

Liability of Municipal Corporations for Nuisance

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*with the discretion of the trustee during the duration of the trust estate."*⁵⁴

The underlying theory behind this and the previous decisions under this statute is, the trustee retains his common law powers, but in any case where a power is inconsistent with the statute, the courts will hold the common law right fails and the statute prevails. It has been asserted that, since this right was unknown to the common law, he has only those powers which the statute gives him. In view of the cases, this assertion seems to be erroneous. In future cases arising under this section as to whether or not the trustee retains a common law power, the answer will be found in the answer to the question: Is the retention of the common law right inconsistent with the statute?

Conclusion.

A trustee has implied authority to lease the trust property. A lease based on this implied power is valid only so long as the trust continues. The trustee can lease for a term to extend beyond the trust by consent of remaindermen, express authority or statute. Under the statute, a lease for a term of five years or less will bind the remainder if the trust should terminate before the expiration of the five years; or, the trustee can lease for a longer term by securing the approval of the court. After securing the approval of the court, he has no authority to modify the terms of the lease, without a like approval by the court, but courts will not advise and direct trustees as to business questions.

LEO F. BOLAND.

LIABILITY OF MUNICIPAL CORPORATIONS FOR NUISANCE.

"A municipality being not only a public agency but also a quasi-private individual is therefore subject to the law. For its wrong to the public it may be prosecuted; for its torts against individuals it may in the proper case be sued in civil action for damages like a private corporation.¹

To formulate a rule as to the liability of a municipal corporation for tort is impossible. This condition is not only due to the

⁵⁴ *Supra* note 3, at 399.

¹ 43 C. J. 920; *Conrad v. Ithaca*, 16 N. Y. 158 (1859); *Healy v. New York*, 3 Hun 708 (1857).

diversity of judicial determinations but also to the dual functions of the municipality.² With reference to the liability of a municipal corporation for tort, it assumes a dual role, one public and the other private, and accordingly it exercises twofold functions and duties. One class of its powers is a public and general character to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants. The other relates only to special or private corporate purposes for the accomplishment of which it acts not through its public officers as such, but through agents or servants employed as such.³ A municipal corporation in its exercise of police power performs a governmental function.⁴ But in its operation of a subway it performs a proprietary or non-governmental function.⁵

The state unless it assumes liability is not liable for torts committed by its officers or agents; this exemption rests upon the fiction that the state is the sovereign and the sovereign can do no wrong. This exemption is also extended to municipal corporations in the discharge of municipal or governmental functions.⁶ Thus in *Wilcox v. City of Rochester*⁷ where an action was brought to recover damages for the negligence of persons having control of an elevator in a police station building in the City of Rochester the court held the municipality not liable on the ground that in maintaining a police station, it was exercising a governmental function.

While it is difficult to formulate a rule embracing all the torts for which a municipality may be liable, yet it is believed that the following formula is accurate and complete.⁸ "So far as municipal corporations of any class and however incorporated exercise powers conferred upon them for purposes essentially public, purposes pertaining to the administration of general laws made to enforce the general policy of the state, they shall be deemed agencies of the state and not subject to be sued for any act or omission occurring while in the exercise of such power unless by statute the action be given. In reference to such matters they should stand as the sovereignty whose agency they are, subject to be sued only when the state by

² PRASHKER, OUTLINE OF THE LAW OF MUNICIPAL CORPORATIONS (1927) §§106, 107.

³ *Lloyd v. New York*, 5 N. Y. 369 (1851); *Barton v. Syracuse*, 36 N. Y. 54 (1867); *Davenport v. Rushman*, 37 N. Y. 568 (1867); *McCarthy v. City of Syracuse*, 46 N. Y. 194 (1871); *Regal v. Rochester*, 45 N. Y. 129 (1871); *Maximillian v. New York*, 62 N. Y. 160 (1875); *Ring v. Cohoes*, 77 N. Y. 83 (1879); *Noonan v. Albany*, 79 N. Y. 470 (1879).

⁴ *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 1083 (1896).

⁵ *Sinsheimer v. Underpinning and Foundation Co.*, 178 App. Div. 495, 165 N. Y. Supp. 645 (1st Dept. 1917).

⁶ *Murtha v. N. Y. H. M. Col. and Flower Hospital*, 228 N. Y. 183, 126 N. E. 722 (1920); *Smith v. State of New York*, 227 N. Y. 405, 125 N. E. 841 (1920); *Pauchogal Land Corp. v. L. I. State Park Commission*, 243 N. Y. 15, 152 N. E. 493 (1926).

⁷ 190 N. Y. 137, 82 N. E. 1119 (1907).

⁸ *Twyman v. Frankfort*, 117 Ky. 518, 78 S. W. 446 (1918).

statute declares that they may be.⁹ In so far, however, as they exercise powers not of this character, powers intended for the private advantage and benefit of the locality and its inhabitants there seems to be no sufficient reason why they should be relieved from liability."¹⁰

The municipality has consistently been held liable for the torts of negligence and nuisance committed on the streets or highways within its territorial limits¹¹ the theory behind it being that although the legislature has primarily control of the highways of the state¹² it has delegated to the municipal corporations the duty of maintaining them within their territorial bounds.¹³ In performing that duty of maintaining streets and keeping them reasonably safe for public travel, municipal corporations act as an arm of the state performing a delegated function.¹⁴ In performance of that duty they act in a quasi-private or corporate capacity.¹⁵ Having undertaken to act the law requires that they act with reasonable care and if they fail to act and their failure to act causes injury they may be liable to the individual.¹⁶

The power conferred upon a municipality to prevent, remove, or abate a nuisance is generally held to be a power for the public good and not for the private corporate advantage and therefore the municipality cannot be held liable for failure to enact ordinances to prevent or abate nuisances or for the acts or omissions of its officers with respect to the enforcement of such ordinances.¹⁷ Where the nuisance is not created or maintained by the express authority of the municipality and is not the result of any act or omission in the

⁹ *Smith v. Rochester*, 76 N. Y. 506 (1879); *Lynch v. New York*, 76 N. Y. 60 (1879); *Missano v. City of New York*, 160 N. Y. 123, 54 N. E. 744 (1889); *Hughs v. Auburn*, 161 N. Y. 96, 55 N. E. 389 (1899); *Lefrois v. Monroe County*, 162 N. Y. 563, 57 N. E. 186 (1900); *Mullen v. Middletown*, 187 N. Y. 37, 79 N. E. 836 (1907); *Herman v. Union District School No. 8*, 234 N. Y. 201, 137 N. E. 24 (1923); *Metzroth v. City of New York*, 241 N. Y. 470, 150 N. E. 519 (1926); *Murtha v. N. Y. H. M. Col. and Flower Hospital*, *supra* note 6; *Oakes Mfg. Co. v. New York*, 141 App. Div. 130, 125 N. Y. Supp. 1030 (2d Dept. 1910), *aff'd*, 206 N. Y. 221, 99 N. E. 540 (1912); *Berger v. Solvay*, 156 App. Div. 440, 141 N. Y. Supp. 995 (4th Dept. 1913); *Finkelstein v. New York*, 183 App. Div. 539, 169 N. Y. Supp. 718 (1st Dept. 1918).

¹⁰ *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622 (1903); *Garden v. Silver Creek*, 127 App. Div. 888, 112 N. Y. Supp. 54 (4th Dept. 1908).

¹¹ *Maximillian v. Mayor*, *supra* note 3; *Missano v. Mayor*, *supra* note 9; *Wilcox v. City of Rochester*, *supra* note 7.

¹² *Bradley v. Dignon Contracting Co.*, 224 N. Y. 60, 120 N. E. 89 (1918).

¹³ *Village Law* 141; *Cons. Laws Ch. 64* (1909).

¹⁴ *Ghu v. Northern Gas Co.*, 158 N. Y. 510, 53 N. E. 692 (1899); *Matter of McCoy v. Apgar*, 241 N. Y. 70, 150 N. E. 546 (1926).

¹⁵ *Supra* note 11.

¹⁶ 4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1892) §1217.

¹⁷ *Cain v. Syracuse*, 99 Hun 105, *aff'd*, 95 N. Y. 83 (1884); *Leonard v. Homesville*, 41 App. Div. 106, 58 N. Y. Supp. 106 (4th Dept. 1889); *White v. Buffalo*, 131 App. Div. 531, 115 N. Y. Supp. 1021 (4th Dept. 1909).

performance of any duty imposed by law, it cannot be held liable, as where nuisances are maintained on private property and in no way amount to an obstruction of the public street nor imperils the safety of travelers in such street.¹⁸ On the other hand it has been held that the municipality is liable for failure to abate a nuisance in or near the street which endangers travelers lawfully in the street or for authorizing the commission of acts on private property which are forbidden by ordinance and are carried out under the supervision of municipal officers in such a manner as to constitute a public nuisance.¹⁹

Where a municipality creates or permits a nuisance by non-feasance or misfeasance it is guilty of tort and like a private corporation or individual and to the same extent is liable for damages in a civil action to any person suffering injury therefrom, irrespective of the question of negligence,²⁰ and such liability cannot be avoided on the ground that the municipality was exercising governmental power.²¹

The power to organize and maintain a fire department for the prevention of damages by fire is a public or governmental function and a municipality will not ordinarily be liable, unless the statute so provides, for the negligent acts or omissions of its departmental employees in performance of their duties.²² The maintenance of a

¹⁸ *Stubley v. Allison Realty Co.*, 124 App. Div. 162, 108 N. Y. Supp. 759 (1st Dept. 1908); *Klepper v. Seymour House Corp.*, 212 App. Div. 277, 209 N. Y. Supp. 67 (3d Dept. 1925). But see *Swentzel v. Holmes*, — Mo. —, 175 S. W. 871 (1915) (holding that where a party wall rendered dangerous by a fire collapses and injures persons other than the owners, the city is liable for its negligence in failing to abate the nuisance).

¹⁹ *Walker v. City of New York*, 107 App. Div. 351, 95 N. Y. Supp. 121 (2d Dept. 1905).

²⁰ *Weet v. Brockport*, 16 N. Y. 161 (1857); *Seifert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321 (1886); *Cohen v. City of New York*, 113 N. Y. 532, 21 N. E. 745 (1889); *Danaher v. Brooklyn*, 119 N. Y. 241, 23 N. E. 745 (1890); *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030 (1891); *Speer v. Brooklyn*, 139 N. Y. 495, 34 N. E. 727 (1893); *Hill v. City of New York*, 139 N. Y. 495, 34 N. E. 1090 (1893); *Herman v. Buffalo*, 214 N. Y. 316, 108 N. E. 451 (1915); *Ahriens v. Rochester*, 97 App. Div. 480, 90 N. Y. Supp. 744 (4th Dept. 1904); *Lyman v. Poldam*, 173 App. Div. 390, 159 N. Y. Supp. 71 (3d Dept. 1916); *Davies v. Jagger*, 197 App. Div. 196, 180 N. Y. Supp. 789 (2d Dept. 1921); *Briggs v. No. Tonawanda*, 213 App. Div. 781, 210 N. Y. Supp. 643 (4th Dept. 1925).

²¹ *Supra* note 10. But see *Finkelstein v. City of New York*, 183 App. Div. 539, 169 N. Y. Supp. 718 (1st Dept. 1918) (holding that although a municipality which owned the fee of the land on which a jail was situated, allowed the wall of the buildings to depreciate that it became unsafe by reason of falling of bricks and constituted a nuisance the municipality was not liable for injuries resulting from the nuisance since it was discharging a governmental function in respect to the jail).

²² *Smith v. Rochester*, 76 N. Y. 506 (1879); *Smith v. City of New York*, 203 N. Y. 106, 96 N. E. 409 (1911); *Gaetjens v. City of New York*, 132 App. Div. 394, 116 N. Y. Supp. 759 (2d Dept. 1909); *Fraser v. City of New York*, 156 App. Div. 495, 142 N. Y. Supp. 1118 (1st Dept. 1913); see *Terhune v.*

municipal water system where the city supplies the same to consumers for compensation will render the municipality liable to persons injured, the reason being that it is a proprietary function and not governmental.²³

The mere granting to another of a license or permit to do some act which in itself is not unlawful will not as a general rule render the municipality liable for injuries caused by the performance of such act.²⁴ Where the municipality by its affirmative act authorizes the use of the streets for a carnival or a display of fireworks or any other public exhibition or amusement intrinsically dangerous or constituting a public nuisance it will be liable for injuries to travelers caused thereby.²⁵ It has been held that a grant of permission for the holding of a horse show will not render the city liable for any injury for a horse show is not intrinsically dangerous.²⁶ An exhibition of wild animals in the streets, however, did render the city liable on the nuisance theory as well as the granting of permission of an inherently dangerous act.²⁷ It has been held that a display of fireworks in the street is not a nuisance as a matter of law but is a question of fact.²⁸

There has been much dissension and diversity of opinion in various jurisdictions as to the function and necessary corollary, tort liability, of parks and playgrounds maintained by municipal corporations. In 1892 the Supreme Court of the United States said in *Shoemaker v. United States*:²⁹ "In the memory of men now living a proposition to take private property without the consent of the owner for a public park and to assess a proportionate part of the cost upon real estate benefited thereby would have been regarded as a novel experience of legislative power. It is true that in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise or recreation but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as a part of the original plan of the town or city. It is said that Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for ex-

City of New York, 88 N. Y. 247 (1882) (holding that the city was not liable to persons dismissed by the fire department).

²³ *Oakes v. City of New York*, 206 N. Y. 221, 99 N. E. 540 (1912); *Caravan v. City of Mechanicville*, 229 N. Y. 473, 128 N. E. 822 (1920) (municipal corporation held guarantor of water); see *In re Certain Lands in City of New York*, 217 N. Y. Supp. 544 (1926) (use of land for a municipal market is for a proprietary and not a governmental purpose).

²⁴ *Masterson v. Mt. Vernon*, 58 N. Y. 391 (1874); *Darlon v. Brooklyn*, 43 Barb. 604 (1870).

²⁵ *Landau v. City of New York*, 180 N. Y. 48, 72 N. E. 631 (1906).

²⁶ *Mt. Vernon v. Aldridge*, 74 Ind. 309, 128 N. E. 934 (1921).

²⁷ *Little v. Madison*, 42 Wis. 643, 6 N. W. 249 (1880).

²⁸ *Melker v. City of New York*, 190 N. Y. 481, 83 N. E. 565 (1908).

²⁹ 147 U. S. 282, 13 Sup. Ct. 361 (1892).

clusive use as a pleasure ground for rest and exercise in the open air. However that may be, there is scarcely now a city of any considerable size that does not have or has not projected such parks." One can see of how comparatively recent origin municipal parks are, which accounts for the little litigation on the subject.

Some jurisdictions have adopted the so-called *liability rule* and the municipality has been held liable for injuries caused by negligence in the maintenance of such parks and playgrounds and the equipment therein,³⁰ the liability being based expressly on the ground that the maintenance of such premises is not a governmental but a corporate duty.³¹ In the *Van Dyke* case,³² the municipality was held liable on the ground that it had extended an invitation to children to use the playground and having done so an obligation rests upon it to protect children of tender years and inexperience at least from its own negligence. It is not liable however for dangers not reasonably to be anticipated³³ nor is it liable for injury to a trespasser nor to a licensee on land which the legislature has released from park purposes.³⁴ Moreover, a municipality is not required to keep every part safe for public travel. "Certain parts of a public park should be kept in a safe condition for public travel but there are often in such a park ponds, lakes, knolls, ravines, and forests not intended and not understood by the public to be intended for public transit."³⁵

Other jurisdictions have adopted the *non-liability rule*, holding that municipal parks and playgrounds are for the sole benefit of the public and not for the profit of the municipality and hence it is not liable at common law for injuries due to the defective condition or negligent maintenance of such property.³⁶ If such property is main-

³⁰ *Silverman v. City of New York*, 114 N. Y. Supp. 59 (1909); *Gorhman v. City of New York*, — App. Div. —, 164 N. Y. Supp. 59 (1st Dept. 1917); *Van Dyke v. Utica*, 203 App. Div. 26, 196 N. Y. Supp. 277 (4th Dept. 1922); *Cleveland v. Nerrando*, 114 Ohio St. 207, 150 N. E. 747 (1926).

³¹ *Van Dyke v. Utica*, *supra* note 30; *Gartland v. N. Y. Zoological Society*, 135 App. Div. 163, 120 N. Y. Supp. 24 (1st Dept. 1909).

³² *Supra* note 30. But see *Vanderford v. Houston*, 97 Tex. Cr. R. 100, 286 S. W. 568 (1926). Here the court said, "An invitation to parents to permit children to visit a park imposes no liability on the municipality for injury to young children and an acceptance of such invitation carries with it an assumption of the risk of danger to children incapable of protecting themselves."

³³ *Sarber v. Indianapolis*, 72 Ind. A. 594, 126 N. E. 336 (1920). Where a municipality in connection with its park system assumed control over a river and the river at that point was used for boating, not bathing, the municipality was bound only to exercise care commensurate, with the dangers likely to occur and to be anticipated from use of the park as place for boating.

³⁴ *Durkin v. City of New York*, 146 App. Div. 472, 131 N. Y. Supp. 275 (2d Dept. 1911).

³⁵ *Holt v. Moline*, 196 Ill. A. 235.

³⁶ *Epstein v. New Haven*, 104 Conn. 283, 132 Atl. 467 (1926); *Keller v. Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919); *Kerr v. Brookline*, 208 Mass. 190, 94 N. E. 257 (1911); *Brisbing v. Asbury Park*, 80 N. J. L. 416, 78 Atl. 196 (1911); *Boyland v. New York*, 3 N. Y. Super. (1 Sandf.) 27 (1847); *Bernstein v. Milwaukee*, 158 Wis. 576, 149 N. Y. 382 (1915).

tained primarily as a source of revenue the municipality is liable.³⁷ The *non-liability rule* does not apply where the municipality knowingly permits a public nuisance in a park likely to cause such injury.³⁸ In *Vanderford v. Houston*³⁹ the court said, "This rule of exemption should not apply where the municipality knowingly permits such nuisance or condition to exist in a public park or other places where it is likely to cause injury. In such a case it should not be held that the city, in creating or knowingly permitting the nuisance or dangerous condition to exist, was exercising a governmental function." It is interesting to note that this state⁴⁰ upholds the *non-liability* theory on the ground that in maintaining a park the municipality is exercising a governmental function.

New York has in some cases adopted the *liability* theory⁴¹ and in others the *non-liability* theory.⁴² The most recent authority on this subject in this state is the case of *Whittaker v. Village of Franklinville*.⁴³ In that case, residents of the village were celebrating the Fourth of July in a small park in the village. In the display of their patriotism they made use of a bonfire, fireworks, and a home-made cannon. The plaintiff while in an automobile on an adjoining street was seriously injured, being struck by a piece of the cannon which burst when fired off. Two trustees of the village were present at the celebration. In precluding the plaintiff a right of recovery the court justified its decision on the ground that maintenance of the park was a quasi-private function and since the city did not receive compensation for the use of the same they may not be held liable even though two of the trustees had knowledge of the same. Crane and Crouch, JJ., dissented without opinion.

With all due respect to the learned court the writer cannot concur in its opinion. Granted that an exhibition of fireworks in the park does not constitute a nuisance *per se*,⁴⁴ can it be said that a hand-made cannon was not a nuisance as a matter of law? Its inherent dangerous character is exhibited and demonstrated by the very accident which occurred and injured the plaintiff in an adjoining street. Such being the case, the plaintiff should have been allowed a recovery on the theory that where a municipality permits a nuisance by nonfeasance or misfeasance it is guilty of tort and is liable irrespective of the question of negligence.⁴⁵ Can it be said that the trustees were not negligent in maintaining a passive acquiescence when the cannon was being fired? But a recovery may be upheld on

³⁷ *Cornelison v. Atlanta*, 146 Ga. 416, 91 S. E. 415 (1917); *supra* note 23.

³⁸ *Vanderford v. Houston*, *supra* note 32.

³⁹ *Ibid.*

⁴⁰ Texas.

⁴¹ *Supra* note 30.

⁴² *Boyland v. New York*, *supra* note 36.

⁴³ 265 N. Y. 11, 191 N. E. 716 (1934).

⁴⁴ *Melker v. City of New York*, 19 N. Y. 481 (1859).

⁴⁵ *Supra* note 20.

another theory which has been adopted in other jurisdictions, namely, where the municipality knowingly permits such nuisance to exist in a park or in any other place where it is likely to cause injury, there should be no exemption from liability to the municipality.⁴⁶ This contention is also supported in the case of *Cleveland v. Ferrando*,⁴⁷ similar to the case at bar on all fours. It was held there "that in failing to remove the explosive that was left on the ground with knowledge of the same and of its dangerous character the municipality should be held liable. The presence of an unguarded, unexploded bomb in a public park where children are invited to come is in itself an intolerable nuisance and so self-evident that any argument can but echo the statement." At any rate, the rule⁴⁸ adopted in the other *non-liability* jurisdictions seems to be the more logical and just, as well as the more favorable to public policy.

IRVING L. KALISH.

RIGHT OF PRIVACY—CIVIL RIGHTS LAW, §§50, 51.

During the last half century, courts of jurisprudence have generally been reluctant to recognize the existence of the so-called right of privacy as an individual and personal right.¹ This behavior on the part of the courts may be attributed, to a large extent, to the apparent infringement of such right upon the rights of freedom of speech and of the press,² or to their strict adherence to established precedents

⁴⁶ *Supra* note 32.

⁴⁷ *Supra* note 30. It is interesting to note that in New York, if an express license or permit had been given, the plaintiff would have been allowed a recovery, but in this case the court says if an express license had been given, the fireworks exhibition would then have been under the regulation of the police, and in such case the municipality would be exercising a governmental function in which case they were exempt from tort liability.

⁴⁸ *Supra* notes 45 and 46.

¹ *Infra* notes 5 and 6. The following cases have rejected the legal right of privacy altogether: *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (W. D. Mo. 1912); *Atkinson v. Dougherty*, 12 Mich. 372, 80 N. W. 285 (1899); *Roberson v. Rochester Folding-Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Baumann v. Baumann*, 250 N. Y. 382, 165 N. E. 819 (1933); *Somberg v. Somberg*, 263 N. Y. 1, 188 N. E. 152 (1933); *Henry v. Cherry*, 30 R. I. 13, 73 Atl. 97 (1909); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911); see *Von Thodorovich v. Franz Josef Ben. Assoc.*, 154 Fed. 911 (E. D. Pa. 1907).

² *Roberson v. Rochester Folding-Box Co.*, *supra* note 1. But see *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 at 74, where Justice Cobb said: "Liberty of speech and of the press is and has been a useful instrument to keep the individual within the limits of lawful, decent, and proper conduct; and the right of privacy may well be used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guaranties of such rights; one may be used as a check upon the other; but neither can be lawfully used for the other's destruction."