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Test of Sovereign Immunity for Municipal Corporations

*Howard H. Fairweather**

IN A RECENT OHIO CASE, the Supreme Court handed down a unanimous opinion that a municipality that voluntarily owns and operates a swimming pool primarily for the benefit of its citizens (who might be interested), does so in the exercise of a proprietary function and is answerable for its negligence.¹ In his opinion, Judge Guernsey cited the customary tests to be applied in such cases of distinguishing between a governmental and proprietary function: "Was it a duty imposed upon the municipality as an obligation of sovereignty, or was it an action taken for the comfort and convenience of its citizens?"² and, "Was the act for the common good of all people in the state, or whether it relates to special corporate benefit or profit?"³ But while all the judges concurred in the decision, two of them,⁴ in a concurring opinion, deeply questioned the basis on which this case, and indeed many others involving the distinction between a governmental and proprietary function, was decided. In his opinion, Judge Gibson states:

While the rule that a municipality is liable when acting in its proprietary capacity but is immune from liability when acting in its governmental capacity may be stated simply enough, the application of the "simple rule" has caused much difficulty, and in fact the law in this area is a tangle of disagreement and confusion. Thus the basic question is whether the purported distinction should be continued.⁵

Such sentiments are not new in Ohio. Both the courts and legal writers have long recognized the problem of distinguishing between governmental and proprietary functions.⁶ And as it ap-

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¹ *Hack v. City of Salem*, 174 Ohio St. 383, 189 NE 2d 857 (1963).

² *City of Wooster v. Arbenz*, 116 Ohio St. 281, 156 NE 210 (1927).

³ *Ibid.*

⁴ J. J. Matthias and O'Neill.

⁵ *Supra*, n. 1 at 391.

⁶ An early statement by the Supreme Court bears testimony to the problem: "Undoubtedly there is difficulty, sometimes, in determining the class in

(Continued on next page)

pears that the distinction will be with the courts for at least some time to come, the real problem is to re-examine the tests to see if a workable solution can be obtained.

At the conclusion of his opinion in the *Hack* case, Judge Gibson attached a compilation of Ohio cases which exemplify the inconsistencies and changes in the court's position in decisions on governmental immunity. As this compilation deserves wider publication, it is attached in tabular form as an appendix to this article. But rather than treat lightly a large number of cases, two problem areas were chosen which are especially symptomatic of the difficulty in applying the established tests as to whether a function is governmental or proprietary. The areas to be examined are (1) collection of garbage, and (2) sewage. In neither area can it be easily seen whether the function is proprietary or governmental. Thus both offer fertile areas of examination.

In *Broughton v. City of Cleveland*⁷ the Ohio Supreme Court decided that:

A municipal corporation, when engaged in the health-preserving service of collecting garbage for its inhabitants, is in the exercise of a police power and is performing a governmental function . . .⁸

This overruled the decision handed down in *Russo v. City of Cleveland*,⁹ which had stated that garbage collection by a municipality is not a governmental function. An examination of the tests applied by the two courts does little to reconcile the inconsistency between the two decisions, as both argue in the same terms. In the *Broughton* case, the court refers back to the tests of sovereignty outlined in *Wooster v. Arbenz*,¹⁰ and comes to the conclusion that, in addition to being "an act for the common good

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which a particular case must fall; and it is also true that there is considerable conflict in the authorities as to the extent of such liability." *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rpt. 857 (1885). See also similar statements by the courts in *Frederick v. City of Columbus*, 58 Ohio St. 538, 549, 51 NE 35 (1898); *Fowler v. City of Cleveland*, 100 Ohio St. 158, 169, 126 NE 72 (1919); *Eversole v. City of Columbus*, 169 Ohio St. 205, 207, 153 NE 2d 515 (1959). For articles in this area see: *Maier, Sovereign Immunity: Will Ohio Follow Michigan's Lead?*, 31 U. Cinc. L. R. 327 (1962); *Hunter, Local Government Tort Liability*, 9 Ohio St. L. J. 377 (1948).

⁷ 167 Ohio St. 29, 146 NE 2d 301 (1957).

⁸ *Ibid.*

⁹ 28 Ohio C. A. 25 (1917), *affd.* in memo. op. 98 Ohio St. 465, 121 NE 901 (1918).

¹⁰ *Supra*, n. 3.

of all the people in the state," the collection of garbage is a function of sovereignty and a valid exercise of police power in that it provides for the protection and preservation of public health. In the *Russo* case, the court argues in much the same terms when it states, "The people of this state at large have no interest in the disposal of garbage in Cleveland," and "Nothing could concretely be more at variance with one's natural notions as to the office and dignity of sovereignty than the gathering of garbage as it is commonly done on the streets."

Clearly, the change of position is not due to any new breakthrough in legal reasoning in this area, but rather to an application of tests which are imprecise and susceptible to varying answers, given the changes in the social climate in which the courts sit. While it is reasonable that fifty years ago the notion of sovereignty would not have included garbage collection, today the opposite notion is accepted. As we have progressed in terms of social responsibility, municipal activity has penetrated into areas undreamed of a generation ago. Off-street municipal garages, public rapid transit, free distribution of anti-polio vaccines, and municipal power facilities, are but a few areas of public activity. This social transition, and court decisions growing from them, can be seen clearly by an examination of decisions relating to garbage collection in the interim period between the *Russo* case (1917) and the *Broughton* case (1957).

In *Gorman v. City of Cleveland*,¹¹ decided in 1927, the Court of Appeals for Cuyahoga County noted the dangers inherent in not providing for the collection and disposal of refuse, and discoursed at some length as to the consequences of neglect. The court was admittedly aware of the *Russo* decision, but attempted to distinguish that case by maintaining that the question of preservation of health and protection from contagion, "did not appear there as predominant issues, determining the difference between a governmental and a proprietary function."¹²

Eleven years later, the Court of Appeals for Sandusky County decided, in *Imes v. City of Fremont*,¹³ that collection of garbage is a governmental function and supported its contention in the face of the *Russo* decision by stating, "the marked tendency is to regard all municipal measures looking to better

¹¹ 26 Ohio App. 109, 159 NE 136 (1927).

¹² *Ibid.* at 117.

¹³ 58 Ohio App. 335, 16 NE 2d 584 (1938).

health and sanitation in the community, as public and governmental functions." By marshalling Ohio citations to bolster its argument,¹⁴ the court finally concluded:

From all this authority, it appears that if the Supreme Court did intend by its memorandum in *City of Cleveland vs. Russo* to hold the garbage service to be a proprietary function, it has impliedly overruled such pronouncement, and it can be safely assumed that a municipality is performing a public service in collection and disposal of garbage.¹⁵

That the Court of Appeals for Sandusky County had correctly gauged the temper of the times can be seen with reference to the *Broughton* case. But ascertaining the social conscience and rendering decisions accordingly (in the face of a clear pronouncement by the Supreme Court to the contrary) is a questionable function for the courts to adopt. There is nothing more difficult to measure objectively than the general will (if indeed there be a "general will"), and nothing more difficult to gauge than the social conscience. For indeed, such decisions more accurately reflect the subjective will and the social conscience of the court rather than the people, and create inconsistencies in the law as the court changes.¹⁶ Unfortunately, a test as to whether a municipal function is governmental or proprietary, based on a determination whether the function is "an obligation of sovereignty" or "an action taken for the comfort and convenience of citizens," is at best transitory, and is based upon the court's notions as to the proper extent of governmental activity.

¹⁴ The cases cited include: *State ex rel. Mook v. City of Cincinnati*, 120 Ohio St. 500, 166 NE 583 (1929), in which paragraph one of the syllabus reads, "The adoption of regulations pertaining to health and sanitation including the process of collection of garbage is within the proper exercise of the police powers of the State and its municipalities"; *Hutchinson v. City of Lakewood*, 125 Ohio St. 100, 180 NE 643 (1932); and the Supreme Court's overruling of a motion to certify the record in *Gorman v. City of Cleveland*, *supra* n. 11.

¹⁵ *Supra*, n. 13 at 337.

¹⁶ A good example of how changes in the bench caused rapid changes in rulings as to the governmental or proprietary nature of a municipal function can be seen from an examination of a set of cases dealing with the status of fire department activities, decided between 1898 and 1922. The decisions rendered in *Frederick v. City of Columbus*, 58 Ohio St. 538, 51 NE 35 (1898); *Fowler v. City of Cleveland*, 100 Ohio St. 158, 126 NE 72 (1919); *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 NE 164 (1922), tend to show that when decisions are based not on the rule of law but rather on the subjective ideas of what the court believes is in accordance with the "general will," inconsistencies and embarrassing changes of position will occur with the changes on the bench.

Whereas the courts seem to have finally arrived at some unanimity in cases involving collection and disposal of garbage, they are still unclear as to the status of sewage disposal, an area which is in many ways analogous to the former. While it would, at first glance, seem that cases pertaining to collection of garbage and sewage disposal would be decided in much the same way, as both areas are involved with functions that protect the health and well-being of the populace, an examination of the decisions in this latter area show that the courts are not yet ready to fully declare sewage disposal to be a governmental function. It seems that the courts will not "fully" declare it a governmental function because it appears that they have decided that while the *maintenance* of a sewage disposal plant is not a governmental function,¹⁷ activities taken for its *construction* are.¹⁸ This judicial hairsplitting has further clouded the issue and appears to have little reasonable basis.

The rationalization behind the holding that collection of garbage is a governmental function, while the maintenance of a sewage system is a proprietary function, appears to have escaped some of the members of the Ohio Supreme Court, as well as the writer. In *Broughton v. City of Cleveland*,¹⁹ Judges Taft and Bell, in the dissenting opinion as to the governmental nature of garbage collection, state:

In my opinion, the accumulation within a municipality of those wastes that sewers are designed to handle would be more deleterious to public health and safety than would accumulation of garbage therein; and the collection and disposal of sewage by the municipality should constitute as valid an exercise of the police power and represent as much a governmental function for safeguarding public health as does the collection of garbage by the municipality.

Hence, it seems to me that, if we are to be consistent with our decision with respect to that operation, maintenance and repair of sewers, we should reverse the decision of the appellate court.²⁰ (That is, hold collection of garbage a proprietary function.)

¹⁷ *Portsmouth v. Mitchell Mfg. Co.*, 113 Ohio St. 250, 148 NE 846 (1925); *Salem v. Harding*, 121 Ohio St. 412, 169 NE 457 (1929); *Dowd v. Cincinnati*, 152 Ohio St. 132, 87 NE 2d 243 (1949).

¹⁸ *Hutchinson v. Lakewood*, 125 Ohio St. 100, 180 NE 643 (1932); *State ex rel. Gordon v. Taylor*, 149 Ohio St. 427, 79 NE 2d 127 (1948).

¹⁹ *Supra*, n. 7.

²⁰ *Ibid.* at 35.

An examination of the cases which deal with holding that the maintenance of sewage systems is a proprietary function is, unfortunately, not revealing as to *why* the court so decided. In *City of Portsmouth v. Mitchell Manufacturing Co.*,²¹ a case which appears to be one of the first in Ohio as to the governmental or proprietary nature of a sewage system, the Supreme Court held that, "construction and institution of a sewer system is a governmental matter, while the obligation to maintain and repair is purely ministerial." The decision was entirely based on the weight of authority in other jurisdictions. This decision was followed without further elucidation in *City of Salem v. Harding*²² in 1929, and in *Doud v. City of Cincinnati*²³ in 1949. It would appear that the question raised by Judges Taft and Bell as to why the collection of garbage is deemed a governmental function while maintenance of a sewage system is proprietary, is left unanswered in Ohio. This is but another example of the glaring inconsistencies created by the application of a test of sovereign immunity which gives the court no benchmark from which to proceed.

Further inconsistencies arise in the examination of those decisions which hold that the construction of a sewer system is a governmental function. In *Hutchinson v. City of Lakewood*,²⁴ the court held that, as "The preservation of the health, safety and welfare of the dwellers in urban centers of population constitutes a part of the police power. . . certainly the power to construct public sewers constitutes a part of the police power for such sewers are established for the express purpose of preserving the public health. This being the case, the function is purely governmental . . ."

Although the construction of a sewage system is deemed governmental as an exercise of the police power of the municipality, it does not appear reasonable to deem that the maintenance and repair of the same system, which is necessary to insure the continued health and welfare of the population, is a proprietary function. Rather, it appears that this inconsistency is merely an illogical outgrowth of the continuing application of the tests of sovereign immunity which are imprecise and too susceptible to varying, if not opposite, judicial interpretations.

²¹ 113 Ohio St. 250, 148 NE 840 (1925).

²² 121 Ohio St. 412, 169 NE 457 (1929).

²³ 152 Ohio St. 132, 87 NE 2d 243 (1949).

²⁴ 125 Ohio St. 100, 180 NE 643 (1939).

Some Possible Guidelines

The remainder of this article will be devoted to an attempt at suggesting some possible guidelines toward a more workable test of sovereign immunity for municipal corporations. The suggested guidelines will be examined in terms of the various advantages and disadvantages of each.

I. Abolition of Governmental Immunity

While this solution has been suggested and examined previously in some detail,²⁵ its simplicity of application commends its mention. Rather than the court attempting to distinguish between a governmental and proprietary function in order to determine whether or not to throw up the shield of governmental immunity in front of the municipality, it could instead concern itself solely with determining liability. At one stroke the inconsistency and confusion would be swept aside. Needless to say, this is not a new solution; it has been proposed with some regularity by various members of the Ohio Supreme Court, notably in Judge Wanamaker's concurring opinion in *Fowler v. City of Cleveland*,²⁶ noted above. As the role of municipal government expands to the point where every member of the public is in frequent contact with it, it is often unjust to deny compensation because of the rule of governmental immunity for injury to that segment of the public which has been negligently injured by an agent of the municipality.

Unfortunately, in the converse of this situation lies the difficulty in abolishing the rule. As municipal activities expand, so, too, does its exposure to liability. Without the protective mantle of governmental immunity for some of its activities, a small municipality might be bankrupted by several sizeable judgments against it. Rather than the public at large being protected, it could be ruined.

II. A Definitive List of Proprietary and Governmental Functions

Another possible solution is to request the Attorney General to draw up a definitive list that would distinguish municipal functions as to their governmental or proprietary nature. As

²⁵ For a comprehensive examination of this solution, see Maier, *Sovereign Immunity: Will Ohio Follow Michigan's Lead?*, 31 U. Cinc. L. R. 307 (1962).

²⁶ *Supra*, n. 15.

the activities of the municipalities expand, the list could be brought up to date by regular and periodic additions. Since the opinions of the Attorney General are persuasive rather than mandatory, the courts would neither be bound by an iron-clad ruling, nor be left without any benchmark from which to arrive at consistent decisions.

The major problem with this solution is that of inability to foresee all of the possible future areas of litigation. A definitive list can only categorize those municipal activities which already have been experienced. It would be impossible to speculate as to the areas into which municipal governments will move in the next decade. Eventually a case will arise which calls for a distinction which has not been classified and is not analogous to any that have been. Thus, the court will be forced back to the application of some general rule.

III. A Test Embodying the Distinction Between the "Mandatory Functions" and the "Enumerated Powers" of a Municipality

Another, and perhaps most workable, solution to the problem might be to view as a governmental function only those activities which are of a mandatory nature as provided by the Ohio Revised Code. Conversely, those activities which are simply enumerated as general powers of the municipality would be classed as proprietary functions. This solution has two points in its favor: (1) the Revised Code is relatively clear in its language as to which activities are mandatory in character and which are simply enumerated as general powers, and (2) such a test has precedent in Ohio case law.

As to the first point, Title 7 on Municipal Corporations seems to distinguish between those functions which are mandatory ("The municipality shall . . ."), and those which are enumerated as general powers ("The municipality may . . ."). For example, R. C. 737.05 and R. C. 737.08 clearly make it a duty of the municipal corporation to maintain a police and fire department, respectively. Similarly, R. C. 723.01 gives the municipality the power to regulate the use of the streets, and specifically charges it with the duty to keep them open: "The municipality . . . shall have the care, supervision and control of public highways . . . and shall cause them to be kept open, in repair and free from nuisance." Conversely, R. C. 717.01, which enumerates the various special powers of municipal corporations, does not make

these activities mandatory but merely permits their existence.

Those functions which the municipalities are bound by statute to perform would be classed as governmental; those functions which the municipality may, at its discretion, wish to perform would be classed as proprietary. However, an obvious problem immediately arises: if those activities which are defined as a duty of the municipality are given the cloak of governmental immunity, does this not except the municipality from liability for failure to perform its duty? This problem can be dealt with by granting to the municipality governmental immunity from tort liability only in the active performance of its duty. It would not be immune from liability in those situations where the court finds that failure to perform the duty was the proximate cause of the injury. Thus, the municipality's failure to act in the face of a duty rather than its efforts toward performing that duty would be the basis for liability. In this manner, the municipality would be afforded some measure of protection while not being given the opportunity to entirely hide behind the shield of governmental immunity. And perhaps most important, the distinction between governmental and proprietary functions will be given a solid base.

As to the second point, that this proposed test has some precedent in Ohio case law can be seen by an examination of the original test pronounced in *Wooster v. Arbenz*.²⁷ By basing the test of a governmental function on whether or not it is a mandatory duty as set forth in the Revised Code, this parallels the reasoning of the Supreme Court in the *Wooster* case when it cited as the test, "whether or not the function is a duty imposed on the state as an obligation of sovereignty." The major difference in the proposed test as compared with that pronounced by the Supreme Court in 1927 is that the former gives reference to a definitive source as to whether or not the function in question is a mandatory duty, while the latter leaves it up to the courts to decide whether it is a duty imposed as an obligation of sovereignty.

Further, the proposed test again parallels the old test in its definition as to a proprietary function. In the above 1927 decision, the court held that if it "was an action for the comfort and convenience of its citizens" then it was proprietary. The

²⁷ *Supra*, n. 2.

proposed test defines those activities which, under the Revised Code, the municipality is permitted (but not charged) to perform as proprietary. Again, the benefit of the proposed test is that the statute is the guide.

Needless to say, this last possible guideline has its weaknesses. For example, under R. C. 755.01, it appears that it is a mandatory duty that a park board be established if five per cent of the qualified electors petition for an election, and if the electorate votes accordingly. But while the establishment of the park board may become mandatory, there is no duty to establish parks, playgrounds, pools, and other recreation areas. Such activities are merely permitted to the municipality. While it is clear that selection of a park board is a mandatory duty, should it not be distinguished from those duties which provide for police or fire departments and which are not conditioned upon the vote of the electorate? Problems such as this will arise under any test established. However, under the proposed test, the courts would have some definitive guidelines as to the correct decision.

Appendix

The following is a list of reported Ohio cases which clearly demonstrate the morass of inconsistencies and changes of mind which have occurred as a result of the application of Ohio's "simple rule."

GOVERNMENTAL

Construction of sewer
City of Salem v. Harding (1929),
121 Ohio St., 412
Hutchinson v. City of Lakewood
(1932), 125 Ohio St., 100

Creation and maintenance of
police department
Aldrich v. City of Youngstown
(1922), 106 Ohio St., 342

Fire department
Fredrick, Adm.; v. City of Columbus
(1898), 58 Ohio St., 538
Wheeler v. City of Cincinnati
(1896), 19 Ohio St., 19

Operation of hospital
Lloyd v. City of Toledo (1931),
42 Ohio App., 36

Collecting garbage
Broughton v. City of Cleveland
(1957), 167 Ohio St., 29

Maintenance of sanitary land fill for
disposal of garbage and refuse
Osborn v. City of Akron (1960),
171 Ohio St., 361

Construction of sewage plant
Ratliff v. Akron (1959),
82 Ohio Law Abs., 353

Collecting rubbish
Gorman v. City of Cleveland (1927),
26 Ohio App., 109
Bademan v. Cleveland (1952),
66 Ohio Law Abs., 175

Construction and maintenance of
park and swimming pool
Selden v. City of Cuyahoga Falls
(1937), 132 Ohio St., 223

Maintenance of public park in
natural state
City of Cleveland v. Walker, Adm.
(1936), 52 Ohio App., 477

Maintenance and control of
combined park and zoo
Crusafi v. City of Cleveland
(1959), 169 Ohio St., 137

PROPRIETARY

Operation and upkeep of sewer
City of Portsmouth v. Mitchell Mfg.
Co. (1925), 113 Ohio St., 250

Airport
Village of Blue Ash v. City of Cin-
cinnati (1960), 173 Ohio St., 345

Fire department
Fowler v. Cleveland (1919), 100
Ohio St., 158

Operation of hospital
Hyde v. City of Lakewood (1961),
17 Ohio Op. (2d), 61

Collecting garbage
City of Cleveland v. Russo, Admr.
(1918), 98 Ohio St., 465

Operation of transportation system
Zangerle, Aud., v. City of Cleveland
(1945), 145 Ohio St., 347
Cleveland Ry. Co. v. Village of
North Olmsted (1935), 130 Ohio St.,
144

Construction and maintenance of
water system
City of Barberton v. Miksch (1934),
128 Ohio St., 169

Cemetery
City of Toledo v. Cone (1884),
41 Ohio St., 149

Maintenance of arts and crafts
building as part of recreation
program
Eversole v. City of Columbus
(1959), 169 Ohio St., 205

Municipal auditorium
State, ex rel. White, v. City of
Cleveland (1932), 125 Ohio St., 230

Municipal stadium
Chupek, Admr., v. City of Akron
(1951), 89 Ohio App., 266

GOVERNMENTAL

Municipal building
Tinsley v. Cincinnati (1957),
 78 Ohio Law Abs., 419

Construction and maintenance
 of park
Snider v. Youngstown (1938),
 27 Ohio Law Abs., 231

Improvement and maintenance
 of streets
*Standard Fire Ins. Co. v. City of
 Fremont* (1955), 164 Ohio St., 344
*Davis v. Charles Shutrump & Sons
 Co.* (1942), 140 Ohio St., 89
City of Dayton v. Glaser (1907),
 76 Ohio St., 471
*Village of Blue Ash v. City of
 Cincinnati* (1960), 173 Ohio St., 345

Barricading street for coasting
*City of Mingo Junction v. Sheline,
 Adm.x.* (1935), 130 Ohio St., 34

Street cleaning
City of Akron v. Butler (1923),
 108 Ohio St., 122
Galluppi v. City of Youngstown
 (1936), 55 Ohio App., 331

Traffic lights
Martin v. City of Canton (1931),
 41 Ohio App., 420

Issuing and revoking building
 permits
James v. City of Toledo (1927),
 24 Ohio App., 268

Jail or workhouse
Wittenbrook, Adm.x., v. Columbus,
 33 Ohio Law Abs., 586
Bell v. City of Cincinnati
 (1909), 80 Ohio St., 1

PROPRIETARY

Renting of memorial building
*Dean v. Board of Trustees of
 Soldiers & Sailors Memorial Bldg.*
 (1940), 65 Ohio App., 362

Construction of off-street
 parking facility
Zaras v. City of Findlay (1960),
 112 Ohio App., 367

Operation of off-street parking
 facility
Cutnaw v. City of Columbus
 (1958), 107 Ohio App., 413

Municipal golf course
Gorsuch v. Springfield (1945),
 43 Ohio Law Abs., 83

Wall of municipal building left
 standing after fire
Lebanon v. Loop (1935),
 20 Ohio Law Abs., 302

Supplying of electricity
Butler v. Karb, Mayor (1917),
 96 Ohio St., 472
*Travelers Ins. Co. v. Village of
 Wadsworth* (1924), 109 Ohio St., 440