MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE—INJURIES SUSTAINED AT MUNICIPAL GOLF COURSE

City of Atlanta v. Mapel[1] was an action against defendant-city for injuries to plaintiff's twelve year old son who suffered severe brain damage when he was struck on the head by a golf ball at a municipal golf course. Pursuant to Ga. Code Ann. § 69-308 (Rev. 1967), plaintiff made a demand upon defendant-city; defendant-city refused the claim. Upon the filing of plaintiff's complaint, defendant moved for summary judgement as to the issue of liability. The defendant-city contended that the operation of a city golf course was a governmental function[2] immune from liability under Ga. Code Ann. § 69-301 (Rev. 1967).[3] Plaintiff's

1. 121 Ga. App. 567, 174 S.E.2d 599 (1970).

2. An affidavit was filed in the lower Court by the General Manager of Parks for Atlanta. It included:

A. Schedule of receipts and expenditures for system of municipal golf courses operated by the city of Atlanta, to wit:

TOTAL RECEIPTS AND EXPENDITURES FOR GOLF
1958 THROUGH 1968

YEAR	TOTAL RECEIPTS	TOTAL EXPENDITURES	EXCESS OR DEFICIT
1968	$ 319,036.40	$ 339,430.56	$(20,394.16)
1967	323,050.35	332,116.09	(9,065.74)
1966	250,917.42	289,390.27	(38,472.85)
1965	289,041.78	298,829.80	(9,788.02)
1964	264,340.05	259,080.23	5,259.82
1963	210,170.67	244,358.71	(34,188.04)
1962	208,644.70	203,726.73	4,917.97
1961	205,640.06	193,672.94	11,967.12
1960	209,730.01	191,524.84	18,205.17
1959	182,188.14	196,475.01	(14,286.87)
1958	154,643.92	193,255.23	(38,611.31)
	$2,617,403.50	$2,741,860.41	($124,456.91)

B. The contention that fees charged to golfers on city courses were regulatory in nature and that without such charges, increased play would create a situation whereby the "courses could not be used to the maximum advantage and pleasure of citizens in the surrounding area who enjoy playing golf."

C. The contention that the course was part of Atlanta Memorial Park. Affidavit of Defendant, Mapel v. City of Atlanta, Civil Action No. B-40206 (Superior Court of Fulton County Nov. 5, 1969).

3.

> Municipal corporations shall not be liable for failure to perform, or for error in performing their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of the ministerial duties, they shall be liable.

brief[4] asserted that the facts alleged in the complaint showed that such an activity was proprietary in nature therefore not within the doctrine of governmental immunity, and further asserted that the doctrine of governmental immunity would deprive plaintiff of property and personal rights without due process of law contrary to the fourteenth amendment of the United States Constitution and the Georgia Constitution.[5] Defendant-city's motion was denied. On appeal, the Georgia Court of Appeals, with one justice dissenting, reversed. The court held that the operation of a city golf course is a governmental function under the Georgia Law; damages and injuries resulting from the tortious performance of a governmental function must be borne solely by the injured individual; only the General Assembly has the power to change this rule.

The history of governmental immunity has been thoroughly discussed in other articles.[6] Concerning governmental immunity and municipalities, the doctrine is evolved from a British case, *Russell v. Men of Devon.*[7] The court held that no action would lie by an individual against the inhabitants of an unincorporated county for an injury sustained in the consequence of a county bridge being out of repair. The court explained that no act of Parliament had made the inhabitants of an unincorporated county at large liable for such action; that the inhabitants were a fluctuating body, and before judgement might be obtained, other persons may have come to reside in the county; it would be unjust to levy against such new inhabitants; that, "*It is better that an individual should sustain an injury than that the public should suffer inconvenience.*"[8] Georgia's codification of municipal immunity was derived from *Collins v. Mayor of Macon.*[9] In explaining the policy, Justice Speer said:

> Municipal corporations are the creature of statute. They possess no powers or facilities not conferred upon them either expressly, or by fair implication, by the law which creates them or other statutes applicable to them. Powers and duties of a municipal corporation under its

4. Brief of plaintiff, Mapel v. City of Atlanta, Civil Action No. B-40206 (Superior Court of Fulton County Nov. 5, 1969). 121 Ga. App. 567, 174 S.E.2d 599.

5. GA. CONST. art. I, § 1(3), GA. CODE Ann. § 2-103 (Rev. 1948). "No person shall be deprived of life, liberty or property, except by due process of law."

6. Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. (1926).

7. 100 ENG. REP. 359 (1788).

8. *Id.* at 362.

9. 69 Ga. 542 (1882).

> charter consists of acts which are legislative or judicial in their nature, and those which are purely *ministerial.*[10]

The remaining portion of his opinion dealt with the former above powers, governmental functions being immune from liability and the latter power, ministerial functions, not exempted. However, Justice Speer further stated in recognizing the realm of a municipal corporation's liability that:

> As to property held by a corporation, the rule is that it is liable for the improper management and use of its property to the same extent and in the same manner as private corporations and natural persons are, and unless they are acting under some valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another.[11]

In essence, Justice Speer classified property held by a municipal corporation, absent "special legislative authority" as a ministerial function. Georgia Code Ann. § 69-312 (Rev. 1967) provides authority for a municipality to maintain public golf courses, but does not in itself exempt a municipal corporation from liability in operating such golf courses.

It is well settled that a city is liable at common law for its torts in the performance or nonperformance of corporate duties as distinguished from governmental functions.[12] The rationale seems to be that municipalities cannot properly perform their governmental functions if they are liable for the tortious performance of their agents.[13] "It has been explained that such a doctrine is appropriate in the interest of public policy, to protect public funds and public property, that taxes are raised for certain specific governmental purposes," and if they could be diverted to the payment of damage claims the more important work of government would be impaired.[14]

The implications of *City of Atlanta v. Mapel*[15] are clear. In construing Ga. Code Ann. § 69-301 the appellate court said:

> It should be fundamental that any city activity or operation is carried on primarily for the public benefit, even if for only a limited segment of the public.[16]

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10. *Id.* at 544.
11. *Id.* at 545.
12. *See* 100 Eng. Rep. 359.
13. O'Connel v. Merchants & Police Dist. Tel. Co., 167 Ky. 468, 180 S.E. 845 (1915).
14. *Id.* at ___, 180 S.E. at 847.
15. 121 Ga. App. 567, 174 S.E.2d 559 (1970).
16. *Id.* at 570, 174 S.E.2d at 601.

Apparently the court has assumed that any operation of a city is a governmental function. Should not the court be wary before closing its doors and denying an injured individual the opportunity to be heard? The statute itself excludes ministerial functions from the doctrine of immunity, inferring that some of a city's activities are not carried on primarily for the public benefit. Earlier cases are contrary to the above and have found certain operations without the protections of the statute, such as electric power plants,[17] public sewer systems[18] and public cemeteries.[19]

In further explaining the test to be used in determining the character of a city's operation, the court, relying on *Cornelisen v. City of Atlanta*,[20] said:

> Georgia has a 'consistent Key'. Laid down in 1916 and scrupulously followed since is this test: Where a city maintained a park for the use of the public, intended as a place of resort for pleasure and promotion of health of the public at large, its operation is in virtue of the governmental powers of the municipality, and no municipal liability would attach . . . It would not affect the public character of the duties of the officers . . . of the city that a purely incidental profit might result to the city from its operation or management of the park . . . .[21]

Since when is a golf course a park? A golf course is not an enclosed pleasure ground set apart for the recreation of the public. "A golf course does not serve the public generally, but only those who play the game. It is designed for a single purpose, while a public park is devoted to no specific use and serves many purposes for the public in general."[22] A golf course is not for the public at large. The affidavit of defendant-city admits that fees were charged to restrict use of the golf course.[23] Golf courses are private in nature. Certainly, a city golf course is for the benefit of the particular inhabitants of the city. Besides the revenue collected in green fees, a city is directly compensated by growth and prosperity and increased property taxes. For the period 1959-1968 the

17. City of Moultrie v. Poole, 260 F.2d 118 (5th Cir. 1958).

18. Henning v. City of Atlanta, 35 Ga. App. 24, 131 S.E. 921 (1925).

19. City of Atlanta v. Rich, 64 Ga. App. 193, 12 S.E.2d 436 (1940).

20. 146 Ga. 416, 91 S.E. 415 (1916).

21. 121 Ga. App. at 570, 174 S.E.2d at 601.

22. Plaza v. City of Mateo, 123 Cal. App.2d 103, 111, 266 P.2d 523, 528-29 (1954) *construed* in City of Atlanta v. Mapel, 121 Ga. App. at 568, 174 S.E.2d at 600.

23. Affidavit of General Manager of Parks, City of Atlanta, *supra* note 2(B). *See also* Cornelisen v. City of Atlanta, 146 Ga. 416, 418, 91 S.E. 415, 418 (1916) where the court said:

> The general rule of non-liability . . . has no application where the duties . . . relate to branches of municipal endeavors which are private in nature primarily for revenue and promotion of municipal welfare.

city had a deficit of only 4% of a total expenditure of 2.7 million dollars.[24] But, the additional tax revenue collected as a result of the golf course system would more than compensate Atlanta's treasury. Furthermore, during 1960, 1961, 1962 and 1964 the defendant-city profited in the golf operations.[25]

Too often overlooked is the dissenting opinion in *Russell*:

> The general principal is, that where one person receives an injury by any other person or persons omitting to do what by law he or they are bound to do, he may maintain an action of the case to recover satisfaction for the damages he has received . . . [T]here is no difference between an action against an individual or corporation, and the present which is brought against men residing in . . . Devon, who have been guilty of some neglect.
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> With respect to the plaintiff, the injury is the same; they are equally innocent, and have suffered by the default of others, who were bound by law to perform a duty which they neglected; they therefore upon every principle of reason and justice ought to have reparation. With respect to the defendants, they are equally guilty of a breach of duty, and are at least able to make this compensation; they therefore on the same principal of reason and justice ought to make satisfaction to the plaintiffs who have suffered from their neglect.[26]

Denying the plaintiff's cause of action concerning injuries sustained on a public golf course while allowing one involving a private golf course is contrary to reason and justice. Furthermore, proper performance of public duties by a municipality and immunity from suit for tort have an inverse relation. Liability rather than immunity tends to make the management of municipal affairs more careful and consistent with the purposes of government. The governmental units should serve as models in behavior. A governmental unit operating a public golf course should be held to the same standard of care as one who operates a private golf course. Immunity directly tends to carelessness and the violation of private rights, and with the ever increasing scope of municipal activities, the possibilities of harm to the individual is correspondingly greater. If the reasons for the majority in *Russell* ever had any substance, they have none today. Public convenience does not outweigh individual compensation. The rule providing immunity to governmental units in the tortious performance of its duties is an "anachronism, without rational

24. Affidavit of General Manager of Parks, City of Atlanta, *supra* note 2(B).
25. *Id.*
26. 100 Eng. Rep. at 361.

basis and has existed only by the force of inertia."[27] It has been judicially abolished in other jurisdictions.[28] There is no reason why the most flagrant of injuries wrongfully sustained by the individual citizen, arising from the torts of government entities should be allowed to rest at the door of the unfortunate citizen alone. It is almost incredible that in this modern age of comparative sociological enlightenment the maxim "The King can do no wrong" should exempt the various branches of government from liability for their improper and wrongful actions; that the entire burden of damages should be imposed upon the injured citizen, rather than be divided among the entire community where it could be borne without hardship upon the individual and where under the modern ideal it justly belongs.[29] The city is today an active and powerful creature capable of inflicting great harm. Its civil responsibilities should co-exist with the privileges granted, but the former should not be overpowered by the latter.

Should a person's right to redress for damages inflicted upon him by another's negligence depend on a distinction of the function in which the tort arose? Concerning municipal corporations, most jurisdictions provide that in the case of governmental functions the municipality shall be immune from suit for its tortious acts, but when the municipality acts in a fashion which is private in nature, immunity shall not apply. Some jurisdictions have explicit tests to be applied.[30]

Concerning golf courses, the court in *City of Atlanta v. Mapel*

27. Williams v. City of Detroit, 361 Mich. 231, ____, 111 N.W.2d 1, 22 (1961); Muskopt v. Corning Hosp. Dist., 11 Cal. Rep. 89, 359 P.2d 457 (1961).

28. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

29. Williams v. City of Detroit, 361 Mich. 231, 111 N.W.2d 1 (1961).

30. In *Gorsivch v. City of Springfield*, 43 Ohio L. Abs. 83, ____, 61 N.E.2d 898, 904 (1945) the court said:

> There is no liability on the part of a municipality in action for tort if the function exercised by the municipality at the time of injury was a governmental function, but the doctrine is also well established that if the function being exercised by the municipality is proprietary and in the pursuit of private and corporate duties for the particular benefit of the inhabitants, as distinguished from those things in which the whole state has an interest, or if the city had an election to do or omit to do the acts set forth, the city is liable in tort.

New York courts further defining the distinguishing criteria between the functions of governmental versus corporate concerning parks, in *Augustine v. Town of Brant*, 249 N.Y. 198, ____, 163 N.E. 732, 734 (1928) said:

> A wise public policy forbids us to recognize the town of Brant as acting as a sovereign when it maintains its park. It acts as a legal individual voluntarily assuming a duty, not imposed upon it, for the benefit of a locality rather than the general public. When it assumes such a duty it also assumes the burdens incident thereto.

admitted that there has been a "trend away from the absolute defenses of immunity in most jurisdictions" and that "elsewhere in the country when golf courses have been specifically considered the 'general rule is to find them proprietary' . . ." But, the court concluded its review of the matter by declaring its innocence from the hardships and injustices of the doctrine which it originated by saying:

> The appellee makes a logical argument in saying that even if this is a governmental function, the damages resulting should not be borne wholely by the injured individual—that they should be shouldered by the government and distributed to the taxpayers who are the ultimate beneficiaries of public activities. However, that argument addresses itself to the legislative branch of government. In Georgia, the legislature has unfortunately codified the doctrine of municipal immunity into statutory law (Code § 69-301) to the extent that the judicial branch has been preempted from effectively destroying that which it created.[31]

Municipal tort immunity can be abolished by judicial abrogation in Georgia. Even though the General Assembly has codified the judicial doctrine of immunity, the courts have not been preempted from effectively destroying that which they have created and thereafter codified by the legislature when the statute is in want of constitutional support. The Georgia Constitution provides that: "Legislative acts in violation of this constitution, or the Constitution of the United States are void, and the Judiciary shall so declare."[32] The manner in which the Georgia courts construed Ga. Code Ann. § 69-301 is arbitrary and capricious:

> The American rules governing tort liability of municipal corporations make a curious patchwork of immunity and responsibility. The dominant motif is a supposed distinction between governmental and proprietary functions . . . No satisfactory test has been devised for distinguishing between these functions.[33]

"No satisfactory test" equates with being arbitrary. Georgia does not have a 'constant key'. The courts' basic approach to municipal liability is based on a variety of arbitrary tests, which, depending on which test is

31. 121 Ga. App. at 571, 174 S.E.2d at 601-602. The court relied on 5 GA. ST. B.J. 494 (1969) as authority for this proposition.

32. GA. CONST. art. I, § 4(2), GA. CODE ANN. § 2-402 (Rev. 1948).

33. City of Atlanta v. Mapel, 121 Ga. App. 567, 568, 174 S.E.2d 599, 600 (1970).

applied to a specific factual situation would find the municipality liable or immune.[34] The Georgia Constitution further provides:

> All government of right originated with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times *amenable* to them.[35]

Amenable means "Subject to the law; accountable; responsible, liable to punishment,"[36] "disposed or ready to answer, yield . . . . liable to be called to account, legally responsible."[37]

In *City of Atlanta v. Mapel* the court insisted on following the doctrine of stare decisis.[38] It is often said that judges stunt the growth of the law by the doctrine of stare decisis as if case-hardened res judicata. In many ways concerning stare decisis the courts act as a killy-loo bird.[39] Why does the court which admits the injustice of the immunity doctrine expand the doctrine in the same breath? As a legal defense the rule of governmental immunity only has the argument that age has lent weight to the unjust whim of long dead kings. It is hard to believe that the courts of America have so long adhered to this relic of the feudal days after we have overthrown the monarch itself. The Georgia Constitution provides that: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."[40] There can be no doubt that a statute which denies redress to an injured individual for the tortious performance of a municipality is in derogation of this constitutional provision. Comprehensive reform may come as a result of judicial iniative.

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34. As suggested by this article, these arbitrary tests violate the equal protection clause of the fourteenth amendment applying the test in *Frost v. Corporation Commission*, 278 U.S. 509, 522 (1928):

> Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually palpably unreasonable and arbitrary.

35. GA. CONST. art. I, § 1(1), GA. CODE ANN. § 2-101 (Rev. 1948).

36. BLACK'S LAW DICTIONARY 106 (4th ed. 1968).

37. AMERICAN COLLEGE DICTIONARY, 40 (1958).

38. 121 Ga. App. at 570, 174 S.E.2d at 601; "We must follow the ratio decidendi of the *Cornelisen* case. . . ."

39.

> The law is the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it didn't care where it was going but was mightily concerned where it had been. And certainly The Law, when it moves at all, does so by flapping clumsily and uncertainly along, with its eye unswervingly glued on what lies behind. 361 Mich. at ____, 111 N.W.2d at 13.

40. GA. CONST. art. I, § 1(2), GA. CODE ANN. § 2-102 (Rev. 1948).