwards *v.* Town of Pocahontas, 47 Fed. 268 (1891).
[17] Missano *v.* Mayor of New York, 160 N. Y. 123, 54 N. E. 744 (1899).
[18] Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397 (1906).
[19] Schwalk's Adm'r. *v.* Louisville, 135 Ky. 570, 122 S. W. 860 (1909).
[20] Maximillian *v.* Mayor of New York, 62 N. Y. 160 (1875).
[21] Tollefson *v.* Ottawa, 228 Ill. 134, 81 N. E. 823 (1907).

it causes death or injury to an individual? Is it more important to excuse cities from liability for their admitted negligence, than it is to compensate private citizens for their wrongful injury? Will such a rule as is applied in this state today, have a tendency to make towns and cities more or less careful of the interests of private citizens? Clearly there can be but one answer to that question.

It has been held that a city is liable to an individual for negligent or wrongful governmental acts, if such acts amount to a taking of the individual's property.[22] Therefore, according to the decisions, a man's property is of more importance than his life.

That a few of the courts have dared to fly in the face of the doctrine and hold the city liable regardless of the question of whether it caused the injury in the doing of a governmental or a private act, will be seen from a careful review of the cases. In the state of Ohio, a city was held liable for damages to one who was injured by a negligently driven fire engine, returning from a fire.[23] Clearly the city there was acting governmentally, as defined by the courts, and yet the court imposed liability. The strongest dissenting state, however, from the general rule as here discussed, seems to be that of New York, where apparently the courts hold municipalities liable for their negligence in all cases, regardless of the question of the governmental or private nature of the act.[24] Cases from that state show that in all cases of injuries resulting from defective condition of school buildings, or from negligence of the persons in charge thereof, New York imposes liability on the city or on the board of education, though the usual rule is to exempt from liability, as education is purely a governmental function. So we may say that the state of New York, though she stands almost alone in this respect, refuses to draw the artificial distinction between the so called governmental and private acts, but imposes liability on the town or city just as it would on an individual, for

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[22] Jordon *v.* City of Benwood, 42 W. Va. 312, 26 S. E. 266 (1896); Ashley *v.* City of Port Huron, 35 Mich. 296, 24 Am. Rep. 552 (1877).

[23] Fowler *v.* City of Cleveland, 100 Oh. St. 158, 126 N. E. 72 (1919).

[24] Wahrman *v.* Board of Education, 187 N. Y. 331, 80 N. E. 192 (1907); Titusville Iron Company *v.* City of New York, 207 N. Y. 203, 100 N. E. 806 (1912); Kelly *v.* Board of Education, 191 App. Div. 251, 180 N. Y. S. 796 (1920); Van Dyke *v.* City of Utica, 203 App. Div. 26, 196 N. Y. S. 277 (1922); Herman *v.* Board of Education, 234 N. Y. 196, 137 N. E. 34 (1920); Williams *v.* Board of Trustees, 204 App. Div. 566, 198 N. Y. S. p. 476 (1923); 34 YALE L. J. 129, and cases there cited.

injuries resulting from its wrongful or negligent act. It is suggested that New York is perhaps right in this, and that the courts of our own and other states would do well to follow her lead.

—J. H. W.

VENDOR AND PURCHASER—COMPLETE PURCHASER—DOCTRINE OF.—In a recent case, the plaintiff, as owner of the oil and gas under a seventy-five acre tract, seeks by a bill in equity to perpetually enjoin the defendant, lessee of the board of education, from drilling a well, and to cancel, as a cloud upon plaintiff's title, the lease from the board of education to the defendant. The only issue of fact is whether the plaintiff is a complete purchaser of the oil and gas rights in the tract without notice of the rights of the defendant under an unrecorded deed to the board of education from a common grantor. *Held,* that to be protected by Section 5, Chapter 74 of the Code, against a prior unrecorded deed, one must be a *complete* purchaser for value, must have had no notice of the prior contract or deed, and must have paid *all* the purchase money for the land purchased by him. *United Fuel Gas Co.* v. *Morley Oil and Gas Co.,* 131 S. E. 716 (W. Va. 1926).

In laying down the above rule the Supreme Court has followed the common law doctrine of "complete purchaser", whereby one, though he had paid part of the consideration, if he received notice of a prior claim before completing the payment (or even after paying the *whole,* if he received notice before obtaining his conveyance), would lose all his claim upon the land. *Tourville* v. *Naish,* 3 P. Wms. 307; *Wigg* v. *Wigg,* 1 Atk. 384; *Story* v. *Lord Windsor,* 2 Atk. 630; *Beverley* v. *Brooke,* 2 Leigh 446. This common rule has been uniformly followed in West Virginia by recent decisions and perhaps by all the decisions in this state on the point with the exception of one case. *Mitchell and Romine* v. *Dawson,* 23 W. Va. 86. In that case however, the court held that C although he received notice of B's equitable lien before paying all the purchase price, took the land from A discharged from B's lien except as to that part of the purchase money still due from C to A at the time he received notice of B's lien. The Supreme Court