St. John's Law Review

Volume 27, December 1952, Number 1 Article 16

Torts--Municipal Liability for Illegal Acts of Third Parties (Caldwell v. Village of Island Park, 304 N.Y. 268 (1952))

St. John's Law Review

In the principal case, the statute was construed to grant the privilege to *public* judicial proceedings, since any other construction would defeat the public policy behind the statute. The privilege is thereby denied whenever the proceedings have been made *private* by court rules sealing the record.

Although the decision is sufficiently broad to encompass other sealed matter,[17] nevertheless, it may be limited to the specific type of matter here involved, that is, filed pleadings in matrimonial actions. The rule, as a practical matter, should not be extended to cover sealed testimony. The latter conclusion is supported by the distinct legal histories,[18] public policies and practical considerations attending testimony and filed pleadings.

Viewed practically, the decision would curtail undesirable newspaper sensationalism, which in turn would implement the protection of public morals, especially of young and impressionable adolescents. A further result of this case will be the protection of the reputation of those so often falsely accused as correspondents in matrimonial actions.

TORTS — MUNICIPAL LIABILITY FOR ILLEGAL ACTS OF THIRD PARTIES.—Plaintiff sued on a negligence theory to recover damages for injuries caused by fireworks illegally discharged[1] by invitees in defendant-municipality's park. Defendant's employees had previously seen, but had not stopped, similar fireworks. Although an admission fee was normally charged, none was required at the time of the injury, nor were the above-mentioned employees present. The

---

and . . . relief was awarded . . . ." Whereas in the *Stevenson* case ". . . the published report was the contents of the affidavit of the plaintiff . . . made in support of a motion . . . . The affidavit and notice of motion were served and filed in court. No opposition papers were served or filed and the motion was never submitted or argued but was withdrawn." *Id.* at 288. Judgment was rendered for the defendant, the court holding that Rule 278 did not take away the privilege.

[17] As, for example, the records and documents relating to the admission or discipline of attorneys, or for the confinement of the mentally ill. N. Y. JUD. LAW § 90(10); N. Y. MEN. HYG. LAW § 74(6).

[18] With the exception of a few early cases, the courts have consistently recognized the applicability of the privilege to reports of testimony. Only recently have merely-filed pleadings come within the scope of the privilege. Moreover, to extend the rule to include sealed testimony would appear to be a futile act in view of the fact that spectators are often allowed to witness the testimony as it is given. Thus they could disseminate what the court had sealed.

[1] N. Y. PENAL LAW § 1894(a)(2).

trial court's decision for plaintiff was reversed on the law by the Appellate Division. The Court of Appeals reversed, and *held:* A municipality is liable for injuries sustained as a result of patently dangerous and criminal acts of third parties within a public park if it has actual or constructive notice of these acts and their probable continuance. *Caldwell v. Village of Island Park,* 304 N. Y. 268, 107 N. E. 2d 441 (1952).

In the maintenance and supervision of public parks, a city performs a corporate or quasi-private function.[2] Where an admission fee is charged, there is no doubt that the operation of the park is a private and profit-making enterprise, and liability will be imposed for negligent acts of the city.[3] It would appear, however, from dicta in the case of *Whittaker v. Franklinville,*[4] that where the negligent act is one of omission [5] and no entrance fee is charged at any time, the governmental immunity rule would apply and protect the city from liability.

The city is not an insurer of the safety of those who use its parks,[6] but a duty devolves upon it to exercise ordinary care.[7] In this respect, it is liable in the same degree and on the same basis as individuals or private corporations.[8] Liability is readily imposed for injuries resulting from defective equipment or facilities,[9] or from failure adequately to protect against unsafe conditions existing in the park and likely to be a menace to human safety.[10]

---

[2] *Cf.* Augustine v. Town of Brant, 249 N. Y. 198, 163 N. E. 732 (1928); see also Note, 142 A. L. R. 1340, 1350 (1943).

[3] Augustine v. Town of Brant, *supra* note 2.

[4] 265 N. Y. 11, 17, 191 N. E. 716, 719 (1934).

[5] N. Y. COURT OF CLAIMS ACT § 8. The state's waiver of immunity under this Act has been interpreted by the courts to exclude liability for negligent acts of omission if the function is governmental rather than corporate. See Note, 24 N. Y. U. L. Q. REV. 38 (1949).

[6] *See* Clark v. Buffalo, 288 N. Y. 62, 65, 41 N. E. 2d 459, 460 (1942); Curcio v. City of New York, 275 N. Y. 20, 23, 9 N. E. 2d 760, 762 (1937); Scala v. City of New York, 200 Misc. 475, 480, 102 N. Y. S. 2d 790, 795 (Sup. Ct. 1951).

[7] Rafsky v. City of New York, 257 App. Div. 855, 12 N. Y. S. 2d 560 (2d Dep't 1939); *cf.* Curcio v. City of New York, *supra* note 6; *see* Collentine v. City of New York, 279 N. Y. 119, 17 N. E. 2d 792 (1938).

[8] *See* Bailey v. Mayor of New York, 3 Hill 531, 539 (N. Y. 1842); Honaman v. Philadelphia, 322 Pa. 535, 185 Atl. 750, 751 (1936).

[9] See Collentine v. City of New York, *supra* note 7 (iron bar protruding from roof frequented by children); Warner v. Albany, 262 App. Div. 677, 31 N. Y. S. 2d 75 (3d Dep't 1941) (faulty park bench); McMahon v. Buffalo, 257 App. Div. 916, 12 N. Y. S. 2d 116 (4th Dep't 1939) (broken bottle embedded in park path).

[10] See Clayton v. Niagara Falls, 252 N. Y. 595, 170 N. E. 2d 156 (1930) (failure to guard hole in ice); Fedearowicz v. Amsterdam, 293 N. Y. 814, 59 N. E. 2d 178 (1944) (failure to warn against danger of using pool); Riggi v. Village of Le Roy, 301 N. Y. 735, 95 N. E. 2d 410 (1950) (failure to guard playground apparatus when supervision was suspended).

However, when the injuries suffered result from the acts of third persons invited into the park, it is more difficult to decide whether or not the city is liable. Because of the great difficulty in anticipating the actions of park visitors, liability will not be imposed upon a municipality unless it could have foreseen the dangerous act and consequently provided against it.[11] Likewise, the city will be absolved if it does not have actual or constructive notice in time to prevent harm.[12]

In *Greiner v. Syracuse*,[13] the city was released from liability for injury resulting from an unlawful explosion in a public street. Two hours notice to policemen was held insufficient notice to the city. Since this occurrence was not an habitual and continuous invasion of the public right, but merely an "isolated trespass," the city could not be held to have received actual or constructive notice.

In a subsequent New York case, *Fritz v. Buffalo*,[14] plaintiff recovered for injuries received as a result of boisterous activities of third parties on the ice-skating facilities of a public park. The question of notice was not discussed. The only question submitted to the jury was whether the injury resulted from inadequate supervision. Apparently, however, the city had foreseen that such rough and dangerous activities might take place, for it had acted by employing guards to watch for and prevent just such activities. It is probable that had the city provided adequate supervision, it would have been relieved from liability if an injury occurred.[15]

In the present case, the dangerous activities engaged in at the beach park, cannot be classed as "habitual or continuous invasions of the public right" under the rule in *Greiner v. Syracuse, supra,* inasmuch as they occurred on but *two* consecutive days before the injury. Nor is it probable that the city foresaw these actions, as it had in the *Fritz* case, for it took no precautions against them. It therefore seems to follow that the present case represents a lessening of the notice requirement and an increased burden of foreseeability upon the city.

In the majority of jurisdictions, the municipality would have escaped liability on the theory of governmental immunity.[16] In the

---

[11] Clark v. Buffalo, 288 N. Y. 62, 41 N. E. 2d 459 (1942) (child threw glass at plaintiff); Mandelowitz v. City of New York, 277 App. Div. 1134, 101 N. Y. S. 2d 166 (2d Dep't 1950) (boys in playground threw cardboard spools); Laub v. City of New York, 271 App. Div. 797, 65 N. Y. S. 2d 261 (2d Dep't 1946) (observer of handball game knocked down by tricycle).

[12] *Cf.* Greiner v. Syracuse, 228 App. Div. 566, 241 N. Y. Supp. 313 (4th Dep't 1930), *aff'd mem.*, 256 N. Y. 688, 177 N. E. 194 (1931); *see* Bauman v. San Francisco, 42 Cal. App. 2d 144, 108 P. 2d 989, 996 (1940) (notice to employee insufficient).

[13] Greiner v. Syracuse, *supra* note 12.

[14] 277 N. Y. 710, 14 N. E. 2d 815 (1938) (facts appear in unofficial reporter only).

[15] *Cf.* Peterson v. City of New York, 267 N. Y. 204, 196 N. E. 27 (1935).

[16] See Note, 142 A. L. R. 1340, 1342 (1943).

present case, however, the Court of Appeals accepts as well-established the principle that whether or not the park is operated for a profit, the city is acting in a quasi-private or corporate capacity. This seems to limit the force of the dictum in the *Whittaker* case, since liability was imposed despite the fact that no entrance fees were charged at the time the injury occurred.

It appears from this opinion that the court broadened the scope of municipal liability to what is perhaps an unreasonable degree.[17] This decision follows a noticeable, though unfortunate, trend toward an extension of municipal tort liability[18]—unfortunate, since it may result in discouraging small and impecunious municipalities from providing recreational facilities. With the tendency toward a decrease in governmental immunity, the ultimate burden upon the taxpayers will be increased, since they will pay not only for the supervision of parks, but also for injuries resulting from a lack of it.

TORTS—RES IPSA LOQUITUR—EXPLODING BEVERAGE BOTTLE.—Plaintiff was injured when a beer bottle, which she had selected from a shelf in defendant's self-service store, exploded in her hands. In an action to recover damages, plaintiff alleged breach of warranty and negligence. The Appellate Division, reversing a dismissal of the complaint, *held* that an inference of negligence arises when a customer is injured by the unexpected dangerous behavior of an article which was hitherto in the exclusive possession of a store owner. *Day v. Grand Union Co.*, 280 App. Div. 253, 113 N. Y. S. 2d 436 (3d Dep't 1952).

Actions for damages for injuries caused by exploding bottles are generally based either on breach of implied warranty or on negligence. The implied warranties—merchantability[1] and fitness for use[2]—arise only after there has been a contract of sale or transfer of title,[3] and may be enforced only by those in privity of contract.[4]

---

[17] *See* Caldwell v. Village of Island Park, 304 N. Y. 268, 276, 107 N. E. 2d 441, 445 (1952) (dissenting opinion).

[18] *See* Duren v. City of Binghamton, 172 Misc. 580, 583, 15 N. Y. S. 2d 518, 521 (Sup. Ct. 1939), *aff'd*, 258 App. Div. 694, 18 N. Y. S. 2d 518 (3d Dep't), *aff'd*, 283 N. Y. 467, 28 N. E. 2d 918 (1940); see Note, 23 ST. JOHN'S L. REV. 117 (1948).

[1] N. Y. PERS. PROP. LAW § 96(2). "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." UNIFORM SALES ACT § 15(2).

[2] N. Y. PERS. PROP. LAW § 96(1). "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." UNIFORM SALES ACT § 15(1).

[3] Bunday v. Columbus Machine Co., 143 Mich. 10, 106 N. W. 397 (1906); Stearns v. Drake, 24 R. I. 272, 52 Atl. 1082 (1902); Naumann v. Wehle Brew-