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GOVERNMENT LIABILITY IN TORT*

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FUNCTION

I

Streets and Highways

Probably no function of a municipal corporation is more "governmental" in character than the care of its highways, streets and bridges. In theory, therefore, the city should be immune from responsibility for negligence in such matters; and such was the common law. Precisely the opposite result, however, constitutes the weight of judicial authority in this country, even in the absence of statute, on the commonly advanced ground that the duty of taking care of the public highways is ministerial in character.[250] The conclusion deserves approval, though not necessarily the ground on which it is based. More difficult to support is the common-law immunity extended to towns and counties in several parts of the country in respect of like defects in public highways. Mention has already been made of the way in which the courts, first in New England,[251] worked out the immunity of the county, on the authority of *Russell v. Men of Devon*.[252] Most of these cases involved actions for injuries arising out of defective highways or bridges. These early cases have been followed very generally in New England

* Continued from the December number, 34 YALE LAW JOURNAL, 129-143.

[250] *Sherwin v. Aurora* (1913) 257 Ill. 458, 100 N. E. 938, 42 L. R. A. (N. S.) 1116 and note; *Cleveland v. King* (1889) 132 U. S. 295, 10 Sup. Ct. 90; cases cited in 4 Dillon, *op. cit.* sec. 1687 and 13 R. C. L. 310, note 19. See criticism in *Lane v. Minn. State Agricultural Soc.* (1895) 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708; White, *Negligence of Municipal Corporations* (1920) secs. 195 *et seq.*

[251] *Mower v. Leicester* (1812) 9 Mass. 247. Of course the state is immune from suit. See *Wilmington v. Ewing* (1901) 2 Penn. (Del.) 66, 43 Atl. 305, 45 L. R. A. 79.

[252] (1788, K. B.) 2 T. R. 667, 100 Eng. Rep. 359.

and a few other states,[253] so that we must accept the distinction which enables the pedestrian who falls into a hole located on the city line to recover damages if he fell in on the city side,[254] but deny him relief if he fell in on the county side.[255] So artificial is this distinction that several courts have rejected it, some holding the city as immune as the county,[256] others holding the county as liable as the city.[257] Judge Dillon conservatively expresses the view that the ground for the distinction "is not as satisfactory to the mind as could be desired."[258] After seeking plausibly to justify the distinction on the ground that the duty of maintaining the public highways is a special one with a local aspect, that the highways are under the direct and exclusive control of the municipal authorities, whose duty in respect of repairs is intrinsically ministerial and that they have ample means to perform the duty properly, he admits that the doctrine of municipal responsibility, vigorously combated by Justice Gray in *Hill v. Boston*,[259] is anomalous. Nevertheless, Judge Dillon gropes for an explanation of the anomaly and suggests that it may be found in the fact that law and logic "are not always precisely coincident or coterminous" and that distinctions "are oftentimes easier to feel than to unfold and define," and do not always obviously "consist with an indefinite extension and inexorable application of those principles of logic that are apparently applicable to and seemingly control the subject."[260] It is believed that the alleged distinction rests upon a fundamental lack of principle, and that the historical origin of the county and the inherently governmental nature of the duty of keeping the public highways in repair probably account for the fact that the exception to the rule of immunity made in the case of city streets and highways was not

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[253] 4 Dillon, *op. cit.*, sec. 1688. and cases cited in 13 R. C. L. 306-307, notes 2 and 3.

[254] *Fleming v. City of Memphis* (1912) 126 Tenn. 331, 148 S. W. 1057.

[255] *Wood v. Tipton County* (1874, Tenn.) 7 Baxt. 112.

[256] *Young v. Charleston* (1880) 20 S. C. 116; *Pray v. Jersey City* (1868) 32 N. J. L. 394; *Arkadelphia v. Windham* (1886) 49 Ark. 139, 4 S. W. 450; *Detroit v. Blackeby* (1870) 21 Mich. 84. See 13 R. C. L. 309, note 16.

[257] *House v. Montgomery County* (1878) 60 Ind. 580; *Dean v. New Milford Township* (1843, Pa.) 5 W. & S. 545; *Anne Arundel County Comm'rs v. Duckett* (1863) 20 Md. 468. In Indiana and Iowa the liability is confined to public bridges. See also *McCalla v. Multnomah County* (1869) 3 Ore. 424; Jones, *Negligence of Municipal Corporations* (1892) sec. 65; and 13 R. C. L. 307, notes 4 and 5.

[258] 4 Dillon, *op. cit.*, p. 2953. He adds, p. 2954: "It must be confessed that where the duty to repair is expressly enjoined by statute, but no action is expressly given, it is not easy to set forth clear grounds for the distinction as to the liability of cities and counties in respect of the duty to keep the streets and highways under their several jurisdictions in repair." See also Jones, *Negligence of Municipal Corporations* (1892) secs. 67-69, and 2 A. L. R. 724.

[259] *Hill v. Boston* (1877) 122 Mass. 344. Justice Gray admitted that the positive act of the city authorities directing an obstruction would impose liability.

[260] 4 Dillon, *op. cit.*, secs. 1713-1716.

extended to counties, although they have in every respect the same relation to the duty involved as a city. It would also have been better and more logical had the reasoning by which the courts worked out municipal responsibility for negligence in the care of streets been extended to other municipal duties equally governmental in character; but while this has been done by many courts in some aspects of the installation and operation of public improvements, such as sewers, the doctrine has not been extended on any basis of logic, so that we are still left in confusion and convinced of the absence of underlying principle. Our sole reliance appears to be the particular view of classification or policy adopted by the courts in the particular jurisdiction in which a case arises.

In respect of the liability of cities and counties in the care of streets and highways, statutes have to some extent ameliorated the confusion by expressly imposing liability for defective highways upon city and county alike,[261] though the liability is usually conditioned upon such requirements as notice, clear proof of municipal negligence or positive misfeasance, absence of contributory negligence, liability to travelers only, and other conditions. Occasionally, the statutes deny or qualify a liability which the courts have imposed in earlier cases.

The defect or negligence imposing liability may be due to a variety of causes, for example, the absence of railings at points in the road where reasonable care requires them;[262] obstructions on streets and sidewalks caused by snow and ice, provided the city had sufficient time after notice, actual or constructive, to remedy the defective condition and had failed to do so.[263] State courts differ greatly in their

[261] *Udkin v. New Haven* (1907) 80 Conn. 291, 68 Atl. 253, 14 L. R. A. (N. S.) 868; 4 Dillon, *op. cit.* sec. 1691 and notes; and 13 R. C. L. 308, notes 10 and 11. It is hardly feasible to examine in detail the limitations and conditions of municipal liability established by the construction of these statutes. Some statutes also contain special exemptions from or qualifications on liability. See *Schigley v. Waseca* (1908) 106 Minn. 94, 118 N. W. 259, 19 L. R. A. (N. S.) 689; also 42 L. R. A. (N. S.) 493; 13 R. C. L. sec. 261; 2 A. L. R. 723; and White, *op. cit.*, secs. 200 *et seq.*

[262] *Palmer v. Andover* (1864, Mass.) 2 Cush. 600; *Mayor . . . . of Baltimore v. State* (1924, Md.) 126 Atl. 130; 4 Dillon, *op. cit.* sec. 1696. So with respect to unguarded manholes or excavations, where negligence can be imputed to the city. *Mackey v. Vicksburg* (1887) 64 Miss. 777, 2 So. 178. *Dame Spedding v. Montreal* (1915, Que.) 47 Sup'r Ct. 493. But of course, unless a nuisance *per se*, statutory conditions as to notice must be complied with. *Ziegler v. City of West Bend* (1899) 102 Wis. 17, 78 N. W. 164. As to the distinctions between nuisance and negligence, as applied particularly in the New York cases, see comment on *Heller v. Smith* (1922, Iowa) 188 N. W. 878, in (1923) 23 COL. L. REV. 56; and White, *op. cit.*, secs. 343-349.

[263] *Williams v. City of New York* (1915) 214 N. Y. 259, 108 N. E. 448. The duty with respect to crosswalks seems in New York somewhat less onerous. *Du Pont v. Village of Port Chester* (1912) 204 N. Y. 351, 97 N. E. 735; (1915) 1 CORN. L. QUART. 53; (1921) 21 COL. L. REV. 824; 4 Dillon, *op. cit.* sec. 1697. 6 McQuillin, *op. cit.* sec. 2770, 2789, 2794. White, *op. cit.* secs. 500 *et seq.*

criteria of negligence. For defective lighting of streets constituting a proximate cause of injury, cities have been held liable, but only, it seems, where the duty of lighting at all has been assumed by the city.[264] For negligently leaving objects or obstructions in the street, calculated to frighten animals, thereby causing injurious accidents, liability has been imposed, on the theory that they constitute public nuisances in streets which the city was under a duty to keep in a safe condition;[265] a similar rule applies to injuries sustained by travellers or pedestrians from falling trees or limbs, ice from roofs, dangerous cornices, billboards, awnings, etc., provided the city can be charged with negligence.[266] With respect to injuries caused by fireworks displays, horse or automobile races, merry-go-rounds, and similar obstructions in the public streets, there appears to be much confusion. When carried on without license or authority from the city, immunity is placed on the ground of want of negligence;[267] but where a license or permit has been granted, immunity is by some courts placed on the ground that public celebrations or fairs, in which these injuries frequently occur, are governmental in character, or are not inherently dangerous, or, like coasting, not being inherently a nuisance, permission to coast came within the city's legislative discretion, or even, in one case, that permission of illegal horse-racing is wholly *ultra vires*.[268] On the other hand, probably the majority of courts find in the license or permit the opera-

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[264] *Randall v. Eastern R. R.* (1871) 106 Mass. 276; *Butler v. Bangor* (1877) 67 Me. 385. Cases cited in 4 Dillon, *op. cit.* sec. 1701, note 3. 6 McQuillin, *op. cit.* sec. 2806.

[265] *Chicago v. Hoy* (1874) 75 Ill. 530. See cases cited in 4 Dillon, *op. cit.* sec. 1702, notes 2 and 3. 6 McQuillin, *op. cit.* secs. 2767-2769, 2783. On the distinction between nuisance and negligence, see (1923) 23 COL. L. REV. 56; White, *op. cit.*, secs. 365 *et seq.*

[266] *Grove v. Fort Wayne* (1874) 45 Ind. 429; *Drake v. Lowell* (1847 Mass.) 13 Metc. 292; but see *Hixon v. Lowell* (1859 Mass.) 13 Gray 59. See *Dahmer v. City of Meridian* (1916) 111 Miss. 208, 71 So. 321; *Dyer v. Danbury* (1911) 85 Conn. 128, 81 Atl. 958; 4 Dillon, *op. cit.* sec. 1705; 6 McQuillin, *op. cit.* sec. 2775 *et seq.*; White, *op. cit.*, secs. 390 *et seq.* and cases there cited. The decisions are by no means uniform, and occasionally make artificial distinctions difficult to support. See cases in (1912) 25 HARV. L. REV. 646, note 14.

[267] *Ball v. Woodbine* (1884) 61 Iowa, 83, 15 N. W. 846.

[268] *Tindley v. Salem* (1884) 137 Mass. 171; *Wheeler v. Plymouth* (1888) 116 Ind. 158, 18 N. E. 532; *Burford v. Grand Rapids* (1884) 53 Mich. 98, 18 N. W. 571; *Marth v. Kingfisher* (1908) 22 Okla. 602, 98 Pac. 436. These cases are all cited in 4 Dillon, *op. cit.* 2980. See also *Pope v. New Haven* (1917) 91 Conn. 79, 99 Atl. 51, L. R. A. 1917 D 1285 (fireworks display); and *Rose v. Gypsum City* (1919) 104 Kan. 412, 179 Pac. 348; (1919) 29 YALE LAW JOURNAL, 117. See the learned dissenting opinion of Wheeler, J in *Pope v. New Haven, supra.* He would have imposed liability on the ground that the explosion of defective fireworks used by the city established a nuisance, and was not merely the negligent performance of a "governmental" function. There is less responsibility, apparently, in controlling moving objects or persons than in controlling those that are stationary.

tive fact predicating liability, on the ground that the city has thereby authorized a nuisance on or illegal use of its streets.[269] With respect to coasting, confusion also prevails.[270] Non-liability may be said to constitute the weight of authority, though the theories advanced, e. g. that the duty to prevent coasting relates to the execution of state law, or is public or police in character and not corporate, or that the enforcement of ordinances is discretionary or governmental or that coasting is not a defect or a nuisance, even where expressly permitted, indicates the absence of underlying principle.

Bridges

The liability of cities for injuries arising out of defective bridges or the negligence of tenders of drawbridges follows to some extent, though not uniformly, the rules adopted by the particular jurisdiction with respect to highways. Common-law immunity with respect to defective highways will usually be found, in the absence of statute, to extend to bridges, both as to vessels and to travellers upon the bridge.[271] Yet it would be unsafe to rely upon such uniformity, for in fact great confusion prevails. Where the city is held not liable the court will glibly advance the ritual that the duty to maintain bridges is performed in its governmental capacity for the public good, and that the city derives no benefit therefrom;[272] yet where the city is held liable, even in the

[269] *Van Cleef v. Chicago* (1909) 240 Ill. 318, 88 N. E. 815 (fair and exhibition in street); *Speir v. Brooklyn* (1893) 139 N. Y. 6, 34 N. E. 727 (display of fireworks); *Heller v. Smith* (1922, Iowa) 188 N. W. 878, and note in (1923) 23 COL. L. REV. 56; *Johnson v. New York* (1906) 186 N. Y. 139, 78 N. E. 715, (automobile speed contest); *Malchow v. City of Leoti* (1915) 95 Kan. 787, 149 Pac. 687; (1915) 43 WASH. L. REP. 620; L. R. A. 1915 F 568 and note (merry-go-round, etc.); White, *op. cit.*, secs. 116, 131. See also 13 R. C. L. 303, 304. In *Shinnick v. Marshalltown* (1908) 137 Iowa, 72, 114 N. W. 542, the injury for which the city was held liable was caused by a rope stretched across the street by a policeman in order to stop traffic.

Yet where the state or its agencies, like a state board of agriculture, licenses a nuisance of this kind, e. g., an aeroplane injuring a spectator at a state fair, some courts learnedly argue that the function of holding fairs and affording amusement there is "governmental" in character—though in speaking of a state activity, it seems unnecessary to make distinctions between governmental and corporate functions—and the injured individual is therefore without redress. See *Morrison v. McLaren* (1915) 160 Wis. 621, 152 N. W. 475, and *supra.*

[270] Imposing liability, *Taylor v. Cumberland* (1885) 64 Md. 68, 20 Atl. 1027; denying liability, *Dudley v. Flemingsburg* (1903) 115 Ky. 5, 72 S. W. 327. See notes of cases in 23 L. R. A. (N. S.) 639; 13 R. C. L. 302; White, *op. cit.* sec. 135; and 6 McQuillin, *op. cit.* sec. 2771.

[271] Immunity, *Evans v. Sheboygan* (1913) 153 Wis. 287, 141 N. W. 265; *Daly v. New Haven* (1897) 69 Conn. 644, 38 Atl. 397; Liability, *Gathman v. Chicago* (1908) 236 Ill. 9, 86 N. E. 152, 19 L. R. A. (N. S.) 1178 and note. See 4 R. C. L. 231 *et seq.*; 6 McQuillin, *op. cit.* sec. 2749; and White, *op. cit.* secs. 405 *et seq.*

[272] See *Daly v. New Haven, Evans v. Sheboygan, supra* note 271, and *Corning v. Saginaw* (1898) 116 Mich. 74, 74 N. W. 307.

absence of statute, the courts have said that the duty is corporate and ministerial and performed in its private capacity.[273] In Wisconsin, a curious result has been reached, namely, that as to navigators on the river, the duty of maintaining bridges is corporate and imposes liability for negligence,[274] whereas the duty as to travelers over the bridge as a highway is governmental and the city is not liable for negligence. Probably nothing better illustrates the want of principle governing the subject.

Public Improvements

The conflict of authority as to the liability of municipal corporations for negligence in the maintenance of streets is reflected in the law governing the liability of the city for the tortious acts of persons in its employ engaged in constructing or repairing the public streets. Immunity or liability in these matters depends upon the view of the particular courts as to whether the duty is governmental or corporate, and in this respect there is the usual wide divergence, depending often upon the particular line on which the courts in that jurisdiction got started. There is no discoverable operative principle.[275] The same confusion prevails as to street cleaning, a question further complicated by the fact that courts disagree in their view as to whether clearing the streets of dirt and refuse pertains primarily to the corporate duty of taking care of the streets or the governmental duty of preserving the public health.[276]

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[273] *Lehigh Valley Transportation Co. v. Chicago* (1909) 237 Ill. 581, 86 N. E. 1093; *Naumburg v. City of Milwaukee* (1906, 7th) 77 C. C. A. 67, 146 Fed. 641.

[274] *Weisenberg v. Winneconne* (1883) 56 Wis. 667, 14 N. W. 871. *Naumburg v. City of Milwaukee, supra* note 273. In *Evans v. Sheboygan, supra* note 272, where the city was held not liable to a traveller on the bridge, the court offers a shallow explanation for distinguishing the earlier cases of *Weisenberg* and *Naumburg:* "We think there is reason for saying that, as to a person navigating a river, a municipality is performing a corporate duty or, if not, that it cannot escape liability for negligence of its employees by asserting that it is performing a governmental duty." We have seen, *supra* note 257, that among the few states holding counties liable, like cities, for negligent defects in highways, Indiana and Iowa confined the liability to bridges. Indiana, however, overruled its earlier decisions in *Commissioners of Jasper County v. Allman* (1895) 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58 and note, and now follows in this respect the prevailing rule of county immunity.

[275] The opposing views are well represented by the two cases of *McManus v. Weston* (1895) 164 Mass. 263, 41 N. E. 301, holding the city immune for negligence of road commissioners, and *Barree v. Cape Girardeau* (1906) 197 Mo. 382, 95 S. W. 330, 6 L. R. A. (N. S.) 1090 and note, holding the city liable for an assault on a motorman by a city street commissioner engaged in repairing a street. See also *Kriebel v. Worcester Township* (1916) 253 Pa. 452, 98 Atl. 686. See the lists of cases on the opposite sides of this question in 19 R. C. L. 1127, notes 11 and 12, and note to *Jones, Adm. v. Richmond* (1916) 118 Va. 612, 88 S. E. 82, (1916) 2 VA. L. REG. (N. S.) 36.

[276] To the effect that the duty of removing refuse, flushing the streets and otherwise cleaning them is governmental, either as caring for the streets or caring for

In the construction and maintenance of public works or improvements, such as sewers, drains, etc., we find a greater disposition to hold the city liable for negligence.[277] The explanation of this disposition can hardly be found in the usually ascribed reason that such undertakings are not governmental, but ministerial in character; it is found rather in the fact that when a public enterprise creates a direct nuisance to private property, the governmental nature of the undertaking seems, in the minds of the courts, to become subordinate or immaterial.[278] Certainly there is nothing less governmental in providing the city with sewers than in providing it with schools and fire protection, and the courts often find themselves involved in the problem of determining whether sewers and drains do not partake of means to safeguard the public health, usually regarded as a governmental function.[279] The fact that the courts appear to find different principles involved when

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public health, see *Savannah v. Jordan* (1914) 142 Ga. 409, 83 S. E. 109; *Kippes v. Louisville* (1910) 140 Ky. 423, 131 S. W. 184, 30 L. R. A. (N. S.) 1161; *Bruhnke v. La Crosse* (1914) 155 Wis. 485, 144 N. W. 1100; *Cassidy v. St. Joseph* (1912) 247 Mo. 197, 152 S. W. 306, and *infra*, note 321. To the effect that it involves the corporate duty of caring for the streets, see *Denver v. Maurer* (1910) 47 Colo. 209, 106 Pac. 875; *Missano v. New York* (1899) 160 N. Y. 123, 54 N. E. 744; *Ostrom v. San Antonio* (1901) 94 Tex. 523, 62 S. W. 909. See note in L. R. A. 1915 C 741 and (1914) 79 CENTRAL L. JOUR. 385.

Sprinkling or flushing the street has more often been held to be governmental as incidental to the preservation of the public health than corporate. Held governmental, in *Harris v. District of Columbia* (1921) 256 U. S. 650, 41 Sup. Ct. 610; *Louisville v. Carter* (1911) 142 Ky. 443, 134 S. W. 468; *Conelly v. Nashville* (1898) 100 Tenn. 262, 46 S. W. 565. Held corporate, in *Denver v. Maurer* (1910) *supra*.

[277] *City of Montgomery v. Stephens* (1915) 14 Ala. App. 274, 69 So. 970, (1916) 14 MICH. L. REV. 352; *Haynes v. Burlington* (1865) 38 Vt. 350; *Macon v. Dannenberg* (1901) 113 Ga. 1111 (obstructed culvert). See (1923) 11 CALIF. L. REV. 444; 4 Dillon, *op. cit.* secs. 1731 *et seq.* and 1741 *et seq.*; and White, *op. cit.* secs. 140 *et seq.*

[278] *Ashley v. Port Huron* (1877) 35 Mich. 296. *Schwalk's Administrator v. City of Louisville* (1909) 135 Ky. 570, 122 S. W. 860. *Seifert v. Brooklyn* (1886) 101 N. Y. 136, 4 N. E. 321. Even the question of negligence becomes secondary when an injury to property is involved. There is still a great conflict among the courts, even as to sewers, some courts finding the function corporate, *Murphy v. Indianapolis* (1902) 158 Ind. 238, 63 N. E. 469; *Ostrander v. City of Lansing* (1897) 111 Mich. 693, 40 N. W. 332; others regarding it as governmental, *Taggart v. Fall River* (1898) 170 Mass. 325, 49 N. E. 622.

[279] It must be admitted that practically all the cases holding the city immune from responsibility on the ground that sewerage is incidental to the preservation of the public health involve actions for personal injury only. *Hughes v. Auburn* (1899) 161 N. Y. 96, 55 N. E. 389; *Smith v. Commissioners of Sewerage of Louisville* (1912) 146 Ky. 562, 143 S. W. 3. The courts occasionally find themselves in doubt, where defective sewerage is connected with a school building, whether the liability for defective sewerage or the immunity in conducting a school shall prevail. *Cf. Watson v. New Milford* (1900) 72 Conn. 561, 45 Atl. 167 (city liable) and *Folk v. Milwaukee* (1900) 108 Wis. 362, 84 N. W. 420 (city not liable).

an injury to private property is negligently caused, is illustrated by the fact that when the negligent maintenance of the sewer system causes merely sickness to the person without involving trespass upon property, the courts fall back upon the formula that in the construction and maintenance of a sewer system, so far as concerns the community at large, the city is performing a governmental function and in the absence of an invasion or violation of a property or contract right of the plaintiff no recovery is possible.[280]

It has already been observed that the same common-law nuisance, such as the maintenance of a city dump, will produce liability for injury to the property of an adjoining owner, but not for a personal injury.[281] For a long time the courts seemed to be fairly well agreed that when the city failed to provide drainage or when the injury was the result of a defective or inefficient plan, no liability could be imposed, for the duty, if any, in this respect, was judicial or legislative—they were not sure which—in its nature.[282] It is of course discretionary, and that is doubtless what is meant. But more recent cases take what is probably a

[280] *Hughes v. Auburn* (1899) 161 N. Y. 96, 55 N. E. 389, where O'Brien, J. said: "In the construction and maintenance of a sewer or drainage system a municipal corporation exercises a part of the governmental powers of the State for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act or the mode of exercising the power conferred on it, for public purposes to be used at discretion for the public good." But see *Willett v. St. Albans* (1897) 69 Vt. 330, 38 Atl. 72. *Hughes v. Auburn* has been followed in several cases, *cf. Williams v. Greenville* (1902) 130 N. C. 93, 40 S. E. 977, and probably represents the weight of authority. It seems strange that all these allegedly valid reasons for denying recovery for personal injuries due to negligence in the management of sewers should become immaterial when the same negligence results in an injury to property. *Cf. Hollenbeck v. Marion* (1902) 116 Iowa 69, 89 N. W. 210. Indeed, in such cases the courts rationalize differently and customarily reach the conclusion that the function is corporate the duty ministerial, and the city therefore liable. See the case of *Platt Bros. v. City of Waterbury* (1900) 72 Conn. 531, 45 Atl. 154, and the exhaustive notes in 48 L. R. A. 691 and 61 L. R. A. 673, at p. 713. See 4 Dillon, *op. cit.* sec. 1744, citing *Loughran v. Des Moines* (1887) 72 Iowa 382, 34 N. W. 172, and *Allen v. Boston* (1893) 159 Mass. 324, 34 N. E. 519, where damages for sickness caused by sewer nuisance were allowed, but where this was incidental to a trespass on plaintiff's property. See 6 McQuillin, *op. cit.* secs. 2698, 2699.

[281] *Louisville v. Hehemann* (1914) 161 Ky. 523, 171 S. W. 165, note in L. R. A. 1915 C 747; *Hines v. Rocky Mount* (1913) 162 N. C. 409, 78 S. E. 510. See also note to *Denver v. Davis* (1906) 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013 and note in 43 L. R. A. (N. S.) 1037.

[282] *Child v. City of Boston* (1862, Mass.) 4 Allen 41, 52; *Mills v. Brooklyn* (1865) 32 N. Y. 489; *Johnston v. District of Columbia* (1885) 118 U. S. 19, 6 Sup. Ct. 923; *Knostman & P. F. Co. v. Davenport* (1896) 99 Iowa 589, 68 N. W. 887; *Hart v. Neillsville* (1905) 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952; *Hesketh v. Birmingham Corporation* (C. A.) [1924] 1 K. B. 260 and 88 J. P. 333. See 9 R. C. L. 662 and cases cited note 20; 4 Dillon, *op. cit.* sec. 1739; 61 L. R. A. 687-688; 6 McQuillin, *op. cit.* secs. 2691, 2693; White, *op. cit.* secs. 26, 40.

better view, namely, that when a sewer or culvert, though properly built, but according to a defective plan, causes a direct invasion of private property, for example, by throwing water or sewage upon it through insufficiency of flow or drainage for normal requirements, the city is liable, though in fact the city's negligence, if any, is due to a defective plan.[283]

As a matter of fact, as Dillon properly says, "it is, perhaps, impossible to reconcile all of the cases on this subject," for some courts emphasize the defectiveness or inefficiency of the plan or the insufficiency or incapacity of a sewer, gutter or drain as a ground for immunity, others emphasize the injury to the realty of a private owner, regardless of cause, as a ground of liability.[284] The better principle would seem to be with the latter courts. Indeed, many courts seek to find a line of distinction between the legislative or judicial duties with respect to sewers and those that are ministerial, holding the city liable on the ministerial ground for negligence in construction and operation or failure to repair. As may well be imagined there is no little disagreement in the judicial effort to establish the line of demarcation between the two types of duty.[285] It is in these cases assumed that the city had authority to construct or maintain the public work in question. The city would have been more certain of immunity had it undertaken not to provide any sewerage at all, an argument once used quite effectively to justify immunity on account of inadequacy of the sewer or drain actually constructed.[286] With respect to surface-water, there is

[283] *Arndt v. Cullman* (1901) 132 Ala. 540, 31 So. 478; *Bowman v. Town of Chenango* (1920) 227 N. Y. 459, 125 N. E. 809; (1920) 20 COL. L. REV. 619; 9 R. C. L. 665, note 17. Some of the earlier cases reached the same result on the theory that the injury was inflicted pursuant to a corporate act and involved an injury to realty. *Ashley v. Port Huron* (1877) 35 Mich. 296; *Miles v. Worcester* (1891) 154 Mass. 511, 28 N. E. 676; *Seifert v. Brooklyn* (1886) 101 N. Y. 136, 4 N. E. 321. This would seem to be rationalizing. The cases occasionally go on the ground that damage to private property is in excess of the city's or board's authority, and therefore hold it liable, not immune. *Nevins v. Fitchburg* (1899) 174 Mass. 545, 55 N. E. 321; *Uppington v. New York* (1901) 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550. See 6 McQuillin, *op. cit.* sec. 2693, 2694, 2699; and White, *op. cit.* sec. 162. See the English cases of *Hawthorn Corporation v. Kannuluik* (P. C.) [1906] A. C. 105 and *Attorney Gen. v. Lewes Corp.* [1911] 2 Ch. 495; and article in (1913) 77 JUST. P 110, where the English cases are discussed.

[284] *Lehn v. San Francisco* (1868) 66 Calif. 76, 4 Pac. 965; *Taylor v. Austin* (1884) 32 Minn. 247, 20 N. W. 157. See 4 Dillon, *op. cit.* sec. 1740; 6 McQuillin, *op. cit.* sec. 2694; and the cases there cited.

[285] *Barton v. Syracuse* (1867) 36 N. Y. 54; *King v. Kansas City* (1897) 58 Kan. 334, 49 Pac. 88; *Kobs v. Minneapolis* (1875) 22 Minn. 159; *Seymour v. Cummins* (1889) 119 Ind. 148, 21 N. E. 549. See 4 Dillon, *op. cit.* secs. 1741-1743; (1916) 14 MICH. L. REV. 353; 1 R. C. L. 670-672; 6 McQuillin, *op. cit.* sec. 2695.

[286] *Mills v. Brooklyn* (1865) 32 N. Y. 489; *Gulath v. St. Louis* (1903) 179 Mo. 38, 77 S. W. 744; *Judge v. Meriden* (1871) 38 Conn. 90. See 4 Dillon, *op. cit.* sec. 1739; 6 McQuillin, *op. cit* sec. 2691; Thompson, *Negligence,* sec. 5871.

less disposition to hold the city liable, partly on the often asserted ground that damages from diverted surface-water are consequential in character, partly on the ground that surface-water is a common enemy which each owner may repel and against which each owner must guard himself, partly on the ground that omission to provide any or adequate drains is an exercise of legislative or discretionary power for which there is no liability.[287]

Perhaps none of these explanations is altogether satisfactory, but as in the case of incidental injuries to private property due to a change in street grade,[288] they may usually be regarded as too slight in degree to justify compensation from the public treasury. In fact, it is probably the constitutional provision regarding compensation for taking or, in most states, for damage to private property for the public use which explains the readiness of courts, even in the absence of statute, to find in an invasion of rights of private property a ground for municipal liability, regardless of whether the function involved is what they profess to regard as "governmental" or "corporate," and the apparent inability to find a similar ground of liability where merely personal injury is involved. Though it is not seemingly apparent to Judge Dillon, the justification he advances for municipal liability to property owners for injuries arising out of defective sewers, applies equally, it is believed, to every form of municipal enterprise producing a direct and serious injury to the citizen, whether in person or property. The apparent readiness to regard the city as a public service corporation in the maintenance and operation of its streets, sewers and public works is not less justified in respect of the maintenance of its police, fire and health services. Dillon says, with sewerage and drainage in mind:

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[287] See Lord Tenterden in *Rex v. Pagham Sewer Commissioners* (1828) 8 B. & C. 355, 360; *Wilson v. New York* (1845, N. Y. Sup. Ct.) 1 Denio 595, 598; *Field v. West Orange* (1882) 36 N. J. Eq. 118; *Valparaiso v. Hagen* (1899) 153 Ind. 337, 54 N. E. 1062. See 4 Dillon, *op. cit.* secs. 1732-1734. 6 McQuillin, *op. cit.* sec. 2700; White, *op. cit.*, secs. 179, 182.

[288] 4 Dillon, *op. cit.* sec. 1676 *et seq.* So there is no liability at common law and by the weight of authority now for the removal of lateral support by the city. *Rome v. Omberg* (1859) 28 Ga. 46, an exception to the general rule of private law on lateral support. A small minority hold the city liable on common law grounds, e. g. *Dyer v. St. Paul* (1881) 27 Minn. 457, 8 N. W. 272, or where the grading is done without lawful authority, *Meinzer v. Racine* (1887) 68 Wis. 241, 32 N. W. 139, or negligently, *Harper v. Lenoir* (1910) 152 N. C. 723, 68 S. E. 228. Most courts refuse to consider the incidental injury to private property by street grading a "taking" under constitutional provisions for compensation, but many states which provide constitutionally for compensation for "damaging" private property permit recovery in these cases. See *Rutherford v. Williamson* (1912) 70 W. Va. 402, 74 S. E. 682. Other states have special statutes providing for compensation. The modern tendency, therefore, as evidenced by constitutions and statutes is to hold the city liable even for the incidental injury, due to a change of grade in public streets, provided it is tangible. See the comment in (1918) 2 MINN. L. REV. 206.

"The city as the corporate representative of the fasciculus of local interests which make sewers a necessity for the benefit of all the inhabitants of the municipality, is the author of the injury which the plaintiff in the cases supposed sustains in the attempt to benefit all. The dictate of justice is that no person should suffer unequally, and, if he does, that all should make compensation."[289]

Parks and Playgrounds

Though public parks and playgrounds are public, usually municipal, property, the greatest doubt prevails as to whether such public property, held for purposes of amusement, recreation, public health and general welfare, is held in the city's governmental or corporate capacity. The varying answer to this question explains the conflict in the courts between municipal immunity and municipal liability in respect of injuries sustained through the negligent management of parks and playgrounds or instrumentalities connected with them. The one line of decision, favoring immunity, finds no difficulty in justifying its position on the ground that in conducting parks and playgrounds the city is acting in a governmental capacity for the general public, not merely for its own inhabitants, that it derives no pecuniary profit therefrom, or that it is sustained by general taxation for the preservation of the public health of the community.[290] The other line of decisions holds the city liable for injuries thus sustained on the ground that its parks are the corporate, analogous to the private, property, of the city, for the safe condition and proper management of which it is liable like any private proprietor.[291] In several of these cases of the latter group, liability for injuries occurring on walks in parks is derived from the analogy of the city's duty to take proper care of its streets and highways;[292] in

[289] 4 Dillon, *op. cit.* p. 3062.

[290] *Blair v. Granger* (1902) 24 R. I. 17, 51 Atl. 1042; *Park Commissioners v. Prinz* (1907) 127 Ky. 460, 105 S. W. 948; *Clark v. Waltham* (1880) 128 Mass. 567; *Bisbing v. Asbury Park* (1910) 80 N. J. L. 416, 78 Atl. 196; *Harper v. Topeka* (1914) 92 Kan. 11, 139 Pac. 1018; *Bernstein v. Milwaukee* (1914) 158 Wis. 576, 149 N. W. 382, (1914) 1 IOWA L. BULL. 102. See the notes in 33 L. R. A. (N. S.) 523 and L. R. A. 1915 C 435. See also 19 R. C. L. 1129; (1915) 24 YALE LAW JOURNAL, 511; 4 Dillon, *op. cit.* sec. 1659; 6 McQuillin, *op. cit.* sec. 2678; White, *op. cit.*, sec. 101. See also *Bolster v. Lawrence* (1917) 225 Mass. 387, 114 N. E. 722, L. R. A. 1917 B 1285 (collapse of bathhouse); *Hibbard v. City of Wichita* (1916) 98 Kan. 498, 159 Pac. 399; (1916) 15 MICH. L. REV. 180, (1916) 26 YALE LAW JOURNAL 77 (child bitten by animal in zoo in park).

[291] *Denver v. Spencer* (1905) 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 147 and note; *State v. Schweickardt* (1891) 109 Mo. 496, 19 S. W. 47; *Silverman v. New York* (1909, Sup. Ct. App. T.) 114 N. Y. Supp. 59; *Gartland v. New York Zoological Society* (1909) 135 N. Y. App. Div. 163, 120 N. Y. Supp. 24; *Pennell's Adm'r. v. Wilmington* (1906, Del.) 7 Pen. 229, 78 Atl. 915. See *Van Dyke v. City of Utica* (1922, Sup. Ct. App. Div.) 196 N. Y. Supp. 277 and the cases there discussed.

[292] *Weber v. Harrisburg* (1906) 216 Pa. 117, 64 Atl. 905; *Ankenbrand v. Philadelphia* (1913) 52 Pa. Super. Ct. 581; *Ackeret v. Minneapolis* (1915) 129 Minn.

others, where injuries occurred, notably to children, by falling into improperly guarded ponds or in other ways, liability was derived on the theory of attractive nuisances maintained by the city.[293]

II

There are certain public services which only the government can adequately perform, as for example, the administration of justice, the preservation of public peace and enforcement of the laws, and the protection of the community from fire and disease. It may hence be conceded that the principle of immunity for the torts of officers engaged in "governmental" functions had some legitimate field of application. Not that such a principle is necessarily inherent in government, for as will be seen hereafter, not a few governments in the world assume responsiblity for the torts of officers engaged in these functions. But at least where there is an effort to sustain the principle, it will more readily meet approval in respect of these public services than in many of the other municipal activities already mentioned. Yet, except as to police officers, it will be found that the principle is not maintained in its pristine purity even in connection with these services, for the effort of courts to do justice to the injured individual, notably for the torts of firemen and health officers, has induced the courts frequently to qualify the application of the principle on grounds which commend themselves as more just and sound in their effect than in the reasoning invoked in their support.

Police

With respect to the torts of police officers, there is an unusual degree of unanimity against municipal liability. The courts are not, however, contented with invoking the ground that police officers are performing "governmental" functions in preserving the peace and enforcing the law and that hence the city, on the traditional policy of the common law, escapes liability for their nonfeasance or misfeasance, but they usually proceed to recite the whole gamut of alleged supporting grounds, namely, that their duties are prescribed by general law, that

190, 151 N. W. 976, (1915) 15 COL. L. REV. 637. In Massachusetts the paths in the parks and commons are not regarded as public highways but are deemed to be used for pleasure, hence the cities and towns are not held liable under the statutes respecting liability for streets and highways for permitting these paths to become dangerous and out of repair. *Clark v. Waltham* (1880) 128 Mass. 567.

[293] *Barthold v. Philadelphia* (1893) 154 Pa. 109, 26 Atl. 304; *Anadarko v. Swain* (1914) 42 Okla. 741, 142 Pac. 1104; *Canon City v. Cox* (1913) 55 Colo. 264, 133 Pac. 1040 (merry-go-round kept in unsafe condition); *Capp v. City of St. Louis* (1913) 251 Mo. 345. 158 S. W. 616, (1914) 2 L. S. MO. BULL. 41, 43.

See also *Roullier v. Magog* (1910, Que.) 37 C. S. 246. In *Carey v. Kansas City* (1905) 187 Mo. 715, 86 S. W. 438, the child was guilty of gross contributory negligence in climbing a fence around a reservoir after repeated warning, and hence plaintiff was non-suited.

they act for the benefit of the public at large and not for the city and its inhabitants, and that, though appointed, paid and discharged by the city authorities, they are not agents of the city but of the state, for which the city is acting by delegation in carrying on police functions, and that therefore the doctrine of *respondeat superior* does not apply. Not many of these alleged supporting reasons commend themselves as convincing or consequential, yet they appear in the cases with fairly consistent regularity. It will be readily admitted that there is no ground of tort liability of the city at common law for a mere failure to enforce the law or suppress crime. But the immunity goes further, extending to the most wilful, negligent or illegal acts of police officers. Thus, the city escapes liability for false arrest, unnecessary violence in arrest, gross negligence in shooting an innocent bystander, or maliciously injuring him,—though the city knew of the officer's vicious propensities—trespass on real estate, or similar injury to person or property, even though the city authorities ratify the act or have themselves been negligent in failing to exact a bond from the officer upon which the injured person might have sued.[294] And yet the rule is not altogether free from exception, for several cases have sought to find that the police officer was at the time of injury engaged in "corporate" functions or functions in which municipal liability is more generally conceded, for example, negligently failing to keep the streets safe or free from nuisances.[295]

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[294] The leading cases perhaps are *Bartlett v. Columbus* (1897) 101 Ga. 300, 28 S. E. 599; *Whitfield v. Paris* (1892) 84 Tex. 431, 19 S. W. 566; *Lamont v. Savanaugh* (1915) 129 Minn. 321, 152 N. W. 720; *Gillmor v. Salt Lake City* (1907) 32 Utah 180, 89 Pac. 714; *Aldrich v. City of Youngstown* (1922) 106 Ohio St. 342, 140 N. E. 164. See the cases discussed in 19 R. C. L. 1119; 4 Dillon, *op. cit.* sec. 1656; 5 McQuillin, *op. cit.* sec. 2431; White, *op. cit.*, sec. 67; 12 L. R. A. (N. S.) 537, 17 L. R. A. (N. S.) 741, L. R. A. 1915 E 460; Ann. Cas. 1913 C 471; and 12 A. L. R. 247.

[295] *Jones v. Sioux City* (1919) 185 Iowa 1178, 170 N. W. 445, (1919) 3 MINN. L. REV. 359 (pedestrian killed by driver of police auto engaged in hauling policemen to their patrols in outlying districts—held a corporate function). But where patrol wagon injured pedestrian, it was held a "governmental" function. *Aldrich v. Youngstown, supra. Shinnick v. Marshalltown* (1908) 137 Iowa 72, 114 N. W. 542 (stretching rope across street—"corporate" duty to keep streets free from nuisances); *Carrington v. St. Louis* (1886) 89 Mo. 208, 1 S. W. 240 (open door in street leading to cellar underneath police station—same principle); *Herron v. Pittsburg* (1903) 204 Pa. St. 509, 54 Atl. 311 (*ibid.*); see other cases cited in note in 17 L. R. A. (N. S.) 741.

In Quebec and some other British possessions, e. g. New South Wales, police officers act in a dual capacity, as officer of the local government and as officer of the crown. In the former capacity, the city has been held liable in Quebec for false arrest, assault, and illegal detention, or where the city has ratified the illegal act. See *Laviolette v. Thomas* (1881) 1 Montreal Super. Ct. 350; *Guénette v. Montreal* (1888) 4 *ibid.* 69; *Bourget v. Sherbrooke* (1905 Sup'r. Ct.) 27 Rap. Jud. Quebec 78. Other Quebec cases where liability was imposed or denied are cited in Ann. Cas. 1913 C, 472.

Fire Department

In the case of injuries occasioned by negligent acts of omission or commission incidental to the maintenance and operation of a fire department, whether due to the municipal authority as a body or to the spasmodic acts of a fireman, there is the same practical uniformity, in the absence of statute, in exempting the city from liability, on the ground that in the service of protection against fire the city is engaged in a governmental function. The customary ritual is advanced that the service is undertaken in obedience to legislative act; that the fire department is not maintained for the benefit of the city and its inhabitants—the courts do not seem to realize the challengeability of this statement; that the employees of the department, although appointed, paid and discharged by the corporation are not "agents of the city" for whose conduct it is liable, but they act as "officers of the city"—they admit this—charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without express authority; and that the maxim of *respondeat superior* has, *"therefore,"* no application.[296]

That much of this reasoning is tautological and in part paradoxical and a *non sequitur* has not materially weakened the judicial tenacity in embracing it. Only lately, in the well-known *Fowler* case in Ohio,—since overruled,—has a court had the temerity to overthrow the ritual by adopting the opposite thesis that the operation of a fire engine, at least when returning from a fire, involved a ministerial duty—possibly an unnecessary and unsound admission. At all events, by the great weight of authority in this country the city escapes all liability for negligent failure to extinguish fires, whether due to an insufficient supply of water, to the incompetence or negligence of firemen or to the defectiveness of the apparatus; as well as for injuries to a pedestrian or to property by the negligent driving or other negligent act of a fireman or the defective condition of apparatus.[297] Even the voluntary

[296] This language is sustantially that of Bigelow, C.J., in *Hafford v. New Bedford* (1860, Mass.) 16 Gray 297, and has been adopted in a great many subsequent cases and in 4 Dillon, *op. cit.* 2985.

[297] The leading cases probably are: *Van Horn v. Des Moines* (1884) 63 Ia. 447, 19 N. W. 293; *Wright v. Augusta* (1886) 78 Ga. 241; *Jewett v. New Haven* (1871) 38 Conn. 368; *Burrill v. Augusta* (1886) 78 Me. 118, 3 Atl. 177. But see *Kaufman v. City of Tallahassee* (1922) 84 Fla. 634, 94 So. 697, 30-A. L. R. 471, in which it was held that a fire truck, so constructed and operated as to menace and injure pedestrians on the sidewalk near corners, imposed liability on the city. The influence of *Fowler v. Cleveland, supra,* is evident; and the fact that the city had a commission form of government, "a large quasi-public corporation whose activities partake more of the nature of a business than a government," exercised a strong influence. See 4 Dillon, *op. cit.* sec. 1660; 5 McQuillin, *op. cit.* sec. 2432; White, *op. cit.,* sec. 66; 19 R. C. L. 1116 *et seq.;* 15 L. R. A. 781; 4 L. R. A. (N. S.) 629; 44 L. R. A. (N. S.) 68; 18 Ann. Cas. 508; 9 A. L. R. 143-157; where the cases are set out at some length.

destruction of property to prevent the spread of a conflagration created no liability at common law, though statutes now frequently provide for compensation.[298] The immunity is often extended to acts having the most indirect connection with fire protection, such as the acts of a municipal employee weighing coal for the fire department,[299] the engagement of the fireman or the apparatus in drills or in parades and celebrations, or even in flushing the streets.[300] The judicial choice, frequently presented in particular cases, between imposing liability for unsafe streets and extending immunity for acts of firemen has usually been resolved in favor of the immunity.[301] The conflict between the liability for insufficient hydrant service or defective water system and the immunity for acts incidental to fire protection has not been so uniformly decided in favor of the city.[302]

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[298] *White v. City Council of Charleston* (1835, S. C.) 2 Hill, 571, (1884) 18 AMER. L. REV. 1009; *McDonald v. City of Red Wing* (1868) 13 Minn. 38; *American Print Works v. Lawrence* (1847) 21 N. J. L. 248, (1850) 23 N. J. L. 590; see *Aitken v. Wells River* (1898) 70 Vt. 308, 40 Atl. 829; see 10 R. C. L. 64; Ann. Cas. 1913 C 600. Recognition of the injustice of imposing such undue burden on the individual for the benefit of the community as a whole led to the enactment of statutes providing for compensation. 4 Dillon, *op. cit.* secs. 1632-1635. See the article by Henry C. Hall and John H. Wigmore, *Compensation for Property Destroyed to Prevent Spread of a Conflagration* (1907) 1 ILL. L. REV. 501, 514, with summary of the cases.

[299] *Manske v. Milwaukee* (1904) 123 Wis. 172, 101 N. W. 377 (reckless moving of scales used in weighing coal for fire department).

[300] *Gillespie v. Lincoln* (1892) 35 Neb. 34, 52 N. W. 811 (exercising fire horses); *Smith v. Rochester* (1879) 76 N. Y. 506 (parade); *O'Daly v. Louisville* (1914) 156 Ky. 815, 162 S. W. 79 (flushing street in front of fire house); *contra: Bowden v. Kansas City* (1904) 69 Kan. 587, 77 Pac. 573; *Simon v. Atlanta* (1881) 67 Ga. 618 (stretching rope across highway); *cf. Shinnick v. Marshalltown* (1908) 137 Iowa 72, 114 N. W. 542, where for the like act of a policeman liability was imposed for breach of the "corporate" duty to keep the streets free from nuisances. *Supra* note 295.

[301] *Welsh v. Rutland* (1883) 56 Vt. 228 (slipping on ice caused by thawing out of hydrant by fireman); *O'Meara v. New York* (1865, N. Y. Sup. Ct.) 1 Daly 425 (driving fire engine on sidewalk); *Dodge v. Granger* (1892) 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781 and note (ladder truck standing across sidewalk). In these cases and others cited in 19 R. C. L. 1117-1118, note 20, the city was held exempt, notwithstanding the fact that the fire department's acts or negligence made the streets unsafe. But see *Opocensky v. South Omaha* (1917) 101 Neb. 336, 163 N. W. 325, where exception from the statutory speed limit was extended only to fire "emergency calls," and not to other cases of excessive speed. See also *Hillstrom v. St. Paul* (1916) 134 Minn. 451, 159 N. W. 1076, where city was held liable for falling of rotten pole used to carry wires for fire alarm system.

[302] See *Aschoff v. Evansville* (1904) 34 Ind. App. 25, 72 N. E. 279 (maintenance of water system—"corporate" liability); *City of Winona v. Botzet* (1909, C. C. A. 8th) 169 Fed. 321, 23 L. R. A. (N. S.) 204. Still an effort has been made to distinguish between the utility when used for fire service or for water supply and to derive the appropriate conclusion as to immunity and liability respectively. *Wright v. Augusta* (1886) 78 Ga. 241; *Springfield Fire & M. Ins. Co. v. Keeseville* (1895) 148 N. Y. 46, 42 N. E. 405; *Judson v. Winsted* (1908) 80 Conn.

Notwithstanding the nearly uniform rule of immunity in the operation of a fire department, the Supreme Court of Ohio in the recent *Fowler* case, above mentioned,[303] and since overruled, struck by the injustice done to the individual by the application of the traditional rule, reexamined its bases and came to the conclusion that it had survived its originating conditions and its usefulness. In a decision challenging the validity of the view that the operation of a fire department is still a governmental function, the court concluded that while the determination whether a fire department was necessary and how extensive it should be is a discretionary and governmental act, the actual administration of the existing system is a ministerial act, for negligence in the performance of which liability is incurred. The court thus admits the traditional classification of governmental and corporate functions, but contracts the former practically to legislative powers and enlarges the latter to include acts of administration. The court challenges the classic view that the city is a repository of sovereign powers and enjoys the state's immunity from suit and liability. It justifies this view by pointing out the metamorphosis in the function of the city as "a great public service corporation"—as indeed, we must admit, is the state. The court in this connection says:

"A municipal corporation is a vastly different thing from what it was in the early days. Then its function was very largely expressed in the exercise, as a political subdivision, of the delegated and limited powers of the sovereignty. It was a favorite maxim of this country that that government is best which governs least * * * Now, the activities and undertakings of a municipal corporation are manifold. They reach and touch in countless directions. It seems to be utterly unreasonable that all these activities and enterprises which are brought

384, 68 Atl. 999; *Piper v. Madison* (1909) 140 Wis. 311, 122 N. W. 730. See also *Martin v. Fire Commissioners* (1913) 132 La. 188, 61 So. 197; and 23 L. R. A. (N. S.) 205; 9 A. L. R. 155.

As to the conflict of authority where the tort involves the negligent care of a fire-house or station see *supra* p. 142. The rule of liability on the theory of a corporate duty to keep public property in repair has been extended to the negligent repair of a fire alarm system by contractors. *Wagner v. Portland* (1902) 40 Or. 389, 67 Pac. 300. So for the negligent construction of a cistern to store water for fire purposes. *Mulcairns v. Janesville* (1886) 67 Wis. 24, 29 N. W. 565.

[303] *Fowler v. City of Cleveland* (1919) 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131. The case overruled *Frederick v. Columbus* (1898) 58 Ohio St. 538, 51 N. E. 35, which seemed pretty strongly entrenched. The court's judgment in the *Fowler* case was influenced by an Ohio constitutional amendment of 1912 which subjected the state to suit. The *Fowler* case has since been overruled and the *Frederick* case reinstated in *Aldrich v. Youngstown* (1922) 106 Ohio St. 342, 140 N. E. 164.

See *Opocensky v. South Omaha* (1917) 101 Neb. 336, 163 N. W. 325, which takes the same view as to firemen's functions. See also *Hesketh v. Toronto* (1898) 25 Ont. App. Rep. 449, where the liability was, however, put on the ground that the fire service was entirely voluntary, and that the firemen were therefore "servants" not "officers" of the city—a somewhat unconvincing distinction.

closely home to the lives of all the people of the municipality must still be regarded as bound up in the vague and uncertain sphere of what is called a governmental function." The court adds that "authority should be reconciled with justice." Justice Wanamaker in a trenchant concurring opinion, drawing on political philosophy, concluded that the acts of a fire department were not ministerial but governmental, and challenged the whole doctrine of immunity for the torts of municipal officers by denying its basis in American political theory, which, he said, was diametrically opposed to the autocratic theory of kingly infallibility and of immunity from suit under the aegis of which the doctrine was born. Although the *Fowler* case was soon overruled, it illustrates the fact that courts often make valiant efforts to escape the fetters of traditional doctrines which work injustice.

The soundness of the doctrine of immunity as applied to instrumentalities engaged in extinguishing fires had already been powerfully challenged by the United States Supreme Court in dealing with the liability of the city of New York for the negligent operation of one of its fire-boats while aiding in extinguishing a fire.[304] In holding the city liable, and pointing out that the local law of New York, which followed the rule of municipal immunity, did not control the maritime law, the Supreme Court expressly refused to concede "the correctness of the doctrine by which a municipal corporation, as to the discharge of 'administrative duties', is treated as having two distinct capacities, the one private or corporate, the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong."

The importance of the decision in the *Fowler* case, notwithstanding the fact that it has been overruled, as well as of the grounds on which the decision was based, is considerable. It at once caused a reexamination of the validity of the alleged distinction between governmental and corporate duties,[305] leading to the general conclusion that the distinction is artificial and its operation in many instances unjust, and that the category of governmental acts, if the distinction is to be maintained, should be confined to strictly legislative or judicial, and should not include administrative acts. It also demonstrates that the courts have it in their power, by taking a more modern view of the bases of municipal activity, to enlarge the scope of so-called corporate functions indefinitely,

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[304] *Workman v. New York* (1900) 179 U. S. 552, 21 Sup. Ct. 212. See also *Thompson Nav. Co. v. Chicago* (1897, N. D. Ill.) 79 Fed. 984 and *Henderson v. Cleveland* (1899, E. D. Ohio) 93 Fed. 844; and *Chicago v. White Transportation Co.* (1917, C. C. A. 7th) 243 Fed. 358, aff. 245 U. S. 660. See also *supra*, p. 38.

[305] (1921) 29 YALE LAW JOURNAL 911; (1921) 34 HARV. L. REV. 66; (1920) 20 COL. L. REV. 774; (1919) 5 CORN. L. QUART. 90. See also a valuable article by Albert J. Harno, *"Tort Immunity of Municipal Corporation,"* (1921) 4 ILL. L. QUART. 28.

in accordance with the spirit of the times and a more enlightened conception of social and individual justice; for if the fire department service can be swept into the ministerial category—perhaps "administrative" would be a better term—certainly there is no reason why all branches of the police, health and other public services not already so classified, could not be transferred into that field of municipal functions.

Public Health

The safeguarding of the public health is usually deemed to be a "governmental" function, so that torts committed by health officers do not render the city liable, in the absence of statute.[306] This goes so far as to exempt the city, although the injury occur in connection with a service only incidentally connected with the preservation of the public health. Thus, the defective condition of public hospitals or pesthouses is not deemed to render the city liable;[307] nor is it where the injury occurred by negligently exposing certain dynamite caps used in blasting for the construction of a hospital;[308] nor where a city ambulance negligently runs over a pedestrian.[309] The immunity is usually justified by the

[306] *Evans v. Kankakee* (1907) 231 Ill. 223, 83 N. E. 223, 13 L. R. A. (N. S.) 1190, note; *Nicholson v. Detroit* (1902) 129 Mich. 246, 88 N. W. 695 (exposing persons to smallpox or other contagious disease by negligence of municipal officers); *Tollefson v. Ottawa* (1907) 228 Ill. 134, 81 N. E. 823; *Twyman v. Frankfort* (1904) 117 Ky. 518, 78 S. W. 446 (negligently caring for person in hospital or pesthouse); *Howard v. Philadelphia* (1915) 250 Pa. St. 184, 95 Atl. 388, L. R. A. 1916 B 917, note (impure vaccine administered by city physician in compulsory vaccination); *Levin v. Burlington* (1901) 129 N. C. 184, 39 S. E. 822 (negligently or erroneously quarantining a person); *Prichard v. Morgantown* (1900) 126 N. C. 908, 36 S. E. 353. In such cases, the officers are individually liable. *Lowe v. Conroy* (1904) 120 Wis. 151, 97 N. W. 942. See 4 Dillon, *op. cit.* sec. 1661; 6 McQuillin, *op. cit.* sec. 2669; White, *op. cit.* sec. 56; 19 R. C. L. 1121; 4 Ann. Cas. 624; 13 L. R. A. (N. S.) 1190; and Ann. Cas. 1918 D 803.

[307] *Butler v. Kansas City* (1916) 97 Kan. 239, 155 Pac. 12, L. R. A. 1916 D 626; *Benton v. Boston City Hospital* (1885) 140 Mass. 13 (injury to person entering building on business, due to unsafe condition of stairs). *Scott v. Indianapolis* (1921) 85 Ind. App. 387, 130 N. E. 658 (injury from falling into unguarded elevator shaft in city hospital); White, *op. cit.*, secs. 56, 102. See the break with precedent in *City of Shawnee v. Roush* (1924, Okla.) 223 Pac. 354, in which a city was held liable for injury sustained by paying patient in a city hospital, the function being deemed "proprietary." (1924) 24 COL. L. REV. 679.

[308] *Frost v. Topeka* (1916) 98 Kan. 636, 161 Pac. 936, L. R. A. 1917 C 429.

[309] *Maxmilian v. New York* (1862) 2 Hun. 263, aff. 62 N. Y. 160; *Watson v. Atlanta* (1911) 136 Ga. 370, 71 S. E. 664; *Foley v. Wesson Memorial Hospital* (1923) 246 Mass. 363, 141 N. E. 113. *Cf. Neff v. Wellesley* (1889) 148 Mass. 487, 20 N. E. 111 (cart driven by employee of poor farm). In *Kellogg v. Church Charity Foundation* (1911) 203 N. Y. 191, 96 N. E. 406, the plaintiff recovered from the charitable corporation for the negligence of its servant, an ambulance driver. See also *Murtha v. New York Homeopathic Medical College* (1920) 228 N. Y. 183, 126 N. E. 722, where the hospital corporation, under contract with the

assertion that in the preservation of the public health, the city acts as a "quasi-sovereignty" and under the customary formula is not liable for the acts of health officers, who, according to the theory adopted, are not officers of the city, but officers of the state, inasmuch as they are performing a governmental or state and not a corporate function. The fact that the health service is a community service and has no more true relation to state sovereignty than the supply of water or gas, does not appear to have been suggested by the courts. Yet as a public service for the benefit of the inhabitants of the city—though the traditional theory requires this manifest fact to be denied—every consideration of justice requires that the city assume responsibility for the torts of its health officers. Indeed, practical considerations have induced such a statutory change in several states. If health officers are to be made personally liable—as they of course are—for negligence or mistake in destroying property as a nuisance or impairing the liberty of persons in enforcing the health laws,[310] they will be disposed to be overcautious, to the manifest danger of the community. Hence statutes have occasionally placed responsibility for such mistakes on the city,[311] a policy which is to be highly commended as best satisfying the needs of the public, the injured person and the officer, as well as the demands of justice.

The justification for such an assumption of liability by the city for at least the good faith mistakes and torts of its officers, is well expressed in the opinion of the Massachusetts court in *Thayer v. Boston*[312] as follows:

"There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time of the act whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject-matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and

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city to furnish ambulances on emergency call, was held liable for negligence of a driver of its ambulance. See also article by O. L. McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Institutions* (1920) 5 CORN. L. QUART. 409, 6 *ibid.* 56.

[310] *Miller v. Horton* (1891) 152 Mass. 540, 26 N. E. 100; *Lowe v. Conroy* (1904) 120 Wis. 151, 97 N. W. 942.

[311] Mass. Laws of 1892, ch. 195, sec. 3; New York City Charter, Laws 1901, vol. 3, c. 466, sec. 1196.

[312] *Thayer v. Boston* (1837) 19 Pick. 511, 31 Am. Dec. 157.

persons employed by the city government, to leave the party injured no means of redress except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law."

Charitable Trusts

The doctrine of the immunity of city hospitals and similar institutions has undoubtedly been greatly influenced by the doctrines developed in connection with the non-liability of charitable trusts for torts. Judging by the irreconcilable explanations offered by the courts for maintaining the immunity of these charitable corporations, it would seem as if the sustaining principle is unstable and uncertain. Whether justified on the ground that it is a breach of the trust and a diversion of trust funds to pay damages for torts,[313] or as against public policy;[314] or on the ground that the doctrine of *respondeat superior,* as in the case of the state, does not apply to charitable corporations[315] none of the reasons commends itself as necessarily logical or sound. Thus, we find several of the best considered cases confining the immunity solely to

[313] *Heriot's Hospital Feoffees v. Ross* (1846, H. L.) 12 Cl. & F. 507. This doctrine is no longer maintained in England. *Hillyer v. St. Bartholomew's Hospital* [1919] 2 K. B. 820, and in Canada, *Lavere v. Smith's Falls Public Hospital* (1915) 35 Ontario L. Rep. 98, though it still finds some support in the United States. It has been extended to private charitable trusts, *Parks v. Northwestern University* (1905) 218 Ill. 381, 75 N. E. 991; *Gable v. Sisters of St. Francis* (1910) 227 Pa. 254, 75 Atl. 1087. But in *Love v. Nashville Agricultural and Normal Institute* (1922) 146 Tenn. 550, 243 S. W. 304 damages were recovered for a sewage nuisance. See (1922) 22 COL. L. REV. 748; *Roosen v. Peter Brigham Hospital* (1920) 235 Mass. 66, 126 N. E. 392; and the articles of Prof. McCaskill, *supra,* (1920) 5 CORN. L. QUART. 409, 6 *ibid.* 56.

[314] *McDonald v. Mass. General Hospital* (1876) 120 Mass. 432; *Hearns v. Waterbury Hospital* (1895) 66 Conn. 98, 33 Atl. 595; *Magnuson v. Swedish Hospital* (1918) 99 Wash. 399, 169 Pac. 828. See Elmer M. Dax, *Immunity of Charitable Institutions from Liability* (1921) 6 ST. LOUIS L. REV. 226, 229, note 8; and (1912) 25 HARV. L. REV. 721, note 4. In *Basabo v. Salvation Army* (1912) 35 R. I. 22, 85 Atl. 120, holding the charity liable in tort, the defense of public policy was condemned. In Massachusetts the doctrine of public policy was developed out of the theory that hospitals were governmental agencies. *Benton v. Boston City Hospital* (1885) 140 Mass. 13, 1 N. E. 836. See also *Morrison v. Henke* (1911) 165 Wis. 166, 160 N. W. 172.

[315] *Holliday v. St. Leonard* (1861, C. P.) 11 C. B. N. S 192; this case was overruled in *Foreman v. Mayor of Canterbury* (1871, Q. B.) L. R. 6 Q. B. 214. The doctrine has, however, been adopted in the United States in the same illogical way that it has been applied to the State and so-called state agencies and cities performing alleged "governmental" functions. *Loeffler v. Trustees of Sheppard . . . Hospital* (1917) 130 Md. 265, 100 Atl. 301; *Foley v. Wesson Memorial Hospital, supra,* note 309. See the criticism of the doctrine in (1912) 25 HARV. L. REV. 721, note 11; and in (1918) 31 HARV. L. REV. 479. See also *Bachmann v. Y. W. C A.* (1922) 179 Wis. 178, 191 N. W. 751, criticized as going too far, in (1923) 21 MICH. L. REV. 698, and annotated in 30 A. L. R. 455. See cases reviewed in 14 A. L. R. 572 and 23 A. L. R. 923.

charitable beneficiaries of the trust, but not to third persons,[316] or denying the immunity altogether.[317] These cases commend themselves as sound from the points of view of public policy, the injured individual and the charitable corporation itself, for responsibility for fault induces care in administration. But whatever justification the doctrine of immunity may have in respect of ordinary charitable trusts—and it is submitted that it has very little,[318]—none of the reasons prevail when the institution is owned or operated by the city, which has the taxing power to secure funds for the vindication of its responsibility for negligence and is therefore in no danger of having its existence suddenly terminated. Nothing better illustrates the artificiality and the injustice of permitting the municipal community through its appointed agents promiscuously to injure private individuals without responsibility.

The influence exercised upon the courts by the idea of the sanctity of private property has brought about some conflict where injury to private property was occasioned by the establishment, even in the absence of negligence, of a pest-house or hospital for contagious diseases so close to private property as to constitute a nuisance. Where the idea of protection of private property dominated, the city was held

[316] *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 92 N. E. 626; *Kellogg v. Church Charity Foundation* (1911) 203 N. Y. 191, 96 N. E. 406. *Schloendorff v. N. Y. Hospital* (1914) 211 N. Y. 125, 129, 105 N. E. 92; *Hewett v. Woman's Hosp. Aid Asso.* (1906) 73 N. H. 556, 64 Atl. 190; *Bruce v. Central M. E. Church* (1907) 147 Mich. 230, 110 N. W. 951; *Marble v. Nicholas Senn Hospital Asso.* (1918) 102 Neb. 343, 167 N. W. 208; and *Tucker v. Mobile Infirmary Asso.* (1915) 191 Ala. 572, 68 So. 4, L. R. A. 1915 D 1167, in which the doctrine of immunity in tort is challenged in principle; approved in *City of Shawnee v. Roush* (1924, Okla.) 223 Pac. 354.

[317] *Glavin v. Rhode Island* (1879) 12 R. I. 411; *Tucker v. Mobile Infirmary Asso.* (1915) 191 Ala. 572, 68 So. 4. Some cases make the criterion of immunity for negligence the care of the corporation in selecting its agents. *Powers v. Mass. Homeopathic Hospital* (1901, C. C. A. 1st) 109 Fed. 294; *Nicholson v. Hospital Asso.* (1916) 97 Kan. 480, 155 Pac. 920; *McDonald v. Mass. Gen. Hospital* (1876) 120 Mass. 432.

Rhode Island passed a statute exempting charitable corporations from liability to patients for the negligence of their servants. R. I. Gen. Laws 1909, c. 213, sec. 38.

Where the corporation is not charitable, but conducted for profit, there is no reason to limit its liability. *Phillips v. St. Louis and San Francisco R. R. Co.* (1907) 211 Mo. 419, 111 S. W. 109. But the mere receipt of some compensation from patients does not deprive it of its charitable character. *Gable v. Sisters of St. Francis* (1910) 227 Pa. 254 75 Atl. 1087; *Paterlini v. Memorial Hospital Asso.* (1918, C. C. A. 3d) 247 Fed. 639. In New York, the immunity with respect to beneficiaries is extended to institutions of a quasi-penal character. *Corbett v. St. Vincent's Industrial School* (1903) 177 N. Y. 16, 68 N. E. 997. This is on the theory of implied waiver, an unconvincing extension of the fiction of waiver when applied to a person compelled by judicial decree to enter a reformatory, a penal institution.

[318] See the argument in (1918) 31 HARV. L. REV. 479.

liable;[319] where the governmental character of the municipal function dominated, the city or board of health was held immune.[320] The conflict is irreconcilable, and challenges the validity of the operative principle.

Removal of Refuse

The removal of garbage, refuse, rubbish and ashes from the streets or from residences along the streets is deemed by the majority of the courts to be incidental to the protection of the public health and hence to constitute a "governmental" function. Thus, we find the somewhat startling proposition sustained that the driver of a city ash cart or garbage wagon is engaged in the sovereign governmental work of safeguarding the public health, for whose torts the city cannot be liable because he is the agent of the "public," not of the city, and that hence the doctrine of *respondeat superior* does not apply.[321] This rule of immunity has even been applied where the city recouped some of the expense of collecting garbage by selling it at the incinerator.[322]

On the other hand, several courts have confessed their inability to stretch the imagination thus far or else have had a better sense of humor or justice and have held the city liable for the torts of menial servants of the type in question either on the ground that removing

[319] *Haag v. Vanderburgh County* (1878) 60 Ind. 511; but see *Clayton v. Henderson* (1898) 103 Ky. 228, 44 S. W. 667, where a statute forbade establishment of pesthouse within mile of city, but only made the officers, not the city, liable. See also *Henderson v. O'Haloran* (1902) 114 Ky. 186, 70 S. W. 662. See also *Baltimore v. Fairfield Improv. Co.* (1898) 87 Md. 352, 39 Atl. 1081; *Thompson v. Kimbrough* (1900) 23 Tex. Civ. App. 350, 57 S. W. 328 (injunction against nuisance); White, *op. cit.*, sec. 117.

[320] *Arnold v. Stanford* (1902) 113 Ky. 852, 69 S. W. 726, decided by the same court that decided *Clayton v. Henderson, supra; Frazer v. Chicago* (1900) 186 Ill. 480, 57 N. E. 1055; *Barry v. Smith* (1906) 191 Mass. 78, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028 and note.

[321] Collecting garbage and ashes: *Louisville v. Hehemann* (1914) 161 Ky. 523, 171 S. W. 165; *Love v. Atlanta* (1894) 95 Ga. 129, 22 S. E. 29 (negligent running away of mule drawing garbage cart); *Savannah v. Jordan* (1914) 142 Ga. 409, 83 S. E. 109; *Condict v. Jersey City* (1884) 46 N. J. L. 157; *James v. Charlotte* (1922) 183 N. C. 630, 112 S. E. 423; *Behrmann v. St. Louis* (1918) 273 Mo. 578, 201 S. W. 547; *Scibilia v. Philadelphia* (1924) 279 Pa. 549, 124 N. E. 273, (1924) 72 PA. L. REV. 452; *Haley v. Boston* (1906) 191 Mass. 291, 77 N. E. 888. To the effect that the majority of the courts hold that flushing or sprinkling the streets is governmental rather than corporate, see *supra* note 276. See the metaphysical refinements indulged in by the court in *Akron v. Butler* (1923) 108 Ohio St. 122, 140 N. E. 324, in determining whether the driver of a truck under the supervision of the superintendent of street cleaning, while returning from the railroad depot after delivering a package for shipment, was engaged in a function related to street cleaning, hence governmental, or in a proprietary function.

[322] *Manning v. City of Pasadena* (1922) 58 Cal. App. 666, 209 Pac. 253; citing as authority, erroneously, it is believed, cases involving state harbor commissioners, *Chapman v. State* (1894) 104 Calif. 690, 38 Pac. 457; *Denning v. State* (1899) 123 Calif. 316, 55 Pac. 1000.

such refuse is simply corporate and not governmental in character,[323] or that it involves a duty incidental to the care and safety of the public streets and is for that special reason corporate, or that the city acts in place of the private owners in removing a private nuisance.[324]

The negligent failure to remove garbage cans from the streets has produced a similar conflict of views as to the predominance of the element of public health over the element of obstructing the streets.[325] Yet, where the work of removing garbage results in the establishment of a nuisance, especially injurious to adjoining private property, the consideration of injury to private property prevails over that of the governmental nature of the municipal function, and the city has usually been held liable.[326] But where the dumping ground or other nuisance merely causes injury to the person, by the offensiveness of odors or in other ways, the "governmental" immunity of the city reasserts itself. So that where the nuisance simultaneously causes sickness to the person and injury to the property, the owner may recover damages for the diminished value of the property, sickness being evidence of diminished power of enjoyment and value; but for the sickness itself, it seems, no recovery is allowed,[327] though the wrongfulness

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[323] The courts are bound by no special inhibitions, except previous decisions, in classifying a particular function as governmental or corporate. *Pass Christian v. Fernandez* (1911) 100 Miss. 76, 56 So. 329; *Young v. Metropolitan St. Ry. Co.* (1907) 126 Mo. App. 1, 103 S. W. 135. See 5 L. R. A. (N. S.) 1005; 6 L. R. A. (N. S.) 1013; 39 L. R. A. (N. S.) 649; 14 A. L. R. 1473; 4 Dillon, *op. cit.* sec. 1662; 6 McQuillin, *op. cit.* sec. 2636.

[324] *Missano v. New York* (1899) 160 N. Y. 123, 54 N. E. 744. *Quill v. New York* (1899) 36 App. Div. 476, 55 N. Y. Supp. 889. The New York courts seem more practical in their views in such matters than the courts of many other states. See also *Barney Dumping Boat Co. v. New York* (1889, S. D. N. Y.) 40 Fed. 50.

[325] *Savannah v. Jordan* (1914) 142 Ga. 409, 83 S. E. 109 (immune as incidental to the preservation of public health); *Louisville v. Hans* (1915) 167 Ky. 160, 180 S. W. 65 (liable for obstructing the streets).

[326] *Stephenville v. Bowen* (1902) 29 Tex. Civ. App. 384, 68 S. W. 833; *Flannagan v. Bloomington* (1910) 156 Ill. App. 162; *Louisville v. Hehemann* (1914) 161 Ky. 523, 171 S. W. 165; *Georgetown v. Ammerman* (1911) 143 Ky. 209, 136 S. W. 202 (the element of eminent domain arising out of damage to private property being an important consideration); *Denver v. Davis* (1906) 37 Colo. 370, 86 Pac. 1027; *Denver v. Porter* (1903, C. C. A., 8th) 126 Fed. 288; *New Albany v. Slider* (1899) 21 Ind. App. 392, 52 N. E. 626. See also 43 L. R. A. (N. S.) 1037. So with respect to trespass on private property, *Ostrom v. San Antonio* (1901) 94 Tex. 523, 62 S. W. 909; *San Antonio v. Mackey* (1896) 14 Tex. Civ. App. 210, 36 S. W. 760; (1899) 22 Tex. Civ. App. 145, 54 S. W. 33.

But in a Massachusetts case, carefully considered, even the flooding of a cellar caused by the dumping of ashes into a water-course was deemed not to render the city liable. *Johnson v. Somerville* (1907) 195 Mass. 370, 81 N. E. 268.

[327] *Williams v. Town of Greenville* (1902) 130 N. C. 93, 40 S. E. 977; *Hines v. Rocky Mount* (1913) 162 N. C. 409, 78 S. E. 510, L. R. A. 1915 C 751. In the latter case, the court said: "In affording damages for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold as the correct deduction from the above principle

of the act is admitted in the fact that an individual suffering from the offensive odors created may obtain an injunction restraining the nuisance.[328] Such artificial and unsound distinctions, sustained largely because of an alleged fear of multiplicity of suits against the city, have been vigorously denounced on numerous occasions,[329] and serve to indicate the urgent need for a reexamination of the principles on which community liability for torts may properly be founded.

III

Public Utilities

The expansion in the functions of a municipality in all civilized countries has resulted in the assumption, whether by legislative command or by permission, of many duties formerly performed solely by private persons. Among these the most common are the duties of public service usually identified with the supply of water, light, gas, transportation and similar undertakings. These services, known under the generic name of public utilities, are generally rendered for compensation, though not necessarily for profit. In determining the liability of the municipality for the torts of its agents in the conduct of these enterprises, the courts find little difficulty in apprehending the corporate nature of the service, the element of compensation, though not always directly apparent, affording the most common operative fact taking these services out of

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that the damages are confined to the diminished value of the property affected, and that sickness attributable to such nuisance may not be properly considered as a direct element of damage."

In *New Albany v. Slider* (1899) 21 Ind. App. 392, 52 N. E. 626, a statute declared that an actionable nuisance included injury to the person, so that sickness was included.

[328] *Shreck v. Coeur d'Alene* (1906) 12 Idaho, 708, 87 Pac. 1001; *Hill v. New York* (1893) 139 N. Y. 495, 34 N. E. 1090.

[329] See the strong dissenting opinions of Walker, J. and Allen, J. in *Hines v. Rocky Mount* (1913) 162 N. C. 409, 78 S. E. 510, citing many cases in which it has been held that municipalities are liable for nuisances like private persons, and that injury to the person is not excluded as a ground of liability. See *Harper v. Milwaukee* (1872) 30 Wis. 365; and Williams, W. L., *Liability of Municipal Corporations for Tort* (Boston, 1901) p. 305. The fact that cities have been held liable for personal injuries resulting from nuisances in the public streets and highways is of course well established. But sickness alone, alleged to have resulted from a city's permitting water to pond in a highway, was held not to be within the statute giving a right of action to any person who shall receive bodily injury or damage in his person or property through a defect in the street. *Triplett v. City of Columbus* (1918) 111 S. C. 7 96 S. E. 675. The majority of the court in *Hines v. Rocky Mount, supra,* intimated that there was a distinction in such liability depending upon whether the nuisance arose incidentally to corporate or governmental functions. This is hardly sustainable as to injuries to property and has no better foundation with respect to injuries to the person.

the sphere of "governmental" enterprises.[330] If it were more commonly appreciated by the courts that the tax-payer pays for all municipal enterprises and that they must all be legally justified as accruing to his benefit, we might find a greater disposition to drop the uncertain and largely outworn distinction between governmental and corporate enterprises, which has plagued the courts in a futile effort at uniform classification and has challenged the logic of the law and the justice of its administration. Probably a further illustration of this artificiality of distinction may be found in the rules developed in connection with the operation of municipal waterworks. This has now become a common field of municipal enterprise.

For the negligent failure to supply water, causing special damage to an individual—the function having been regularly undertaken—it would seem not unfair to hold the community liable. But here distinctions are drawn. If the failure resulted in a fire loss, which due care might have averted, there is no community liability, on the alleged ground that the duty was in this case owing to the public and not to the individual injured, notwithstanding the fact that he may have paid water rates for the very purpose of securing this supply of water.[331]

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[330] Supply of electric light, *Posey v. North Birmingham* (1907) 154 Ala. 511. 45 So. 663, 15 L. R. A. (N. S.) 711; *Eaton v. Weiser* (1906) 12 Idaho 544. 86 Pac. 541. Of course, the city must have authority to operate an electric light plant. *Posey v. Birmingham, supra.*

Supply of gas, *Brantman v. Canby* (1912) 119 Minn. 396, 138 N. W. 671. *Contra: Irvine v. Greenwood* (1911) 89 S. C. 511. 72 S. E. 228. 6 McQuillin, *op. cit.* sec. 2680; 3 Dillon, *op. cit.* sec. 1303; 4 *ibid,* sec. 1670; 19 R. C. L. 1132 and cases there cited. note 1.

Distinctions have been made by some courts where the lighting was furnished to a public building, or on the streets, where the purpose is to prevent crime. In doing these things, the duty was deemed "governmental" and the city immune in tort. *Hodgins v. Bay City* (1909) 156 Mich. 687, 121 N. W. 274; *Palestine v. Siler* (1907) 225 Ill. 630, 80 N. E. 345. But in the matter of street lights, the municipal advantage in escaping liability for street injuries has served to induce several courts to impose liability for negligent management thereof. *Saulman v. Nashville* (1915) 131 Tenn. 427, 175 S. W. 532, L. R. A. 1915 E 316 and note; municipal ferry, *Davies v. Boston* (1906) 190 Mass. 194; 76 N. E. 663. See also White, *op. cit.,* secs. 85-93.

[331] *Wright v. Augusta* (1886) 78 Ga. 241; *Edgerly v Concord* (1879) 59 N. H. 78; *Springfield Fire & Marine Ins. Co. v. Keeseville* (1895) 148 N. Y. 46, 57, 42 N. E. 405, where the court was forced into the position of asserting that the establishment and operation of waterworks was a "governmental" function. See 3 Dillon, *op. cit.* sec. 1303 1340; 4 *ibid.* sec. 1670; 6 McQuillin, *op. cit.* sec. 2680; 19 R. C. L. 1130; White, *op. cit.*, sec. 86; Jones, *op. cit.*, sec. 40.

This immunity has even been extended in most states to a water company furnishing water to the city and its inhabitants under contract with the city. *German Alliance Insurance Co. v. Home Water Supply Co.* (1912) 226 U. S. 220, 33 Sup. Ct. 32, overruling dicta in *Guardian Trust Co. v. Fisher* (1905) 200 U. S. 57, 26 Sup. Ct. 180. See (1910) 58 U. PA. L. REV 556 and 61 *ibid.* 407. This is justified on the absence of privity of contract, disability of a third party beneficiary,

Yet when the municipal negligence results in injury of a different kind, there seems little judicial hesitation in regarding the supply of water as a corporate or commercial enterprise, though it is admitted that the object in undertaking the service was not to make money but to increase the comfort and convenience of the inhabitants and incidentally to promote the public health.[332] When the waterworks or appurtenances, such as hydrants, are used for the dual purposes of fire protection and other purposes, such as flushing the streets, a valiant attempt is made to distinguish the particular function or use in connection with which the injury occurred and to determine liability accordingly.[333]

For the furnishing of contaminated or impure water it would seem that the city can only be held liable on evidence of gross negligence in permitting the contamination to occur.[334] Though it has been decided that the supply of water was not merely a service but a sale, it seems that there is no implied warranty of purity.[335]

The fact that in principle the courts admit that negligence in the operation of public utilities involves legal liability in accordance with usual rules of law affords ground for the hope that progress may be made by showing that the conception of "public utilities" may properly be enlarged to include other public services, such as the administration of the fire and health departments. On the continent, this development is discoverable in the enlargement of the conception of "administrative" as distinguished from "governmental" or "sovereign" services. It is believed that public opinion in the United States will readily support a similar broadening of the concept of "administration" as distinguished from "legislation" and the application of the rules of *respondeat superior* to functions falling within the former group.

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or denial that the individual consumer is a beneficiary. But a contrary view is taken in Kentucky, North Carolina, Florida, Wisconsin, and Indiana (*semble*). See cases cited in 3 Dillon, *op. cit.*, p. 2304 and (1913) 61 U. PA. L. REV. 408; and *Highway Trailer Co. v. Janesville Electric Co.* (1922) 178 Wis. 340, 190 N. W. 110; (1906) 20 HARV. L. REV. 242; (1923) 32 YALE LAW JOURNAL 410.

[332] *Watson v. Needham* (1894) 161 Mass. 404, 37 N. E. 204 (negligent failure to supply water); *Henry v. Lincoln* (1913) 93 Neb. 331, 140 N. W. 664 (injury to city employee at pumping station); *Esberg Cigar Co. v. Portland* (1899) 34 Ore. 282, 55 Pac. 961 (injury to property from bursting main). See the many other cases cited in 19 R. C. L. 1130, note 12, and those discussed in 23 L. R. A. (N. S.) 204.

[333] *Winona v. Botzet* (1909, C. C. A. 8th) 169 Fed. 321, 23 L. R. A. (N. S.) 204 (horse frightened by whistle of waterworks); *Judson v. Winsted* (1908) 80 Conn. 384, 68 Atl. 999 (horse frightened by flushing of hydrant); 6 McQuillin, *op. cit.* sec. 2683.

[334] *Stubbs v. Rochester* (1919) 226 N. Y. 516, 124 N. E. 137; *Keever v. City of Mankato* (1910) 113 Minn. 55, 129 N. W. 158; 6 McQuillin, *op. cit.* sec. 2684. See the exhaustive notes in 5 A. L. R. 1402 and (1910) 1 Negligence and Compensation Cases 187. The cases turn largely on the question of evidence of negligence.

[335] *Canavan v. City of Mechanicsville* (1920) 229 N. Y. 473, 128 N. E. 882, 13 A. L. R. 1123; see (1920) 20 COL. L. REV. 620, on the decision below. See dissenting opinions of Pound and Elkins, JJ.

ULTRA VIRES

One of the most uncertain departments of the law of municipal corporations lies in the application of the principles of agency to the acts of its officers. It has already been observed that the doctrine of *respondeat superior* has received an extraordinary application, relieving the city from liability where the tort is committed in connection with so-called "governmental" acts on the ground that in the performance of such acts the officer is an agent of the public or state and not of the city—a principle believed to be thoroughly unsound. Probably more sound, but difficult of application, is the doctrine of *ultra vires* as related to municipal corporations. Applied with much greater strictness than in the case of private corporations, it serves to relieve the city from liability where the function in connection with which the tort occurred was entirely beyond its powers, express or implied, to undertake.[336] Much stress is laid upon the degree of disability, and it is not always easy to distinguish between a total want of power to engage in the enterprise, in which case there is immunity, and unlawful minor acts within a general corporate power, in which case liability is more usual.[337] Thus, it often becomes necessary to determine whether a particular act of an officer is within the scope of his powers and of the city's general powers. Unless discrimination is used, it might be possible to describe every unlawful or malicious act of an officer as unauthorized and therefore *ultra vires*. Hence the courts have sought to draw a line between acts entirely beyond municipal powers and other unlawful acts, for which, if not immune on another ground, such as their governmental character, liability is imposed; and between official acts within the scope of the officer's powers, though perhaps unauthorized, and personal acts entirely outside his authority—in which latter case there is only personal liability.[338] A decision

[336] Disability to grant certain franchises, *Idaho Springs v. Filtean* (1889) 10 Colo. 104, 14 Pac. 49; disability to operate a lighting plant, *Posey v. North Birmingham* (1907) 154 Ala. 511, 45 So. 663; to operate a ferry, *Hoggard v. Monroe* (1899) 51 La. Ann. 683, 25 So. 349; to operate a quarry, *Radford v. Clark* (1912) 113 Va. 199, 73 S. E. 571; (1912) 25 HARV. L. REV. 648.

Town held immune for unlawful criminal prosecution resulting in driving plaintiff from town, as *ultra vires*. *Brown v. Edgartown* (1920) 236 Mass. 258, 128 N. E. 1, (1922) 30 YALE LAW JOURNAL 303.

The doctrine has been applied to the negligent construction of a bridge under an unconstitutional statute. *Albany v. Cunliff* (1849) 2 N. Y. 165, 172, 178.

See other illustrative cases in 4 Dillon, *op cit.*, sec. 1650; and White, *op. cit.*, secs. 33-36.

[337] *Scott v. Tampa* (1911) 62 Fla. 275, 55 So. 983; *Worley v. Columbia* (1885) 88 Mo. 106; McQuillin, *op. cit.* sec. 2638; White, *op. cit.*, sec. 35.

[338] Maliciously suing out an injunction, *Doyle v. Sandpoint* (1910) 18 Idaho 654, 112 Pac. 204; *cf. Ysleta v. Babbitt* (1894) 8 Tex. Civ. App. 432, 28 S. W. 702.

In *Stanley v. Sangerville* (1920) 119 Me. 26, 109 Atl. 189, 9 A. L. R. 348, a town was held liable in an action for libel on the ground that it was acting in its corporate capacity when it charged the plaintiff with larceny for the alleged conversion

of the United States Supreme Court in 1885 holding the city liable for the torts of its officers though engaged in an enterprise *ultra vires*,[339] though followed to some extent by the courts of Iowa[340] and heartily approved by Jones in his work on the Negligence of Municipal Corporations,[341] has on the whole been repudiated judicially and is disapproved by Dillon.[342] It cannot be denied that there is much reason in support of the principle that a community is liable when it has, though without statutory power, purported to authorize a certain enterprise or act, in the conduct or performance of which an innocent person was unlawfully injured. The community, not the innocent individual, should bear the burden of its error in exceeding its granted powers. On the other hand, one may support the distinction between official and personal acts of an officer, a distinction recognized in most systems of law.

MOB VIOLENCE

Finally, mention may be made of a legal institution which evidences the fact that the Anglo-American law is not impervious to considerations of social justice in imposing upon the community the risk and burden of certain types of loss or injury falling upon innocent individuals. Reference is made to the liability imposed by statute upon cities, towns or counties for losses suffered by individuals due to mob violence. The institution has a long history in England, and even longer on the European continent; in England, "the hundred" was held answerable for robberies committed within it, and a series of statutes,

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of a municipal culvert. *Cf. Howland v. Maynard* (1893) 159 Mass. 434, 34 N. E. 515, where the city was held immune for libel where the libel was contained in a committee report submitted to the town meeting. See also *Covington County v. Stevens* (1919, C. C. A., 5th) 256 Fed. 328, holding that a county cannot commit or authorize an officer to commit libel. In England, municipal liability appears to depend upon whether the officer was acting within the scope of his employment. *Glasgow v Lorimer* [1911, H. L.] A. C. 209.

Cf. Wallace v. Menasha (1880) 48 Wis. 79, 4 N. W. 101, city held not liable for act of city treasurer in selling property of wrong person to secure payment of delinquent taxes; and *Durkee v. Kenosha* (1883) 59 Wis. 123, 17 N. W. 677, where the city was held liable for property seized and sold under a void special assessment in opening a street. See 4 Dillon, *op. cit.*, secs. 1652, 1653.

[339] *Salt Lake City v. Hollister* (1885) 118 U. S. 256, 6 Sup. Ct. 1055.

[340] *Ultra vires* held no defense, *Fitzgerald v. Sharon* (1909) 143 Ia. 730, 121 N. W. 523. See 6 McQuillin, *op. cit.*, sec. 2637. It seems that it is no defense in admiralty. *The Major Reybold* (1901, E. D. Pa.) 111 Fed. 414.

[341] Jones, *op. cit.*, p. 341 *et seq.* Justice Miller in *Salt Lake City v. Hollister, supra* note 339, pointed out a distinction between contracts *ultra vires* and torts *ultra vires*, imposing liability in the second case, but not in the first. The distinction has been challenged by Dillon, *op. cit.*, v. IV, sec. 1649.

[342] See *Cavanaugh v. Boston* (1885) 139 Mass. 426, 1 N. E. 834, and the many cases cited by McQuillin, 6 *op. cit.* sec. 2637 *et seq.*; 4 Dillon, *op. cit.* sec. 1647 *et seq.*; 19 R. C. L. 1137; (1912) 25 HARV. L. REV. 648.

beginning in 1285, in the statute of Westminster, 13 Edw. I, c. I, and continued in several Riot Acts, recognized the principle that the civil subdivision, charged with the duty of protecting property, was liable to the individual for failure to exert the necessary power to prevent loss, not merely by way of negligence, but absolutely.[343]

The institution did not come to America with the common law[344] and unless provided for by statute, failure to enforce the laws or prevent riots or damage to property would merely be regarded as a defect in or breach of a "governmental" duty—policy—which entails no pecuniary liability. Considerations of public policy have, however, induced a number of states to enact statutes, as have practically all the countries of Europe, imposing upon the city, town or county the duty to indemnify, in whole or in part, the property loss sustained by the victims of mob violence.[345]

The theory and policy of such statutes have been expressed as follows:[346]

"The policy . . . may be supposed to be to make good, at the public expense, the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally we may suppose, to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purview of civil government, and indeed, it is to attain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view."

The function of the statutes then is minatory, to induce, by realization of community loss, a community interest in the prevention of mob violence; preventive, in imposing responsibility for failure to prevent; and compensatory, in imposing liability without fault and indemnity without proof of negligence.

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[343] Pollock & Maitland, *History of English Law*, I, 545; Maitland, *Collected Papers*, (1911) vol. 1, p. 230. *Ratcliffe v. Eden* (1776, K. B.) 2 Cowp. 485; (1875) 4 LAW MAG. & REV. 552; *Chicago v. Sturges* (1911) 222 U. S. 313, 323, 32 Sup. Ct. 92.

[344] *Gianfortone v. New Orleans* (1894, E. D. La.) 61 Fed. 64; *Campbell v. Montgomery* (1875) 53 Ala. 527; *Western College v. Cleveland* (1861) 12 Ohio St. 375.

[345] Such statutes exist in California, Illinois, Kansas, Maine, Montana, New Hampshire, New Jersey, New York, Pennsylvania and in other states. See Dillon, 5th ed., sec. 1637-1638; White, *op. cit.*, sec. 41; *Darlington v. New York* (1865) 31 N. Y. 164; *Underhill v. Manchester* (1864) 45 N. H. 214; *Butte Miners' Union v. Butte* (1920) 58 Mont. 391, 194 Pac. 149, 13 A. L. R. 746, and cases cited in 13 A. L. R. 753.

[346] *Darlington v. New York* (1865) 31 N. Y. 164. Statutes of this kind have been held constitutional as an appropriate exercise of the police power. *Chicago v. Sturges* (1911) *supra*, note 343.

THESIS

Surely a community that has the social vision to charge upon itself the full risk of a defective administration of its police protective service in certain flagrant cases, even to the point of insurance and liability without fault, cannot be wanting in the necessary social sense to assume responsibility for the wrongful, illegal and tortious official acts of its own agents inflicting loss upon individual members of the community or strangers. Whether we reach this conclusion upon a theory of *respondeat superior* or upon a theory of community assumption and distribution of risk for accidents and negligence in the public service, we should not be perverse in insisting upon our defective social engineering in the face of the experience of most other civilized countries. A community that has been able to appreciate the sound public policy and efficiency of workmen's compensation legislation, should not fail to meet the more modest requirements of the universally accepted and elementary principle of the employer's responsibility for the torts of his servants within the scope of their duties or authority. That these are public servants and the employing corporation the community itself should make no difference. The officer will not be relieved from liability to the community for wilful wrongs, but the individual victim will no longer seek his compensation solely at the hands of a subordinate officer. The community will gain by promoting respect among its members for its fairness and justice and, instead of relying upon antiquated formulas to escape liability, it will meet the exigencies of modern organized life by discharging what the rest of the world recognizes as just obligations.

In the second part of this study, it is proposed to examine the theories upon which has been justified or denied the responsibility of the political community to the individual for the torts of its agents and officers. This will be followed by an examination of the history of the doctrine in practice and of the positive law governing the subject in foreign countries as compared with our own. Finally, the draft of a statute will be essayed to furnish the basis of an amendment of the Federal Tucker Act and of the law in the various states by uniform act.*

* The second part of this study will appear in (1925-1926) 35 YALE LAW JOURNAL.