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Negligence--Tort Liability of Municipal Corporations

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decree is not finally established.¹⁹ It follows, therefore, that if the Supreme Court was apprehensive in allowing domicile to be attacked in sister states, it would not allow a second element (length of residence) to enter and become an additional ground for collateral impeachment.

It is true that these residency requirements have useful purposes in protecting defendants, in preventing non-residents from using state courts as a “dumping ground” for the marital troubles of other states, and in protecting society from “quickie” divorce suits.²⁰ However, these desirable results which are achieved by labelling length of residence a jurisdictional fact seem to be of less importance when it is apparent that such a “labelling” also leads to a lessening of the finality of courts’ decisions and tends to destroy any measure of uniformity that is present among the states. These latter results are clearly in opposition to the fixed purposes of our legal system and should be avoided.

HARVEY M. ADELSTEIN

NEGLIGENCE — TORT LIABILITY OF MUNICIPAL CORPORATIONS

The city of Cleveland employed dynamite while improving and developing the Brookside Park Zoo. Plaintiff’s property, located near the zoo, was damaged by subterranean tremors resulting from the blasting. Plaintiff sued, joining the city of Cleveland and E. I. Du Pont de Nemours & Company, Inc., the latter having supplied the explosives to the city. The common pleas court dismissed the action as to the city of Cleveland and the court of appeals affirmed.² The Supreme Court of Ohio sustained the judgment.² Although the court conceded that the city’s use of dynamite created an absolute nuisance,³ it held that because the improvement and development of a public zoo is a governmental function of a municipal corporation, the city was immune from liability which was predicated upon a common-law tort action. Nor was plaintiff permitted to avail himself of section 723.01 of the Ohio Revised Code, which places a duty upon the municipality to keep its public grounds free from nuisance,⁴ for the court concluded that he was not within the intended scope of the statute’s protection.

In denying plaintiff an action based upon common-law tort, the court applied a basic principle of municipal corporation tort liability. There has developed in this field of law a distinction between acts

². Holman v. Holman, 35 Tenn. App. 273, 244 S.W.2d 618 (1951); Roberts v. Roberts, 144 Tex. 603, 192 S.W.2d 774 (1946); Aucutt v. Aucutt, 122 Tex. 518, 62 S.W.2d 77 (1933).
which are proprietary in nature and those which are basically governmental functions. If an injury results from the municipality's acting in its proprietary capacity, the municipality may be liable in an ordinary tort action; if the act is a governmental function of the municipality, no tort liability exists. In the latter instance, the injured party may have a remedy in Ohio by virtue of section 723.01.

With the progressive expansion of municipal activity, it has become increasingly difficult to distinguish between a governmental and a proprietary function, and consequently, the courts have encountered difficulties when applying the concept.

The most thorough explanation of the proper test to be applied when distinguishing between functions was given in *City of Wooster v. Arbenz.* In that decision the court classified a function as "governmental" if it were one which the state was originally obligated to perform, but which was undertaken to be performed by the municipality. The court stated that protection against fires, crimes, and health hazards is an obligation of the state, and when carried out by the municipal corporation, the entire state is benefited. Thus, these particular functions were enumerated as being governmental. The court, however, classified a function as "proprietary" if the state was under no duty to perform it, and its performance, therefore, would be of benefit only to the municipality and its citizens. Thus, providing public markets and supplying water and lighting, were listed as proprietary.

Although the test enunciated in that decision appears to be clear and conclusive, the Ohio Supreme Court's application of that rule has been utterly confusing. For instance, the most critical analysis fails to disclose the functional difference between the construction of a sewer and its subsequent maintenance and repair. Yet, the court has held that sewer construction was a governmental function, and its subsequent repair, proprietary. Applying to the present case the

1. The suit against Du Pont was later compromised.
3. See Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914); City of Tiffin v. McCormack, 34 Ohio St. 638 (1878).
4. *Ohio Rev. Code* § 723.01 provides: "Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance." This duty was first imposed in 1852. 50 Ohio Laws 244.
5. Two early Ohio cases enunciating the doctrine are City of Cincinnati v. Cameron, 33 Ohio St. 336 (1878), and Wheeler v. City of Cincinnati, 19 Ohio St. 9 (1869).
6. 116 Ohio St. 281, 156 N.E. 210 (1927).
8. Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E.2d 243 (1949). Other examples: *compare* Beebe v. City of Toledo, 168 Ohio St. 203, 151 N.E.2d 738 (1958) (operation of city dump held proprietary), *with* Broughton v. City of Cleveland, 167 Ohio St. 29, 146 N.E.2d 301 (1957) (operation of garbage collection held governmental); *compare* State *ex rel.*
test announced in the *Arbenz* decision,\(^9\) it appears that the improvement of a zoo is not a state obligation undertaken by the city, nor, therefore, a benefit to the state as a whole. It should have been properly classified as a proprietary function of the city.\(^10\)

Having denied plaintiff a common-law action, the court proceeded to construe section 723.01 of the Ohio Revised Code, which places a duty upon the municipal corporation to keep its public grounds free from nuisance. As a result of a strict construction of this statute, plaintiff was excluded from the scope of its protection. The court held that because plaintiff was not a "user" of the zoo at the time of his injury, he had no right to bring an action based upon the statute. In arriving at this determination, the court relied heavily upon the language in *Standard Fire Insurance Co. v. City of Fremont.*\(^11\) In that case, it was emphatically stated that the statute protects only the *users* of the public streets, sidewalks, and parks. Thus, in the instant case, because plaintiff's property was not physically located within the confines of the Brookside Park Zoo, plaintiff was denied recovery.

In the *Standard Fire* case, the Supreme Court reiterated its view toward the construction and interpretation of this statute: the common law clothed the sovereign with immunity from suit; since a statute authorizing an action against a municipality is in derogation of the common law, it must be strictly construed.\(^12\)

This position, however, is not necessarily well-founded. In the cases involving this statute, the court has failed to make mention of section 1.11 of the Ohio Revised Code, the pertinent part of which follows:

> Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws . . . .

A remedial law has been described as one which affords a remedy, and the remedy afforded may be one which corrects a defect in the common law.\(^13\) At common law, a municipal corporation incurred no

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White v. City of Cleveland, 125 Ohio St. 230, 181 N.E. 24 (1932) (operation of Public Auditorium held proprietary), *with* Selden v. City of Cuyahoga Falls, 132 Ohio St. 223, 6 N.E.2d 976 (1937) (operation of swimming pool held governmental).

9. 116 Ohio St. 281, 284, 156 N.E. 210, 211 (1927). Reference is occasionally made to the test set forth in this case. See, *e.g.*, Eversole v. City of Columbus, 169 Ohio St. 205, 158 N.E.2d 515 (1959).

10. The Ohio Supreme Court has recently acknowledged the irreconcilability of its past decisions in this area. See Eversole v. City of Columbus, 169 Ohio St. 205, 158 N.E.2d 515 (1959).

11. 164 Ohio St. 344, 131 N.E.2d 221 (1955).


13. *Crawford, Statutory Interpretation* § 252 (1940); 2 *Sutherland, Statutory Construction* § 3302 (3d ed. 1943).
liability for a tort resulting from the performance of a governmental function. Thus, a statute which specifically provides a remedy where none had previously existed is clearly remedial in nature. The court's strict construction of section 723.01 appears to be precisely the opposite of that intended by the legislature.

On the other hand, a strong rebuttal can be made to the contention that section 723.01 should be liberally interpreted. It may be urged that regardless of its apparent remedial nature, the statute imposes a new liability,\textsuperscript{14} is in derogation of sovereignty,\textsuperscript{15} and, therefore, should be strictly construed in favor of the municipality.\textsuperscript{16}

A dispute over which of several conflicting maxims of statutory construction to apply actually hides the real issue. The statute will be construed according to the dictates of public policy. If the court favors the financial strength of the municipal corporation and the resulting benefit to the entire citizenry, it will continue to place a strict construction upon the statute. If, however, the court considers the intent of the legislature and shows concern for innocent victims of negligent conduct, it will give force and effect to the statute by means of a liberal construction.

The entire area of municipal corporation tort liability is deserving of critical examination. An injured party's common-law rights, it seems, depend upon a sometimes whimsical classification of municipal functions. The court should either adhere to the test in the \textit{Arbenz} decision, or set a new standard of classification. In either instance, consistency is desirable.\textsuperscript{17} Desirable also, this writer feels, is a liberal approach to section 723.01, because a strict construction defeats the purpose of a statute specifically designed to benefit members of the public injured by negligent acts of a municipal corporation.

\textbf{LAWRENCE M. BELL}

\textsuperscript{15} See 3 Sutherland, \textit{Statutory Construction} §§ 6301-03 (3d ed. 1943).
\textsuperscript{16} The only Ohio Supreme Court case found in which the particular problem was discussed is Phillips Sheet & Tin Plate Co. v. Griffith, 98 Ohio St. 73, 120 N.E. 207 (1918). In that case the court stated that a statute which created a cause of action against a county for injuries received from rioting crowds was remedial and should be liberally construed.

A complete discussion of the often conflicting maxims of statutory interpretation is beyond the scope of this article. For an exhaustive study, see Symposium on Statutory Construction, 3 \textit{Vand. L. Rev.} 365-584 (1950).

\textsuperscript{17} Many writers feel that the distinction is antiquated and should be abolished. For a discussion of this proposition see Prosser, \textit{Torts} 774-75 (2d ed. 1955) and the references cited at note 42 therein.
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