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Municipal Corporations

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a failure of the parties to effect a reconciliation. In the *Smith* case,[10] the court adopted this general rule and held that a contract which is void and unenforcible is not "sanctioned by law" as that term is used in Canon 13; consequently, it is a violation of Canon 13 for an attorney to enter into such a contract. Where the contingent fee contract is related to the amount of support money and alimony awarded to the wife, as was the case here, there is the additional objection that such a contract would interfere with the duties of the court.

In fixing the amount and time of payment of support money and alimony, the court is entitled to have all the facts which would influence its decision. It is also entitled to be free from side agreements which would frustrate the court's effort to make suitable provision for the wife without undue burden on the husband.[11]

JOAN SMITH

Conduct of Lawyer before the Court—Candor. In a trial on a breach of contract action, the attorney, testifying on behalf of his client, stated that he had paid the cost of a title insurance policy, but did not reveal to the court that he had requested the insurance company to hold his check until the outcome of the trial. In a disciplinary proceeding, In re *Healy,* 143 Wash. Dec. 247, 261 P.2d 89 (1953), the court held that while the attorney did not testify falsely before the trial court, he failed to exercise the candor which is required of him as an attorney. The attorney was suspended from practice for ninety days.

MUNICIPAL CORPORATIONS

Tort Liability. In its national aspect the tort liability of a municipal corporation presents an area of confusion, contradiction, and lack of uniformity. The field is one of refinement, illogic, and apparently capable of resolution only by legislative enactment. In 1953 the Washington Court rendered three significant decisions which serve to clarify our position on the subject. These three cases, in their order of discussion, are *McLeod v. Grant County School Dist.*,[1] *Kilbourn v. City of Seattle,*[2] and *Hutton v. Martin.*[3]

The general common law rule relating to the tort liability of a municipal corporation is: a municipal corporation is liable for torts committed by its agents in the performance of proprietary function, but, *in the absence of statute,* it is not responsible for torts committed in

[10] *Supra* note 1.
[11] *In re* Smith, 42 Wn.2d 188, 254 P.2d 464, 469 (1953).
[1] 42 Wn.2d 316, 252 P.2d 360 (1953).
[2] 143 Wash. Dec. 345, 261 P.2d 407 (1953).
[3] 41 Wn.2d 780, 252 P.2d 581 (1953).

the performance of governmental functions.[4] A municipal corporation engaged in a government function enjoys sovereign immunity from suit, and most jurisdictions recognize a distinction between a municipal corporation proper, *i.e.*, a city, and other governmental subdivisions classified as quasi-municipal corporations, *viz.*, school districts, counties, etc.[5] In the absence of statute, quasi-municipal corporations are almost never liable for torts because they are presumed to exercise governmental functions only. Apparently to abrogate the common law rule of immunity for governmental functions, as well as to destroy the distinction of quasi-municipal corporations from municipal corporations proper, the legislature enacted RCW 4.08.120[6] which provides in part: "An action may be maintained against a county, or other of the public corporations mentioned in RCW 4.08.110, . . . for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation." RCW 4.08.110 mentions ". . . county, incorporated town, school district or other public corporation of a like character. . . ."

The first case, *McLeod v. Grant County School Dist.*,[7] illustrates the result reached when the above statute is literally read. Plaintiff, a twelve year old girl, was raped by two fifteen year old students in a darkened room under the gymnasium grandstand of the public school; the door to this room in the gymnasium was left unlocked, and the teacher ordinarily supervising noon activities had absented himself. In an action against the defendant for negligence for failure to adequately supervise and allowing accessibility to "the darkened room," *Held:* for plaintiff and cause remanded with directions to overrule the demurrer to plaintiff's amended complaint.

That a school district may be held liable for damages for rape of a student is admittedly startling. The aforementioned statute was literally applied to remove a common law immunity based on performance of a governmental function. The only immunity granted to a school district appears from judicial construction of statutory proviso RCW 28.58.030 which reads: "No action shall be brought or maintained against any school district, its agents, officers, or employees relating to any park, playground, or field house, athletic apparatus or appliance of manual training equipment, whether situated in or about any school house or

[4] Harris v. Des Moines, 202 Iowa 53, 209 N.W. 454 (1926). See also 48 MICH. L. REV. 41 (1949-50).
[5] 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.05 (3d ed., 1950).
[6] As amended by L. 1953, c. 118, § 2.
[7] *Supra* note 1.

elsewhere, owned, operated or maintained by the school district." This partial restoration of the common law has been construed narrowly to give immunity only where the injury is sustained in connection with athletic apparatus or appliances or manual training equipment, by regarding that portion of the statute referring to "any park, playground, or field house" as used in the adjectival sense, *i.e.*, merely enumerating the places in which the devices must be located.[8] Thus, a school district may be liable for an injury sustained on a school playground if no athletic apparatus, etc., is involved.[9] This distinction is significant because the statute could have as easily been construed to apply to injuries suffered as a result of the school's negligence occurring in the enumerated locations. A football is not an athletic appliance or apparatus within the meaning of the statute since it has been interpreted to have reference to some sort of "more or less permanently located equipment."[10] In view of the court's reluctance to grant immunity in even this narrowly confined area, the holding of the *McLeod* case is not quite so surprising as at first blush. As custodian of its pupils through its agents, officers, and employees, a school district must maintain adequate supervision, for ". . . a duty is imposed by law on the school district to take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated."[11] The decision may be open to criticism on the basis of tort principles, but it must be remembered that the extent of the decision in this field was only refusal to rule as *a matter of law* that there was no negligence. In any event, outside the aforementioned exceptions, the liability of a school district for the tortious acts of its officers, agents, or servants is governed by the normal rules of tort law.[12]

A literal reading of RCW 4.08.020 would indicate that a municipal corporation and such quasi-municipal corporations as counties, school districts, etc., would be subjected to the same tort liability. However two distinct lines of decision have arisen. As demonstrated by the *McLeod* case, the statute has been construed to completely abrogate the common law rule of quasi-municipal corporation immunity, but in reference to municipal corporations proper, *i.e.*, cities, the Washington

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[8] Stoval v. Toppenish School Dist., 110 Wash. 97, 188 Pac. 12 (1920); see also Juntila v. Everett School Dist., 178 Wash. 637, 35 P.2d 78 (1934).
[9] Stoval v. Toppenish School Dist., *supra* note 7.
[10] Briscoe v. School Dist., 32 Wn.2d 353, 201 P.2d 697 (1949).
[11] *Ibid.*
[12] *Ibid.*

Court has ignored the statute and preserved the governmental and proprietary distinction and determined whether liability exists on this basis.[13] Judicial disregard of the statute's application to *both* types of municipal corporations has been conscious![14] In refusing to regard them similarly the court has said that to deny immunity to a city ". . . would be to unsettle the law of damages."[15] Thus, subject to a minor deviation,[16] the common law rule is still in force when a municipal corporation proper is a party defendant.

An important exception to the general rule that a municipal corporation, in the absence of statute, is not responsible for torts committed in the exercise of a governmental function exists where injury is sustained by a person as a result of a nuisance created, maintained, or permitted by the municipality. Washington has recognized the exception[17] but had not ruled on the matter where the nuisance was attributable to the *negligence* of a city until *Kilbourn v. City of Seattle*.[18] Plaintiff brought the action individually and as guardian for his child. The child, while playing on a cinder pathway in a city park, was struck by a dead limb which fell from a tree; although the area was inspected daily and dead limbs removed, this particular one had been dead for four or five years. *Held:* affirming the trial court's judgment n.o.v. in favor of defendant, (1) operation of a city park is a governmental function, and the city is immune from liability for negligence; and (2) if a city creates, permits, or maintains a nuisance, and its existence is a consequence of negligence, the city is immune unless the situation constitutes a nuisance *per se*.

The attempt to urge the court to follow RCW 4.08.120 was unsuccessful, leaving as the only basis for liability the well-recognized nuisance exception. The Washington Supreme Court's position is that

[13] Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605 (1894).

[14] Howard v. Tacoma School Dist., 88 Wash. 167, 152 Pac. 1004 (1915).

[15] *Ibid.*

[16] Phinney v. Seattle, 34 Wn.2d 330, 208 P.2d 879 (1949), where D city's failure to provide a stop sign was proximate cause of auto collision, and P's injury. Statute commanded D to maintain sign at intersections. *Held:* city is liable for failure to perform governmental function commanded by statute. *But see* Bradshaw v. City of Seattle, 143 Wash. Dec. 705, 264 P.2d 265 (1953) (statutory command held too indefinite).

[17] Hagerman v. Seattle, 189 Wash. 694, 66 P.2d 1152 (1937). Nor does the doctrine of immunity apply: (a) where the injury complained of is the taking or damaging of private property for public use, without compensation; (b) where the right of action is based on the failure of the municipal corporation to use ordinary care in maintaining its streets, sidewalks, and public ways in a reasonably safe condition for travel in the usual modes; or (c) the municipal corporation is under a duty specifically commanded by statute to maintain barriers or post warning signs along the highway, or where the situation along the highway is inherently dangerous or of such character as to mislead a traveler exercising reasonable care.

[18] *Supra*, note 2.

despite injustice, despite hardship, and despite the nationwide trend to mollify the harshness of the rule, any change in the rule of governmental immunity of a city must come from the legislature; and since this immunity exists where a city has been negligent, there is no basis for liability on a nuisance theory if the nuisance has its origin in negligence. The logic of this position must be admitted. There is considerable authority, nevertheless, for the proposition that where a municipal corporation creates or permits a nuisance by non-feasance or misfeasance, it is liable to any person suffering special injury therefrom, *irrespective* of the question of negligence.[19] This has been the means used to circumvent the hardships and injustices which often occur from strict adherence to the rule of governmental immunity. This line of decision was available to the court, but it preferred the logic of its own position. Apparently this predilection for logic was not strong enough for the court to stop ignoring the application of RCW 4.08.120 to an incorporated town, and although stare decisis was not followed where it would "perpetuate error" in *Hutton v. Martin,*[20] it is followed in the *Kilbourn* case to the perpetuation of injustice.

In the two preceding cases there was no question but that the activity conducted was a governmental function. In *Hutton v. Martin*[21] plaintiff's husband was killed when struck by a city garbage truck. In an action against the city (and its employee), *Held:* for the plaintiff; city garbage disposal is a proprietary rather than a governmental function, and consequently there is no immunity from tort liability. In making this decision the court was forced to overrule the previous case of *Krings v. Bremerton,*[22] stating "the doctrine of stare decisis should not be applied in this case where to do so would perpetuate error." Immunity in performance of governmental functions exists by virtue of "borrowed" sovereignty from the state.[23] It exists where the function is performed for the benefit of the general public as opposed to exercise of those powers conferred by the state on a city for the sole benefit of its inhabitants. Thus, the test is simply whether the function is carried out for the benefit of the inhabitants of the municipality, in which case it is regarded as proprietary, or for the common good of the general

[19] Barker v. Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943); Warren v. Bridgeport, 129 Conn. 355, 28 A.2d 1 (1942); City of Weatherford v. Lufton, 189 Okl. 438, 117 P.2d 765 (1941); Wilson v. Portland, 153 Ore. 679, 58 P.2d 257 (1936).

[20] *Supra,* note 3.

[21] *Ibid.*

[22] 22 Wn.2d 220, 155 Pd.2d 493 (1945).

[23] Riddoch v. State, 68 Wash. 329, 123 Pac. 450 (1912).

public, in which case it is considered governmental. A municipality is authorized by statute[24] to operate certain public utilities which may be roughly categorized: (1) waterworks; (2) sewerage systems and plants for garbage collection and disposal; (3) public markets and cold storage plants; (4) plants for manufacture of materials used in street construction; (5) transportation of freight and passengers; and (6) plants for furnishing gas, electricity, and other means of power. Of these public utilities only[25] garbage disposal had previously been held to be a governmental function.[26] Liability of a city in connection with garbage disposal in other jurisdictions has usually involved the question of nuisance where the governmental-proprietary distinction is not controlling, but where the question has arisen with regard to the negligent operation of garbage trucks it has been held to involve the exercise of a proprietary function.[27] By placing garbage disposal in the proprietary classification, the court has reached a desirable and sensible result. There remain to be decisions on categories (3) and (4), but since operation of all other public utilities is now regarded as a proprietary function of a municipality, the court probably will in the future include them in that category. By so doing, Washington decisions on tort liability of municipal corporations in the operation of public utilities will have the uniformity the court[28] as well as the public desires, and the doctrine of immunity will not be given a needless extension.

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Local Improvement Guaranty Fund—Use of Fund. In *City of Tacoma v. Perkins*, 42 Wn.2d 80, 253 P.2d 957 (1953), it appeared that money from a local improvement guaranty fund had been used to redeem property lying within a protected and unprotected district. The court held, under RCW 35.54.080, the fact that "there is an incidental or secondary result which inures to the benefit of another district not protected by the fund does not necessarily make it wrong to use guaranty fund money...." Although the fund money could not have been used to redeem property lying solely within an unprotected district, it was permissible to use it to redeem property lying within both districts.

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[24] RCW 80.40.010.

[25] There is no immunity when a city operates waterworks: Russell v. Grandview, 39 Wn.2d 551, 236 P.2d 1061 (1951); sewer systems: Hayes v. Vancouver, 61 Wash. 536, 112 Pac. 498 (1911); electric plants: Abrams v. Seattle, 60 Wash. 356, 111 Pac. 168 (1910); street railways: Koch v. Seattle, 113 Wash. 583, 194 Pac. 572 (1921).

[26] *Supra*, note 18.

[27] Schmidt v. Chicago, 284 Ill. App. 570, 1 N.E.2d 234 (1936); Baumgardner v. Boston, 304 Mass. 100, 23 N.E.2d 121 (1939).

[28] Hutton v. Martin, 40 Wn.2d 781, 252 P.2d 581 (1953).