

**MUNICIPAL CORPORATIONS—TORT LIABILITY—NEGLIGENT CONSTRUCTION OR MAINTENANCE OF SWIMMING POOL—[Virginia].**—Plaintiff injured her hand by striking it against a barbed-wire fence while bathing in a swimming pool, evidently formed by fencing a portion of a lake with barbed-wire extending above and under the water. She sued the municipal corporation which owned and, without charge, operated the pool, alleging that the fence had been negligently erected. *Held*, that a swimming pool owned and operated by a municipal corporation is a ministerial enterprise, negligent operation of which makes the defendant city liable in tort.<sup>1</sup> It is almost uniform law in this country that a municipal corporation is liable for torts committed by its agents in the performance of ministerial<sup>2</sup> functions but is immune from liability where torts are committed in performance of governmental functions.<sup>3</sup> The courts vary greatly, however, as to what functions are ministerial rather than governmental, and what tests are significant in determining a function's classification.<sup>4</sup>

The principal case is unique in holding a municipally owned and operated swimming pool to be ministerial in function in the absence of pecuniary profit or some dangerous nuisance. There is an exception to the general American rule<sup>5</sup> holding municipal swimming pools to be governmental, *viz.*, that municipal pools are ministerial when operated primarily and substantially for profit.<sup>6</sup> Aside from this exception, whether the municipality

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1. *Hoggard v. Richmond* (Va. 1939) 200 S. E. 610. *Contra: Sroufe v. Garden City* (Kan. 1938) 84 P. (2d) 845. Here an infant was drowned in a municipally owned and operated swimming pool when held in a pipe by the suction of draining water. His mother sued the defendant city for damages, alleging negligence in removing an iron grating from the outlet. *Held*, that, because a municipal pool is a governmental enterprise, its negligent maintenance does not give rise to an action in tort against the city.

2. Sometimes called "corporate" or "proprietary."

3. 4 Dillon, *Municipal Corporations* (5th ed. 1911) 2869, sec. 1647; Note (1938) 24 Va. L. Rev. 430; Borchard, *Government Liability in Tort* (1924) 34 Yale L. J. 129. South Carolina and Florida do not determine liability according to types of functions. See *Irvine v. Greenwood* (1911) 89 S. C. 511, 72 S. E. 228, holding a municipality immune from all actions in tort; *Kaufman v. Tallahassee* (1922) 84 Fla. 634, 94 So. 697, 30 A. L. R. 471, holding that a city with a commission form of government is liable in tort as is any quasi-public corporation more in the nature of a business than a government.

4. Note (1931) 75 A. L. R. 1196; *Freedman, Liability in Tort of Municipal Corporations in Missouri* (1938) 3 Mo. L. Rev. 275.

5. *Crone v. El Cajou* (1933) 133 Cal. App. 624, 24 P. (2d) 846; *Hannon v. Waterbury* (1927) 106 Conn. 13, 136 Atl. 876; *Jones v. Atlanta* (1926) 35 Ga. App. 376, 133 S. E. 521; *Mocha v. Cedar Rapids* (1927) 204 Iowa 51, 214 N. W. 587; *Warren v. Topeka* (1928) 125 Kan. 524, 265 Pac. 78, 57 A. L. R. 555; *Mayor and City Council of Baltimore v. State* (Md. App. 1937) 195 Atl. 571; *Bolster v. Lawrence* (1917) 225 Mass. 387, L. R. A. 1917B 1285; *Heino v. Grand Rapids* (1918) 202 Mich. 363, 168 N. W. 512, L. R. A. 1918F 528; *St. John v. St. Paul* (1930) 179 Minn. 12, 228 N. W. 170; *Coughlan v. Omaha* (1919) 103 Neb. 726, 174 N. W. 220; *Mola v. Metropolitan Park Dist.* (1935) 181 Wash. 177, 42 P. (2d) 435; *Gensch v. Milwaukee* (1922) 179 Wis. 95, 190 N. W. 843; *Rome v. London & Lancashire Indemnity Co.* (La. App. 1936) 169 So. 132.

6. *Carta v. Norwalk* (1929) 108 Conn. 697, 145 Atl. 158; *Burton v. Salt*

charges the public for using the pool has not influenced the courts' classification of swimming pool operation as governmental or ministerial.<sup>7</sup> In line with the majority view of municipal liability for nuisances,<sup>8</sup> recovery in tort has been allowed against a municipal corporation where the injury resulted from a nuisance connected with the pool.<sup>9</sup>

The *ratio decidendi* of the instant case is not impressive.<sup>10</sup> The court maintained that "Furnishing water to the inhabitants of a municipality for domestic purposes, and furnishing water to inhabitants \* \* \* for the purpose of public swimming \* \* \* are closely allied activities"; that, since municipal waterworks are universally classed as ministerial enterprises, municipal swimming pools must be ministerial and not governmental.<sup>11</sup>

In spite of the court's questionable rationalization, the decision is in harmony with the modern and desirable trend toward greater liability of municipal corporations for their agents' torts.<sup>12</sup> The possibility that increased liability may lead municipal corporations to increased inspection and care in the administration of public facilities makes this decision socially justifiable.

T. B.

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SALES—CONSTRUCTION OF CONTRACT TERMS AS TO TIME OF DELIVERY—“ON OR BEFORE AT BUYER’S OPTION”—[ARKANSAS].—A contract to sell goods called for immediate shipment of a part of the goods to a designated place, “balance as ordered within six months.” A year after the stated period had expired, the seller sued the buyer, who had failed to order, for breach of contract. *Held*, for defendant, the buyer’s right to order being construed as an option whereby he might advance the time for delivery, and the seller’s duty to deliver during the period being absolute and not conditional on the buyer’s order.<sup>1</sup>

The question confronting the courts in the construction of contracts of sale calling for delivery during a specified period “as ordered” or calling for delivery “on or before — at buyer’s option” is whether an order or notice by the buyer is a condition precedent or a mere privilege of demanding delivery before the end of the period. The decision turns on the court’s view of what the parties intended as deduced from the words of the contract and the circumstances surrounding the transaction. In the few cases construing contracts similar to the one involved in the instant case, where the

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Lake City (1926) 69 Utah 186, 253 Pac. 443, 51 A. L. R. 364; Belton v. Ellis (Tex. Civ. App. 1923) 254 S. W. 1023. Incidental profit is not sufficient to place a municipal pool in the ministerial class. Petty v. Atlanta (1929) 40 Ga. App. 63, 148 S. E. 747.

7. See cases cited supra, note 5.

8. Note (1931) 75 A. L. R. 1196.

9. Hoffman v. Bristol (1931) 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191 (civil action for damages, dangerous diving board).

10. Hoggard v. Richmond (Va. 1939) 200 S. E. 610, 616. Contrast the more logical dissenting opinion. 200 S. E. at 616.

11. *Id.* at 615.

12. Note (1938) 24 Va. L. Rev. 430.

1. Pictorial Paper Package Corp. v. Swamp & Dixie Laboratories, Inc. (Ark. 1938) 122 S. W. (2d) 529.