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Municipal Corporations—Liability for Torts in Recreation Centers

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sunstroke occurs while the insured is pursuing his ordinary intended course of occupation or pleasure there is no such occurrence. *Paist v. Aetna Life Ins. Co.* (D. C. E. D. Pa. 1931) 54 F. (2d) 393; *Nickman v. New York Life Ins. Co.* (C. C. A. 6, 1930) 39 F. (2d) 763; *Semancik v. Continental Casualty Co.* (1914) 56 Pa. Super Ct. 392; *Continental Casualty Co. v. Pittman* (1916) 145 Ga. 641, 89 S. E. 716; see also *Caldwell v. Travelers' Insurance Co.* (1924) 305 Mo. 619, 267 S. W. 907; *Jensma v. Sun Life Assurance Co.* (C. C. A. 9, 1933) 64 F. (2d) 457; *Pope v. Prudential Ins. Co.* (C. C. A. 6, 1928) 29 F. (2d) 185. Two cases contra, ostensibly based on the same principle, have failed to distinguish between cause and effect, and have found the necessary unforeseen occurrence in the resultant prostration and not in the course of events producing it. *Elsley v. Fidelity and Casualty Co.* (1918) 187 Ind. 447, 120 N. E. 42, overruling (Ind. App. 1915) 109 N. E. 413; *Bryant v. Continental Casualty Co.*, above.

Almost without exception policies on which recovery for this type of injury has been allowed have had special clauses stating that sunstroke shall be an injury for which the insurer is liable if brought about by accidental means, and while this has had little effect on the reasoning upon which the courts have based their decisions, it has noticeably operated to influence them in deciding whether ordinary cases of sunstroke were a risk contemplated by the parties at the time the contract was made. It has thus strengthened the idea that sunstroke of all kinds, being an accident in the view of the average insured, should be a basis of liability. The majority and dissenting opinions in the instant case are sufficient to show that the real issue in this and other decisions has been between the layman's definition of an accident as an unlooked-for, unforeseeable event, mischance or mishap, and the lawyer's distinction between the accident itself and the means or cause which brought it about. Justice Cardozo recognizes the first when he says, "When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means." The other side of the question is taken by Mr. Justice Stone, speaking for the majority, "the insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

The distinction is doubtless a somewhat artificial one and has the obvious purpose on the part of the insurer of limiting liability, but it has practical justification. See *Note* (1930) 78 U. Pa. L. Rev. 762. If the distinction were not recognized in any of the countless situations to which it applies under this type of general accident policy, insurers would almost surely be compelled to raise premiums to compensate for increased liability, affecting the usefulness not only of ordinary but of Workmen's Compensation insurance as well. And if it is to be retained, the majority opinion in the present case, based on the rule that some unintended mischance must occur in the course of action itself to constitute accidental means, seems the more logical one.

T. S. M., '36.

MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS IN RECREATION CENTERS.—Two recent decisions typify the conflict which exists in the law of municipal liability for negligence of employees in public recreation centers. In Pennsylvania a girl eleven years old was injured when she

fell from a swing in a public playground and struck a sharp and jagged stone which lay in the path of the swing. The jury found that the attendant was negligent in not removing the stone. *Held*: The city is liable for such negligence, since the operation of a playground is analogous to operating a park, and Pennsylvania has uniformly held a city liable for negligent maintenance of parks. *Paraska v. City of Scranton* (Pa. 1933) 169 Atl. 434. On the other hand, in Illinois, a city ordinance created a recreation board which among others had the power to provide swimming pools for the inhabitants. The board made arrangements to provide the use of a pool eight miles away and employed one Smith to transport children thereto. The plaintiff, a child, was injured when the auto in which she was being conveyed, collided with another, due to Smith's negligence. *Held*: The city was not liable; since the injury was the result of an accident in the course of a governmental function. *Village of La Grange Park v. Gebhart* (Ill. 1933) 188 N. E. 372.

The general rule which holds the municipality liable for torts of its agents in corporate functions and immune to liability for torts flowing from its exercise of governmental functions is too well settled to cause any conflict. *City of Mobile v. Lartigue* (1930) 23 Ala. App. 479, 127 So. 257; *Harris v. D. of C.* (1920) 256 U. S. 650; 6 McQuillin, *Municipal Corporations* (2d ed., 1928) sec. 2771; 19 R. C. L. 1081 *et seq.* The border line between the public or governmental and the corporate or proprietary functions in many instances is difficult to discern. It is in this "twilight zone" that the conflict in the decisions occurs. The principal cases fall within this latter group.

Thus, there is a substantial contrariety of opinion in the courts of last resort on the question as to whether the maintenance of parks, playgrounds, and swimming pools is a governmental or proprietary function. The slight weight of authority holds a municipality liable for negligent maintenance of a park. *Keller v. Los Angeles* (1919) 179 Cal. 605, 178 Pac. 505; *Bolster v. Lawrence* (1917) 225 Mass. 387, 114 N. E. 722, L. R. A. 1917B, 1285; *Heino v. Grand Rapids* (1918) 202 Mich. 363, 168 N. W. 512, 29 A. L. R. 863. Missouri and other states are committed to the view that a city must use ordinary care in maintaining parks to make them reasonably safe for users or else answer in damages. *Capp v. St. Louis* (1913) 251 Mo. 345, 158 S. W. 616, 46 A. L. R. (N. S.) 731; *Barthold v. Phila.* (1893) 154 Pa. 109, 26 Atl. 304; *Silverman v. New York* (1909) 14 N. Y. S. 59; *Bloom v. Newark* (1905) 3 Ohio N. P. N. S. 480. But, if a city derives profit from the operation of a public park, it is deemed a proprietary function. *Cornelisen v. Atlanta* (1917) 146 Ga. 416, 91 S. E. 415; *Schmidt v. Berlin* (1895) 26 Ont. Rep. 54. Charges must in fact be made. *Blair v. Granger* (1902) 24 R. I. 14, 51 Atl. 1042; *Bolster v. Lawrence, supra.* It is not proprietary if profit is incidental only. *Blair v. Granger, supra.*; *Hendricks v. Urbana Park Dist.* (1932) 265 Ill. App. 102. When a city maintains a nuisance in a park it is liable for injuries resulting therefrom. *Harper v. Topeka* (1914) 92 Kans. 11, 51 L. R. A. (N. S.) 1032. There are fewer cases in the books involving the liability of cities for the negligent maintenance of swimming pools. A number of jurisdictions declare such function to be a governmental one, *Nemec v. Kenosha* (1919) 169 Wis. 379, 172 N. W. 711; even though a charge was made, *Hannon v. Waterburg* (Conn. 1927) 36 Atl. 876. Such is a corporate function in other states. *Belton v. Ellis* (Tex. 1923) 175 N. Y. S. 274; *Burton v. Salt Lake City* (1927) 69 Utah 186, 253 Pac. 443. A similar conflict exists with respect to the liability of a municipality in the operation of

public playgrounds. 6 McQuillin, *Municipal Corporations* (2d ed., 1928) sec. 2860; 19 R. C. L. 1129.

In view of the tendency of recent decisions the rule is developing to charge the city with a duty of care in maintaining parks, playgrounds, and like recreation centers. See McQuillin, *Municipal Corporations* (1932 Supp.) sec. 2859. At least, the city should be held responsible when a child is injured in a playground or swimming pool. To hold otherwise is to establish a rule of law which puts children at the mercy of dangerous conditions of which they are not aware and over which they have no control, a result which *Paraska v. City of Scranton, supra*, decides is not consonant with justice.

H. A. G., '35.

RES IPSA LOQUITUR—EXTENSION TO ELECTRICAL APPLIANCES.—The plaintiff, a country girl about nineteen years of age, went into the beauty shop of the defendant and there ordered her first permanent wave. She was conducted to the rear of the shop and after a shampoo her hair was wound up on spindles and the current applied. She complained that the spindles pulled her hair and later that her head was being burnt, but the attendants declined to take action, assuring her that the curler could neither pull nor burn. A day later she found her head severely burnt and blistered, causing her intense pain for a month, and impairing her capacity to hear. *Held*: The case is within the limits of the *res ipsa loquitur* doctrine. *Glossip v. Kelly* (Mo. App. 1934) 67 S. W. (2d) 513.

The case seems to be in line with the prevailing view. The injury, according to human experience, would not have been sustained unless there was some imperfection in the instrument or negligence on the part of the operator. The defendant's agents were in sole control and the plaintiff had no way of telling what special negligence caused the injury. However, the case marks an extension of the doctrine by the Missouri courts. There are several general classes of cases in which the rule is applicable: (1) where passengers are injured in a railroad wreck, *McGoffin v. Missouri Pac. Ry. Co.* (1891) 102 Mo. 540, 15 S. W. 76; *Knox v. Missouri K. and T. Ry. Co. et al.* (1918) 199 Mo. App. 64, 203 S. W. 225; (2) where persons are injured by an explosion of powder or dynamite. *Holman v. Clark* (1917) 272 Mo. 266, 198 S. W. 868; (3) where a person is injured by a falling object. *McClosky v. Kopljar* (1932) 329 Mo. 527, 46 S. W. (2d) 557; (4) where persons are shocked or electrocuted by defective wires, telephones or other instruments, *Grady v. Louisiana Light, Power and Traction Co.* (Mo. App. 1923) 253 S. W. 202; *Joyce v. Missouri and Kansas Telephone Co.* (Mo. App. 1918) 211 S. W. 900; *Sprinkles v. Missouri Public Utilities Co.* (Mo. App. 1916) 183 S. W. 1072. There is doubt whether the rule can be invoked today in the case of injury from escaping gas, steam or water. The prevailing view in America is that it does apply in the case of escaping gas, and early Missouri cases held to the same effect. *Sipple v. Laclede Gas Light Co.* (1907) 125 Mo. App. 81, 102 S. W. 608. But later cases overruled this stand. *Brauer v. St. Louis County Gas Co.* (Mo. App. 1922) 238 S. W. 519; *Rede v. St. Louis County Gas Co.* (Mo. App. 1923) 254 S. W. 415. The situation was complicated in *Streck v. St. Louis County Gas Co.* (Mo. App. 1933) 58 S. W. (2d) 487, where the plaintiff's gas supply was shut off, causing the stove flame to be put out and then was turned on again, causing him injury.