

## Municipal Corporations: Responsibility in Tort: City Liable Like Private Landowner

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Evidence as to the condition of the refuse, the banana peel or apple core, for example, may be something to support the plaintiff's contention that the refuse had been on the floor for some period of time. *Anjou v. Boston Elevated Ry. Co.*, 208 Mass. 273, 94 N.E. 386 (1911). But see *Sisson v. Boston Elevated Ry. Co.*, *supra*, where the company showed also that a porter was constantly on duty and where the court accepted the company's contention that the bruised condition of the apple core would not support any inference about length of time it might have been on the platform. In *Vick v. Schoff*, (Tex. Civ. App. 1924) 260 S.W. 116, the plaintiff supported his case with the testimony of witnesses who had seen the company's employees eating bananas on the train. In *St. Louis-San Francisco Ry. Co. v. Daniels*, 170 Ark. 346, 280 S.W. 354 (1926), the appellate court held that an instruction on highest degree of care was proper and that the plaintiff had introduced enough evidence to get his case to the jury where he could show that other passengers had kicked other bits of refuse off the same station platform about the same time the plaintiff had been injured. *Cf. Kelly v. Boston Revere Beach & Lynn R. Co.*, 266 Mass. 23, 164 N.E. 624 (1929). In that case the plaintiff had sat upon a needle which was sticking out of a car seat. It appeared that shortly before that happened the conductor had helped a passenger, who had been sitting in the same seat, to pick up the contents of a sewing basket which had been spilled upon the floor. Under the circumstances the court held that an instruction on highest degree of care was warranted and that the plaintiff had made out a case against the company. In the instant case the court seemed concerned only about the instructions on the degree of care. The court felt that the instructions had been too favorable for the defendant but that the error, such as it was, had not affected the plaintiff adversely. It is obvious that the plaintiff did have a case to suggest how the banana peel had come to be where it was and to suggest, too, that the carrier's employees should have discovered it.

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MUNICIPAL CORPORATIONS—RESPONSIBILITY IN TORT—CITY LIABLE LIKE PRIVATE LANDOWNER.—The plaintiff's eight year old son was accidentally shot and killed on the afternoon of April 22, 1930 when struck by a bullet fired by an older boy, one Uccelino. At the time of the accident the deceased was standing near his home and Uccelino was across the street in a public park. The park was an open 18-acre tract of land owned, maintained, and controlled by the defendant city; the management of the park was supervised by a force of city employees. For a period of seven or eight years promiscuous rifle shooting had been indulged in throughout the park by many persons who were not members of any rifle club or similar authorized organization, and the city employees in the park had been present on many occasions and knew that this shooting was being carried on. A verdict was entered for the plaintiff parents of the deceased boy in the sum of \$2,259.72, but the trial court rendered judgment for the defendant city notwithstanding the verdict on the ground that the only negligence shown had no relation to the physical condition of the park, its equipment or the ordinary use thereof, but at most consisted in the neglect of the city to so police the park as to keep order. On appeal, *held*, judgment reversed, the city occupied the position of a landowner in regard to this park and thus the full proprietary liability of a private property owner attached to the city and it became liable for the damages caused by its breach of duty in failing to abate a dangerous condition of which it had notice. *Stevens v. City of Pittsburgh*, (Pa. Super. 1937) 194 Atl. 563.

While the municipal corporation in performing or omitting to perform a duty imposed upon it as an agent of the state in the exercise of strictly governmental or state functions is generally held not liable in a private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents, there is a wide divergence in the decisions as to what functions are governmental or public and what are private or corporate, and functions held to be governmental in some jurisdictions are held to be corporate in others. 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1937) 2792. The principle controlling the instant case was first laid down by the Pennsylvania Supreme Court in *Honaman v. Philadelphia*, 322 Pa. 535, 185 Atl. 1750 (1936), where the court decided that a municipality in acquiring and maintaining parks and playgrounds is acting as a landowner and exercises a proprietary rather than a governmental function and is liable for the improper use of its property in the same manner as private corporations and natural persons. The Wisconsin courts have been strict in their classification of those acts coming within the proprietary functions of a municipal corporation and through the performance of which tort liability may attach to the municipality. See (1937) 21 MARQ. L. REV. 96. In an action for the death of a boy on a city owned bathing beach it was held that as the negligent act causing the act was one being performed by employees of the defendant city as a proper part of their service in maintaining and operating a free public bathing beach as a portion of one of the city parks the city was acting in its governmental capacity and was exempt from liability. *Gensch v. Milwaukee*, 179 Wis. 95, 190 N.W. 843 (1922). The establishment and control of a public playground has also been held to be a governmental function. *Berstein v. Milwaukee*, 158 Wis. 576, 149 N.W. 382 (1914). The right to recover from a municipality even for injuries sustained through the creation or maintenance of a nuisance by the municipality in its governmental capacity does not exist in favor of a person toward whom the municipality was acting in its governmental capacity at the time of the injury. *Virovatz v. City of Cudahy*, 211 Wis. 257, 247 N.W. 341 (1933). In *Erickson v. West Salem*, 205 Wis. 107, 236 N.W. 579 (1931), where a six year old child while at play drowned in an open ditch at the mouth of a sewer located in a public park and within six feet of the street, it was held that as the park, sewer, and ditch were constructed and maintained by the city in its governmental capacity no liability attached to the city. But where a city operates a bathing beach and also furnishes water to private consumers it is liable for injuries caused by its failure to exercise ordinary care to the same extent that a private person or corporation operating a waterworks would be liable. *Nemet v. Kenosha*, 169 Wis. 379, 172 N.W. 711 (1919). A survey of the Wisconsin cases comparable with the instant case reveals that the supreme court has consistently refused to extend the scope of the so-called proprietary functions of municipalities. While in the instant case it was held that the ownership and maintenance of a public park by the City of Pittsburgh was within the scope of its proprietary functions, it has been held in Wisconsin that the ownership of parks, playgrounds, and beaches by a municipality are governmental functions. The Wisconsin legislature in some measure has curtailed the complete freedom from tort liability which municipal corporations in this state had long enjoyed in their governmental functions, when by statutory enactment it was provided that municipalities were not exempt from liability for injuries to persons or property caused by mob action, [WIS. STAT. (1937) § 66.07], defective roads and bridges, [WIS. STAT. (1937) § 81.15], or the negligent operation of city-owned motor vehicles [WIS. STAT. (1937) § 66.095]. However, this action by the legislature has not, up until

the present time, influenced the supreme court to "liberalize" its classification of those acts falling within the proprietary capacity of municipalities; as is evidenced by the court's holding in two recent cases above mentioned. See *Virovatz v. City of Cudahy*, and *Erickson v. West Salem*, *supra*.

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PAWNBROKERS AND MONEYLENDERS—A PAWNBROKER CANNOT QUALIFY AS A HOLDER IN DUE COURSE OF NEGOTIABLE STOLEN BONDS WHERE STATUTE REQUIRES PAWNBROKER TO PUBLICIZE LOANS AND ACCOUNT TO OWNERS OF STOLEN GOODS.—The plaintiff was a pawnbroker. It was an Illinois corporation. Two negotiable bonds were pledged with it by a pawnor to secure a loan of \$600. The bonds on their face were worth \$2000. The bonds had been obtained fraudulently by someone from the claimant in the present case. No one in the pawnbroker's employ knew of that fact. The third party claimant had notified the office of the state's attorney that the bonds had been obtained from her. The pawnbroker made its daily report to the police officials as required by the local regulatory statutes. The pawnbroker listed the bonds. The state's attorney detected the missing bonds and demanded that the pawnbroker turn the bonds over to his office. The pawnbroker complied, but thereafter demanded a return of the bonds, claiming to have been a holder in due course. When the bonds were not returned the pawnbroker sued the state's attorney for conversion. The defendant interpleaded the third party claimant. After a trial by the court the trial court found judgment for the third party. On appeal, *held*, judgment affirmed. The plaintiff was affected by the pawnbroker's statute notwithstanding its status in other respects as a holder in due course of negotiable paper. *Swesnik Loan Co., Inc. v. Courtney*, (Ill. App. 1937) 10 N.E. (2d) 512.

Whether the plaintiff had given value to the pledgor of the bonds without reason to suspect any defect on the pledgor's claim was not material in the opinion of the appellate court. The plaintiff had accepted the goods in pawn. The company had complied with the statute in making its reports. And the statute is intended to aid in the recovery of stolen goods. It has been held that a pawnbroker who can qualify as a holder in due course is protected against the previous holders of negotiable paper notwithstanding the fact that he has taken them in pawn. *American Railway Express Co. v. Gallant Loan and Mercantile Co.*, (Mo. App. 1924) 259 S.W. 828; *American Railway Express Co. v. Frieman Loan & Mercantile Co.*, (Mo. App. 1924) 260 S.W. 1008. It is to be noted, however, that in these cases there was apparently no pawnbrokers' statute effective in the jurisdiction where cases were decided. Certainly the courts did not call attention to any regulatory statutes or ordinances. Courts as well as legislatures may choose to hold pawnbrokers to a high standard of care in their business. The doctrine of apparent authority will not be available to the pawnbroker who lends to one with "authority" only to sell or to display. *Silberfeld v. Solomon*, 70 Colo. 413, 202 Pac. 113 (1920); *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. (1882). The New York court, however, has chosen to extend the protection of the "Factors' Act" to pawnbrokers. *Nelkin v. Providence Loan Society of New York*, 265 N.Y. 393, 193 N.E. 245 (1934).