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Local Government - Municipal Immunity from Tort Liability - The Nuisance Exception

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matter for the Legislature rather than the court.[20] In any event, it is clear that a disavowal of a child conceived during the marriage must be based on one of the fact situations provided in the Code. Therefore, evidence obtained from blood grouping tests, or any other evidence which may prove non-paternity with equal certainty, will be inadmissible in *actions en désaveu* until the Legislature specifically authorizes their use.

William H. Cook, Jr.

LOCAL GOVERNMENT—MUNICIPAL IMMUNITY FROM TORT LIABILITY—THE NUISANCE EXCEPTION

Plaintiffs sued the City of New Orleans to recover damages for the death of their four-year old son who drowned in a pool of water which was allowed to accumulate in an area maintained by the city as a garbage dump. Plaintiffs alleged that the deceased child had been attracted to the pond by a large number of sea gulls which constantly lined its banks. The city filed an exception of no cause of action based on the theory that a municipality is immune from liability for damages arising ex delicto from its exercise of a governmental function. The trial court maintained the exception and dismissed the suit. On appeal, *held*, exception overruled and case remanded. The immunity of municipalities does not extend to cases in which an attractive nuisance has been created or maintained by the municipality.[1] *Burris v. New Orleans*, 86 So.2d 549 (La. App. 1956), cert. denied, June 11, 1956.

At Anglo-American law, while municipalities are held liable in damages for torts committed by their employees in the exercise of "proprietary" functions, they are immune from liability for torts committed in the exercise of "governmental" functions.[2]

20. In view of the decisions of the Supreme Court in such cases as Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952), and Lejeune v. Lejeune, 184 La. 837, 167 So. 747 (1936), it could be said that the real rationale behind the exclusion of the blood test evidence is the desire of the court to prevent the bastardizing of any child conceived during the marriage, despite the fact that the Code provides for the *action en désaveu* under certain circumstances.

1. The court held that under some circumstances a pond may be an attractive nuisance. See Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So.2d 791 (1949); Fincher v. Chicago, R.I. & P. Ry., 143 La. 164, 78 So. 433 (1918). See Comment, 10 LOUISIANA LAW REVIEW 469 (1950).

2. Wysocki v. City of Derby, 140 Conn. 173, 98 A.2d 659 (1953); Woodford v. City of St. Petersburg, 84 So.2d 25 (Fla. 1955); Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947); Millar v. Town of Wilson, 222 N.C. 340, 23 S.E.2d 42 (1942); Tolliver v. City of Newark, 145 Ohio St. 517, 62 N.E.2d 357

In many jurisdictions, an exception to this municipal immunity is made in cases involving injury resulting from a nuisance which has been created or maintained by a municipality.[3] Although the courts which recognize this nuisance exception use it extensively to allow recovery against municipalities,[4] the exception is held not to extend to cases involving attractive nuisances.[5] Louisiana follows the general rule of municipal immunity from liability for damages arising ex delicto from the exercise of governmental functions.[6] Prior to the instant case, however, the Louisiana courts had apparently never directly considered the question of whether the nuisance exception to municipal immunity is to be recognized in this state.[7]

(1945); Vaughn v. City of Alcoa, 194 Tenn. 449, 251 S.W.2d 304 (1952); Lakoduk v. Cruger, 287 P.2d 338 (Wash. 1955). The only jurisdiction not recognizing the classification of municipal functions into proprietary and governmental functions is South Carolina. In that state, since the decision in Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911), the rule is that municipalities are immune from liability for damages resulting from the exercise of any municipal function, unless liability is imposed by statute. Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954). See Note, 16 LOUISIANA LAW REVIEW 812 (1956).

3. Downey v. Jackson, 259 Ala. 189, 65 So.2d 825 (1953); Ingram v. City of Acworth, 90 Ga. App. 719, 84 S.E.2d 99 (1954); Steifer v. Kansas City, 175 Kan. 794, 267 P.2d 474 (1954); Wershba v. City of Lynn, 324 Mass. 327, 86 N.E.2d 511 (1949); Kinnischtzke v. City of Glen Ullin, 79 N.D. 495, 57 N.W.2d 588 (1953); Levene v. City of Salem, 191 Ore. 182, 229 P.2d 255 (1951); Vaughn v. City of Alcoa, 194 Tenn. 449, 251 S.W.2d 304 (1952). But a city is not liable for failure to abate a nuisance which it did not create, except after notice and request to abate it. City of Phoenix v. Harlan, 75 Ariz. 290, 255 P.2d 609 (1953); 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.47 (3d ed. 1949).

4. Lindemeyer v. Milwaukee, 241 Wis. 637, 6 N.W.2d 653 (1942): "The 'nuisance doctrine' has so far developed as to indicate that there is a growing belief that any wrong committed by a municipality may be redressed on the theory that it is a nuisance."

5. Sroufe v. Garden City, 148 Kan. 874, 84 P.2d 845 (1938); Von Almen's Adm'r v. Louisville, 180 Ky. 441, 202 S.W. 880 (1918); Carder v. City of Clarksburg, 100 W.Va. 605, 131 S.E. 349 (1926); Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952); Wilson v. City of Laramie, 65 Wyo. 234, 199 P.2d 119 (1948) (reviewing authorities). *But see* Melendez v. Los Angeles, 60 P.2d 865 (Calif. 1936) (attractive nuisance stated a cause of action although created in the exercise of governmental function, but this was based on statute prohibiting defective conditions after notice); Galleher v. City of Wichita, 179 Kan. 513, 296 P.2d 1062 (1956) (city not liable because of lack of control, but the court strongly implied that it would have been liable had it had control); Doran v. Kansas City, 237 S.W.2d 907 (Mo. App. 1951) (city liable for death of plaintiff's two sons who drowned in public park, without discussion of municipal immunity).

6. Barber Laboratories v. New Orleans, 227 La. 104, 78 So.2d 525 (1955); Prunty v. Shreveport, 223 La. 475, 66 So.2d 3 (1953).

7. The language in two injunction cases indicates that the Louisiana courts are not favorably disposed toward granting immunity to municipalities for nuisances created or maintained in the exercise of a governmental function, but in neither case was the question of damages considered. In Gibson v. Baton Rouge, 161 La. 637, 109 So. 339 (1926), in which the plaintiffs sought to enjoin the defendant city from maintaining a nuisance, the court said that "municipalities are no more privileged to maintain a public nuisance than are private individuals."

In the instant case the damages for which recovery were sought arose from the city's exercise of the governmental function of garbage disposal.[8] Plaintiffs would therefore be denied recovery for the death of their child unless an exception were made to the rule of municipal immunity. The court, recognizing that the question was res nova in Louisiana, decided not only to adopt the nuisance exception but also to include the doctrine of attractive nuisance within it. Thus the Louisiana court has encroached upon municipal immunity one step further than have the courts of other jurisdictions.[9]

The doctrine of municipal immunity is condemned by courts and writers alike as being unjust and illogical.[10] It is therefore

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Id. at 638, 109 So. at 340. Denying relief on the ground that the city could not immediately change its system of garbage disposal, the subject of the action, the court expressly refrained from deciding whether plaintiffs were without a remedy for future damages resulting from the nuisance. In Ryan v. Louisiana Society for Prevention of Cruelty to Animals, 62 So.2d 296, 300 (La. App. 1953), the court said, in dictum, that "a municipal corporation, no more than any individual or private corporation can maintain or cause a nuisance, *and the same remedies exist*, generally speaking, against a nuisance arising from municipal action as in other cases." (Emphasis added.) In view of the fact that torts of municipalities are often in the nature of nuisances [3 COOLEY, TORTS 238, § 450 (4th ed. 1932)], it is likely that the reason for the lack of decisions on the question of recovery for damages against a municipality for injuries resulting from a nuisance which is created or maintained in the exercise of governmental functions is that Louisiana plaintiffs have not been aware of the nuisance exception in other jurisdictions. In the instant case the plaintiffs did not even use the term nuisance or attractive nuisance in the pleadings, but the court found that the allegations of fact were sufficient to indicate that the plaintiffs intended to rely on the doctrine of attractive nuisance.

8. The court in Manguno v. New Orleans, 155 So. 41 (La. App. 1934) declared garbage disposal to be a governmental function.

9. All of the courts which have considered the question of whether recovery may be had against a municipality for injury resulting from an attractive nuisance which is created or maintained by the municipality in the exercise of a governmental function have held in the negative. See note 5 *supra*. The court in the instant case noted that some courts allow recovery for injury resulting from a *nuisance* and that other courts do not allow recovery for injury resulting from an *attractive nuisance* in such cases. From this, the court concluded that a conflict exists among the courts of other jurisdictions. It is difficult to tell, from the language used, whether the court was led into this error through a failure adequately to distinguish between the separate and distinct doctrines or whether the court simply assumed that if the nuisance device is treated as an exception to municipal immunity then the attractive nuisance device should be similarly treated.

10. See, for example, Orgeron v. Louisiana Power & Light Co., 19 La. App. 628, 140 So. 282 (1932) (author of opinion in instant case criticizing municipal immunity); Barker v. Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943) (collecting many authorities, such as legal periodicals, annotations, and judicial decisions criticizing municipal immunity); Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919) (for a lengthy and excellent criticism of the doctrine); Kilbourn v. Seattle, 43 Wash.2d 373, 261 P.2d 407 (1953); Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952). See also 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.02 (3d ed. 1949); PROSSER, LAW OF TORTS § 109 (2d ed. 1955); Green, *Freedom of Litigation (III), Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944).

not surprising to find that the courts are eager to retreat from the immunity doctrine. The nuisance exception to municipal immunity is but one of the devices through which the effects of the immunity doctrine have been curtailed.[11] Despite this attitude, the courts of common law jurisdictions have refused to include attractive nuisance within the established framework of the nuisance exception or to make a separate exception in cases involving attractive nuisances.[12] The different historical backgrounds of the two doctrines would in some measure support a contention that attractive nuisance bears no relation to the nuisance doctrine which would justify its inclusion within the nuisance exception.[13] It is believed, however, that the nuisance exception is founded simply upon the desire of the courts to retreat from an unpopular immunity.[14] Viewed in this light, any argument that because these two doctrines are based on different legal theories the nuisance exception should not be extended to cover attractive nuisance situations would seem hollow. In this connection, it is interesting to note that, much as the nuisance doctrine is used to retreat from the well-established immunity of municipalities, attractive nuisance was devised to retreat from the equally well-established immunity of landowners from liability for negligence to trespassers.[15] The use of the attractive nuisance doctrine to effect a further retreat

11. Probably the most effective single device which the courts have developed in order to circumvent the application of the municipal immunity doctrine is the classification of municipal functions into proprietary and governmental, recovery being denied only for injury resulting from the exercise of those functions which are classified as governmental. See note 2 *supra.*

12. See note 5 *supra.*

13. The term "nuisance" was used as early as the thirteenth century, at a time when negligence was unknown in legal theory, to refer to interferences with servitudes or other rights to the free use of land. "Nuisance" has since become little more than an epithet, used by courts to refer to a condition brought about by almost any type of conduct, including negligence, whenever it is deemed convenient to avoid any analysis of a problem. 3 COOLEY, TORTS § 399 (4th ed. 1932); PROSSER, LAW OF TORTS §§ 70, 74 (2d ed. 1955).

The doctrine now known as attractive nuisance stems from the decision in Railroad Co. v. Stout, 17 Wall. (84 U.S.) 657 (1873), the well-known turntable case. That decision, however, based recovery for the trespassing child's injury on a general negligence theory. Later decisions of most courts [see Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So.2d 791 (1949)], have restricted the attractive nuisance doctrine's applicability. The attractive nuisance doctrine is simply a device used by the courts to effect a necessary compromise between the interest of society in preserving the safety of its children and interest of landowners to use their land for their own benefit. PROSSER, LAW OF TORTS § 76 (2d ed. 1955); Green, *Landowner v. Intruder; Intruder v. Landowner*, 21 MICH. L. REV. 495 (1923); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953).

14. PROSSER, LAW OF TORTS § 109 (2d ed. 1955).

15. See note 13 *supra.*

from the immunity of municipalities would therefore seem appropriate. As was indicated recently in the *Review*,[16] it is probable that nothing short of legislative enactment will effectuate total municipal responsibility for torts. Until such time as this may happen, however, judicial restraint upon the applicability of this immunity is necessary in order to avoid injustice. It is submitted that the instant case achieves a desirable result which is in line with, and in advance of, the growing trend[17] toward increased municipal liability for tort.

Daniel J. McGee

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16. Note, 16 LOUISIANA LAW REVIEW 812 (1956).
17. Keifer & Keifer v. Reconstruction Finance Corp. and Regional Agriculture Credit Corp., 306 U.S. 381 (1939); Barker v. Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943); PROSSER, LAW OF TORTS § 109 (2d ed. 1955).