

1896

The Liabilities of a Municipal Corporation for the Negligence of a Servant

Frederick Luther Taylor
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

 Part of the [Law Commons](#)

Recommended Citation

Taylor, Frederick Luther, "The Liabilities of a Municipal Corporation for the Negligence of a Servant" (1896). *Historical Theses and Dissertations Collection*. Paper 364.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

T H E S I S .

THE LIABILITY OF A MUNICIPAL CORPORATION FOR THE
NEGLIGENCE OF A SERVANT.

Presented by

FREDERICK LUTHER TAYLOR,

For the Degree of

B A C H E L O R O F L A W S .

CORNELL UNIVERSITY

1896.

In discussing the liability of a municipal corporation for the negligence of a servant, I propose to deal with a particular case which has actually arisen in practice, but which has not as yet been disposed of in the Courts.

This discussion will necessarily embrace the fundamental principles which enter into all cases against municipalities; and I propose especially to compare and distinguish the New York cases which appear to have established precedents in cases of similar nature.

In discussing the case in question, I propose to show that the defendant, the City of Brooklyn, should be held liable for negligence, and my efforts to reconcile the cases, and my reasoning throughout will be with the aim of eventually showing such to be the case.

In the primary discussion of the facts, I shall also necessarily set forth the terms of the contract which existed between the city and a contractor, and endeavor

to show the weight and effect of the provisions of said contract, before discussing the doctrine respondeat superior, under which I will endeavor to fix the liability of the City.

The facts of the case appear as follows: Up to 1894 drainage was provided for the portion of the City of Brooklyn through which Greene Avenue passes, by a system of sewerage which, in that year proved its inadequacy by failing to carry off the flow of water caused by ordinary storms. The property owners made complaint, and subsequently a contract was entered into for the establishment of an auxiliary system of sewers, a branch of which was to run through said Greene Avenue.

The contract was entered into by the Mayor and Commissioner of Public Works, as representatives of the City of Brooklyn, and a contractor, who was to perform the work according to provisions hereinafter set forth. The contract provided that the work be carried on in pursuance of plans and specifications filed in the office of the Commissioner of Public Works.

And in following these plans, the contractor caused

a trench forty-seven feet in depth to be dug through Greene Avenue, and in consequence of the improper or negligent construction of the sewer and by virtue of improperly shoring and walling up said trench the property of adjoining property owners has been greatly damaged by the settling of their lands and attendant damages caused by the caving and settling of the ground surrounding said trench.

Among other provisions of the contract providing for the supervision, inspection, and general direction of the work by the City officers, appear the following: (1) "The department of Public Works shall be, and is hereby authorized, by its Chief Engineer, or such other errson or persons, or in such manner as it may deem proper, to inspect the materials to be furnished and the work to be done under this agreement and to see that the same correspond to the specifications."

This provision in the event of any drainage occuring by virtue of poor materials, or by poor work not complying with the specifications, would, it is beyond controversy, operate to make the city directly responsible therefor.

(2) Section 14 of Specification provides that

"All work of every kind and nature to be done under this contract to complete the drainage of the said section 2 of the Main Relief Sewer extension, shall be done according to the exhibits on said maps and plans, and the plans, models, and descriptions or specifications on file in the office of said Commissioner and in accordance with all the directions of the Engineer of said Commissioner. And said Commissioner reserved to himself the right, and it is expressly agreed by the said party of the second part, that the said Commissioner may change at his discretion the amount of all the various kinds of work and materials and structures and may decrease or increase the amount of money to be paid the said party of the second part under this contract, according to the several prices herein Stated."

This provision evidences the fact that the contractor is not acting independently, but is carrying out the work according to plans laid out by the City, who may in its discretion, change the amount of work, materials or structure. The most noteworthy function of this provision is to give to the City Engineer express power to direct the manner of performing the work.

The contract contains also a clause setting forth that whenever the term "Engineer" is used it refers both to the Chief Engineer of the department of City works, and his authorized agents; and all explanations and directions necessary to carrying out and completing satisfactorily the different descriptions of work contemplated and provided for under this contract, will be given by said Engineer.

However, the clause of the contract which is of most import in fixing the responsibility for the damage under discussion, is Section 25, which reads as follows:

"If any person employed by the contractor on the works shall appear to the Engineer to be incompetent or disorderly, he shall be discharged immediately upon the requisition of the Engineer; and such person shall not again be employed upon them without permission."

The weight of this provision will be set forth in the ensuing discussion of the liability of the City for the damage as before discribed.

By force of these provisions, as heretofore set forth, the City of Brooklyn is expressly vested with the following powers as to the overseeing of proper perform-

mance of the contract:

(1) The power to discharge employees engaged by the contractor.

(2) Power to direct the manner of performance of the work.

(3) Power to pass upon the quality of materials used and to discard them if not in compliance with the specifications.

In discussing the liability of the city under the doctrine respondeat superior, it is necessary to primarily determine whether the contractor in the case was the servant of the city of Brooklyn only, or of the public at large.

Has the City, in obedience with a Legislative act, appointed this contractor to perform a public service in which the Corporation has no private interest or benefit, or has the City chosen him in compliance with her own resolutions and wishes ?

If the former is the case, the doctrine respondeat superior must be abandoned, but if the latter be true,

we may apply the doctrine.

This question is exhaustively discussed in the case of Maximilian vs. The Mayor, 62 N.Y. 160. The facts in this case involved the injury of an individual through negligence of the driver of an ambulance. The Court holds:

1. That the rule of respondeat superior is based upon the right which an employer has to engage and discharge his servants with regard to their skillfulness or behavior.

II. If the act of a subordinate appointed by the municipality is done in the attempted performance of a duty laid by the law upon him and not upon the municipality, then the municipality is not liable for his negligence, and

III. Where a municipal corporation, in obedience to an act of the Legislature, elects or appoints an officer to perform a public service in which the corporation has no private interest, and from which it derives no special benefit or advantage in its official capacity, such officer cannot be regarded as the servant of the corporation. Acting on these principles the Court held

that the driver of the ambulance was not a servant of the City of New York, and arrived at that conclusion as follows:

FIRST. The ambulance driver was under the direction and control of the Commissioners of Corrections and Charities, who had sole power to employ and discharge such servants.

SECOND. The Commissioners of Charities and Corrections, although becoming imbued with their official power from a circumscribed locality, are public officers discharging public duties laid by law on them for the benefit of the general public.

THIRD. The City of Brooklyn receives no emolument from the acts of these commissioners, and is in no way benefited thereby, as a corporation.

It seems, however, that the findings in the above case will in no way tend to remove the City from liability where the wrong complained of is the negligent or unskilled act of one employed under the Supervision of the City Engineer, and engaged in work directly benefiting the City, as does the construction of sewers.

The reasoning upon which the City was held not to be liable, (in Maximilian vs. The Mayor), can be supplanted by the determination of three questions, in distinguishing the case at bar.

(1) Did the City of Brooklyn act under Legislative compulsion or under authority issuing from the combined acts of the Common Council and Commissioner of Public works ?

The contract was made under Laws of 1888, and the question is answered by the provision of Sec. 25, Title XV of said Laws, which reads as follows: "The Commissioner of Public Works has power to establish storm sewers where he deems necessary, subject to the approval of the Common Council.

Section 27 Title XV of the Laws of 1888, reads in substance as follows: "Where the Common Council of the City of Brooklyn have approved by resolution any plans for the perfecting of sewerage, presented by the Commissioner of Public Works, it shall be his duty to proceed and construct said sewers."

(2) Did the power to employ and discharge servants employed in the construction of the sewer lay with the City or otherwise ?

In the case at bar, by the express terms of the contract, this power was vested in the city.

Under this state of facts, it is unquestionably clear that the contractor is the servant of the City of Brooklyn, and not of the general public, as is an ambulance driver.

(3) Did the City receive benefit, as a municipal corporation, by the construction of the sewer system ?

Obviously it appears that this is an improvement for the benefit of the City of Brooklyn, and for the City of Brooklyn alone. The distinction between the case at bar and the case of Maximilian vs. The Mayor is too plain to need be discussed.

Where the duty of the City is ministerial, not judicial or legislative, the corporation is liable for all damage resulting from its acts; whereas, in the

former instance, the City is not so liable. Now I purpose dealing with the specific act of the City in constructing a sewer, and showing such to be held a purely ministerial duty.

The Case of Barton vs. The City of Syracuse, (36 N.Y. 54), holds that in the construction of sewers, and in keeping them in repair, municipal corporations act ministerially, and are bound to exercise needful diligence, prudence and care concerning them, and that the City is liable for damages to adjoining property owners whether or not the City has notice of the defects.

Dillon on Municipal Corporations, (Vol. 2, 1333), holds that the work of constructing drains is a ministerial duty, and cites :

Mills vs. City of Brooklyn, 32 N.Y. 489.

Barton vs. City of Syracuse, 36 N.Y. 54.

The case of Seifert vs. City of Brooklyn seems to be a leading case, and in general outline accords with the case of Barton vs. City of Syracuse, which is cited above and previously quoted.

In the case of Evers vs. Long Island City, the Court

remarks that "The duty resting upon a Municipal Corporation to construct streets, sidewalks and sewers is judicial in its nature, yet, after they are constructed the duty to keep them in repair is a ministerial one. The Court cites as authority the case of Hinds vs. City of Lockport, (50 N.Y. 236).

However, that case does not entirely concur with its foregoing citation, and merely says that "the duty of keeping sewers in repair is ministerial", and does not hold that the City is acting judicially up to the time the sewers are "constructed", or as I imply, "finished", and only assumes a ministerial duty in keeping the same in repair.

The case of Lloyd vs. The Mayor, (5 N.Y.369), arose over a state of facts caused by the neglect of the servants of the City to properly guard an excavation made in repairing a public sewer, and whereby the plaintiff's horse was killed by falling into the excavation.

The Court here held that the City was responsible for the negligence of those employed to repair the sewer. The Corporation set up in defense that a corporation could not be held for the negligence of servants

it must employ. The Court in reply to this said that such a doctrine could not prevail, for as a Corporation could act only through agents, if such a doctrine were in vogue, corporations would be absolved from liability in every case. Here it is pointed out that the duty was a ministerial one.

The case of Storrs vs. City of Utica, (17 N.Y.104) arose upon facts as follows: A sewer for the benefit of the City was in process of construction, and the work was skillfully performed. However, by virtue of neglect to properly display danger signals, the plaintiff drove into the excavation and was injured. The Court held the City responsible for the damage and went on to say, That the City would, in all cases be so held liable, even though the Corporation provided by special contract that its agents assume responsibility for the proper guarding of the excavation.

This conclusion seems to be arrived at by applying the principle that one individual cannot shift the liability for a dangerous undertaking by employing an agent, and holds that the danger arises from the very nature of the improvement.

The Court remarks in its opinion at page 108, that when the work is let out by contract, then the Contractor alone is liable to third parties, if his servants are negligent in the construction work.

A case apparently in support of this proposition, is Kelly vs. The Mayor etc. of New York, (11 N.Y. 432). However, upon discussing this case, and comparing the case at bar therewith, it will be discerned that such a holding cannot be here applicable. The case of Kelly vs. The Mayor etc of New York arose upon facts as follows: The City had a contract with a contractor, by virtue of which a certain street was to be graded. Through the negligent blasting, or rather failure to warn passers by of the blasting, the plaintiff was injured. The Court held the Contractor alone liable, and held that the City was not any more liable because of terms in the contract providing that the work be done under the direction and to the entire satisfaction of the Commissioner of Repairs, and the surveyor having

charge of the work. In reconciling this case, we will next review the following case, which is used as an authority in deciding the case under consideration. (Kelly vs. The Mayor).

The Court cites the case of Pack vs. The Mayor etc and holds that the City is not liable upon the principles laid down in that case. In the case about to be considered, the facts are identical with those embodied in the foregoing case, the contract providing that the work be performed according to "such further directions as may be given by the commissioner and surveyor". Here the contractor alone is held liable, but for a reason, as is shown by the words of the Court: "They could not control the contractor in any respect if he should proceed negligently. They could neither dismiss him or control him in his work."

The case which we are now discussing, i. e. Kelly vs. The Mayor, is decided upon the same facts and principles, and the words of the Court, in absolving the City from liability are: "The clause in question clearly

gave to the corporation no power to control the contractor in the choice of his servants. This right of selection lies at the foundation of the responsibility of the master or principal for the acts of his servant or agent."

It is evident that the Courts absolve the City from liability for the reason that the principle of master and servant cannot be established where the City does not possess the right to choose or discharge the servants for whose negligence the City is sought to be made liable. Other principles entering into these cases are due to questions arising in every negligence case, the real and underlying force of the decision being based upon the impossibility of establishing the relationship of principal and agent between the City and the Laborers.

In the case at bar, it is evident that, by the terms of the contract the City of Brooklyn retained the power to discharge incompetent servants. The words used being: "If any person employed by the contractor on the works shall appear to the Engineer to be incompetent or shall be discharged immediately upon the

requisition of the Engineer, and such person shall not again be employed upon them without permission".

Consequently these cases cannot be construed as opposing the proposition we are here seeking to establish i. e. that the City of Brooklyn occupies the position of principal, as to Contractor Creem and his operators as agent.

In the case of Kelly vs. The Mayor, and cases of concurrent nature, the Courts seem to lay down a proposition which would operate to free a municipal corporation from liability, notwithstanding a provision in a contract whereby it is stipulated that the City officers shall direct the work, or that the work be conducted in accordance with their approval. Without the presentation of additional facts, this may be conceded to be true, but if, in connection with this power, the power to choose and discharge the employees is co-existent, the force of such a doctrine is entirely lost. The case of Kelly vs. The Mayor itself practically concedes this. (See page 434.)

Assuming it to be established that the City of Brooklyn is acting ministerially in the construction of the sewer, and that the City is vested with express authority to choose and discharge employees, it does not seem possible to the writer to invent or apply any existing doctrine with sufficient force to remove the City from a direct responsibility for the damages under consideration. Were such a result possible, I can see no instance wherein a Municipal Corporation could be held liable for negligent acts of its servants.

It is also interesting to inquire who would be liable to adjoining property owners for the damages they have sustained if the City were absolved from liability. In answer to this the Corporation Counsel may reply that the contractor is solely liable. Again it might be argued that the contractor had given a bond in contemplation of damages of similar character.

As to the first contention, that the contractor solely is liable, we have only to consider the conditions which might arise were such a doctrine sustained in order

to see its fallacy. A Municipal Corporation might, in certain instances engage an insolvent contractor and what recourse in such case would individuals have for damages they might sustain ?

Now as to the giving of a bond by the contractor, whereby he assumes a liability for such damages as we are considering.

It is a question too clearly settled to admit of discussion that an individual owing a duty toward another cannot, at will, divest himself of entire liability by inducing a third party to assume the responsibility for his contingent mal or misfeasance.

In discussing this proposition, I have not entered into a discussion of the authorities treating thereof. My reason for apparently dealing lightly with this consideration is that it was deemed, by the eminent counsel engaged in the case, to be a question of no importance as affecting the plaintiff's right of recovery and that the law regarding the same was definitely settled.

In conclusion I would say that in discussing the propositions embodied in this case, the writer has proceeded with the sole view of establishing a case against the City. There is, of course, a vast number of cases which may seem to destroy the force of the propositions I have endeavored to establish, and it is only with the leading cases of this character that I have dealt. I have been unable to find in the reports of the New York Courts, a single case which is directly or I may say at all, in point with the case I have attempted to discuss; and my theories are therefore based only upon general principles, and upon such holdings as support the steps out of which I have attempted to build a stairway which may lead to the ultimate end I have tried to establish.