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## Municipal Corporation Tort Liability

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**MUNICIPAL CORPORATION TORT LIABILITY.**—The representatives of the deceased brought this action for the death of their son, drowned while bathing in a swimming pool owned and operated by the city of Evansville. The lower court held the city liable on grounds of negligence. On appeal, the Supreme Court allowed appellant's motion for a new trial, on the grounds that there was not sufficient evidence showing negligence.<sup>1</sup>

At common law municipal corporations generally were immune from tort liability. However, at the present time, the courts have ruled that while the municipal corporation is not liable for torts committed by its agents in the performance of governmental, political, or public functions it is liable when the tort is committed in the performance of corporate, private, or ministerial functions.<sup>2</sup> This distinction has not proved entirely satisfactory, and is difficult of application<sup>3</sup>—a fact which is driven home by the chaotic condition of our existing law on this subject. In granting immunity, the courts have held the operation and maintenance of the following to be governmental functions: bridges,<sup>4</sup> public improvements,<sup>5</sup> parks and playgrounds,<sup>6</sup> police,<sup>7</sup> fire department,<sup>8</sup> charitable trusts,<sup>9</sup> and public health.<sup>10</sup> Yet in many of the same jurisdictions, the courts have held these same functions to be corporate and have imposed liability in the following operations: streets

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<sup>1</sup> *City of Evansville v. Blue* (Ind. App., 1937), 8 N. E. (2nd) 426.

<sup>2</sup> Borchards, E. M., *Governmental Liability in Tort* (1924), 38 Yale L. J. 129.

<sup>3</sup> *Young v. Metropolitan Street Railway Co.* (1907), 126 Mo. App. 1, 103 S. W. 135: "The reasons given for liability and non-liability of municipal corporations, we admit, are not logical or consistent. Some of the reasons given for non-liability will apply just as forcibly to cases where liability is asserted and vice versa."

<sup>4</sup> *Daly v. New Haven* (1897), 69 Conn. 644, 38 A. 397.

<sup>5</sup> *Kippes v. Louisville* (1910), 140 Ky. 423, 131 S. W. 104, 30 L. R. A. (N. S.) 116.

<sup>6</sup> *Blair v. Granger* (1902), 24 R. I. 17, 51 A. 1042.

<sup>7</sup> *Bartlett v. Columbs* (1837), 101 Ga. 300, 28 S. E. 599.

<sup>8</sup> *Aschoff v. Evansville* (1904), 34 Ind. App. 25, 72 N. E. 279.

<sup>9</sup> *Frazer v. Chicago* (1900), 186 Ill. 480, 57 N. E. 1055.

<sup>10</sup> *Evans v. Kankakee* (1907), 23 Ill. 223, 83 N. E. 223, 13 L. R. A. (N. S.) 1190, note.

and highways,<sup>11</sup> bridges,<sup>12</sup> public improvements,<sup>13</sup> parks and playgrounds,<sup>14</sup> police,<sup>15</sup> fire department,<sup>16</sup> charitable trusts,<sup>17</sup> and public utilities.<sup>18</sup> From this survey of the cases, it is readily apparent that the courts have found such a basis for distinction untenable.

At the present, in cases where the courts do not allow recovery, there is no remedy except against the officer doing the tortious act.<sup>19</sup> The apparent injustice of a municipal corporation escaping responsibility in some of these cases leads to an inquiry in this field. What reasons are given by the courts for denying relief?

One of the oldest maxims of the common law has been "where the reason of a rule ceased the rule also ceased."<sup>20</sup> And yet, in dealing with municipal corporations the courts still adhere to the old doctrine of tort immunity, although most of the reasons for it seem to have been outgrown. For example, if a municipal corporation could be sued, it has been said, it would not be able to perform its functions properly.<sup>21</sup> Some courts cling to the old idea that the "King can do no wrong."<sup>22</sup> Others have upheld the inability to be sued for failure to perform public duties because of lack of incorporation.<sup>23</sup> The applicability of these theories to modern governments, engaged in their varied and numerous enterprises, must be conceded to be unsuitable.

Borchard, a recognized authority in this field, even goes so far as to point out that municipal governments might be run with a greater efficiency and a greater responsibility if the courts abandoned the old doctrine of immunity. And if this would not induce a greater respect for the law, it would, at least, respond to the public's sense of justice, losses inflicted on the individual being spread over the community as a whole, instead of resting upon the unfortunate victim alone.<sup>24</sup> The tendency has been in this direction, and the distinction between governmental and corporate functions is being severely questioned and repudiated.<sup>25</sup> The modern trend led by the famous Fowler case<sup>26</sup> has

<sup>11</sup> *Sherwin v. Aurora* (1913), 257 Ill. 458, 100 N. E. 938, 42 L. R. A. (N. S.) 1116 and note.

<sup>12</sup> *Gathman v. Chicago* (1908), 236 Ill. 9, 86 N. E. 152, 19 L. R. A. (N. S.) 1178 and note.

<sup>13</sup> *Murphy v. Indianapolis* (1902), 158 Ind. 238, 63 N. E. 469.

<sup>14</sup> *City of Denver v. Spencer* (1905), 34 Colo. 270, 82 P. 590, 2 L. R. A. (N. S.) 147.

<sup>15</sup> *Jones v. Sioux City* (1919), 185 Ia. 1178, 170 N. W. 445, 17 L. R. A. (N. S.) 741.

<sup>16</sup> *Kaufman v. Tallahassee* (1922), 84 Fla. 634, 94 So. 697, 30 A. L. R. 471.

<sup>17</sup> *Tucker v. Mobile Infirmary Ass'n.* (1900), 191 Ala. 572, 68 So. 4, L. R. A. 1915 D, 1167.

<sup>18</sup> *Posey v. No. Birmingham* (1907), 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

<sup>19</sup> *Miller v. Horton* (1891), 152 Mass. 542, 26 N. E. 100.

<sup>20</sup> *Funk v. U. S.* (1933), 290 U. S. 371, 78 L. Ed. 369, 54 S. Ct. 212.

<sup>21</sup> Borchards, E. M., *Governmental Liability in Tort* (1924), 38 Yale L. J. 129, 134.

<sup>22</sup> *Langford v. U. S.* (1879), 101 U. S. 341, 343.

<sup>23</sup> *Supra*, Note 22.

<sup>24</sup> *Supra*, Note 22.

<sup>25</sup> *Fowler v. Cleveland* (1919), 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131. (Since overruled by, *Aldrich v. Youngstown* (1922), 106 Ohio St. 342, 140 N. E. 164.)

<sup>26</sup> *Supra*, Note 26.

been to abandon entirely the criteria of governmental or proprietary distinctions, and to apply to municipal corporations the same rules of tort liability as are applied to other legal entities.<sup>27</sup>

The Indiana case<sup>28</sup> here in point discusses neither governmental nor corporate functions, completely ignoring such distinctions, and premises liability, if any, solely on negligence. This is an entirely different premise from that of the old theory, and seems to be in accord with the new definite trend in the direction of tort liability for municipal corporations. F. L. M.

**DAMAGES—MENTAL ANGUISH.**—Plaintiff contracted with defendant, an undertaker, to prepare for burial and to bury plaintiff's minor daughter. As part of the contract for which defendant was compensated, the defendant promised to have a photograph made of the deceased daughter before burial. Defendant knew that plaintiff had no picture of his daughter and knew plaintiff's purpose in having one made. Defendant negligently allowed the body to be buried without having the photograph made. Plaintiff stated these facts in his complaint, seeking to recover for mental anguish occasioned by the breach of contract. A demurrer to this complaint was sustained by the lower court. Plaintiff assigned error. Held: affirmed. A contract action cannot be maintained for mental anguish alone.<sup>1</sup>

Damages for emotional disturbance as distinguished from punitive damages are compensatory in nature and, when awarded, they are given as a matter of right.<sup>2</sup> No general rule has ever been devised which will satisfactorily reconcile all the cases where the problem of recovery or non-recovery of damages for mental suffering is presented. No difficulty is experienced where there has been an invasion of the plaintiff's personal physical integrity, and the resulting mental pain and suffering is a proximate consequence.<sup>3</sup> This is true irrespective of the intentional or negligent character of the defendant's conduct. Nor is there much conflict in the authorities where such elements of damages are allowed as compensation for a mental injury suffered from a wilful tortious act, especially in those cases where the wrong affects the liberty,<sup>4</sup> character,<sup>5</sup> reputation,<sup>6</sup> privacy,<sup>7</sup> or domestic relations<sup>8</sup> of the injured party. If the defendant acted with the intention of causing mental suffering,

<sup>27</sup> *Workman v. Mayor of City of New York* (1900), 79 U. S. 552, 21 S. Ct. 212; *Kaufman v. Tallahassee* (1922), 84 Fla. 634, 94 So. 697, 30 A. L. R. 471; *Evans v. Berry* (1933), 62 N. Y. 160, 186 N. E. 203; *Williams v. Jacksonville* (1935), 118 Fla. 671, 160 So. 15, 98 A. L. R. 513.

<sup>28</sup> *Supra*, Note 1.

<sup>1</sup> *Plummer v. Hollis* (1937, Supreme Ct. of Indiana), 11 N. E. (2d) 140.

<sup>2</sup> *State Ex Rel. Scoby v. Stevens* (1885), 103 Ind. 55, 2 N. E. 214.

<sup>3</sup> *Cox v. Vanderbleed* (1863), 21 Ind. 164.

<sup>4</sup> *Harness v. Steele* (1902), 159 Ind. 286, 64 N. E. 875 (Action for false imprisonment).

<sup>5</sup> *Leach v. Leach* (1895, Tex. C. A.), 33 S. W. 703 (Rape).

<sup>6</sup> 90 A. L. R. 1175-1200 (Where the defamation is not actionable per se, no recovery can be had for mental suffering unless other injury or damages are proved).

<sup>7</sup> *Pavesich v. New England Life Ins. Co.* (1905), 122 Ga. 190, 50 S. E. 68.

<sup>8</sup> *Pickle v. Page* (1930), 252 N. Y. 475, 169 N. E. 650.