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GOVERNMENT LIABILITY IN TORT*

EDWIN M. BORCHARD

MUNICIPAL CORPORATIONS

It is when we come to the municipal corporation as an agency of the public power that we find the greatest confusion to prevail, not only as to the substantive liability or immunity of the corporation in tort, but as to the grounds upon which the liability or immunity, as the case may be, properly rests. In few, if any, branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology, with the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy. This is notably the case in the effort to apply the supposedly settled rule that the municipal corporation is not liable for torts committed by its agents in the performance of governmental, political or public functions, whereas it is liable when the tort is committed in the performance of corporate, private or ministerial functions. Not all courts, however, are equally submissive to the commands of a ritual; so that we find the utmost confusion among the courts in the attempt to classify particular acts of state agents as governmental or corporate. Disagreement among the courts as to many customary municipal acts and functions may almost be said to be more common than agreement and the elaboration of the varying justifications for their classification is even less satisfying to any demand for principle in the law. Indeed, so hopeless did the effort of the courts to make an appropriate classification of functions appear to the Supreme Court of South Carolina that they determined to abandon the distinction between governmental and corporate acts. But instead of holding the municipality liable in tort in all cases, as the late Judge Wanamaker of the Ohio Supreme Court recently suggested as desirable, the South Carolina court decided to

*Continued from the November number, 34 Yale Law Journal, 1-45.

187 In Irvine v. Town of Greenwood (1911) 89 S. C. 517, 72 S. E. 228, the court said: “The confusion which has resulted from the refinements and distinctions attempted by other courts with respect to the liability of municipal corporations for torts committed by officers or employees is so great that it would be difficult, if not impossible, to deduce from them a rule which could be applied with confidence by the public or the bar.” Of course a special statute may impose liability, Burnett v. City of Greenville (1917) 106 S. C. 255, 91 S. E. 203; 6 McQuillin, Municipal Corporations (1913) sec. 2623.

188 Wanamaker, J., in his opinion concurring in the result in Fowler v. City of Cleveland (1919) 100 Ohio St. 158, 176, 126 N. E. 72, 77, where, overruling a long-established line of authority, the city was held liable for injuries to one who was injured by a negligently driven fire-engine returning from a fire, said:
hold the city immune in all cases, standing in this respect alone among the states. Judge Foote in the case of *Lloyd v. New York*, commonly regarded as a leading case, after announcing the time-honored formula, came to the discouraging conclusion that there was no guiding rule for the courts and that “all that can be done with safety is to determine each case as it arises.” In the light of such confession of lack of principle, it is not surprising that judicial utterances are irreconcilable and that the effort to determine the law governing the liability of municipal corporations in tort resolves itself into a study of local arbitrariness in the different jurisdictions, thereby justifying a challenge against all the formulas, phrases and terminology under the control of which the courts profess to be acting. If consistency in the law is necessary to give it prestige, as Judge Learned Hand has recently remarked, then this branch of the law is greatly in need of reform.

**PRINCIPLES**

It was natural that with the development of industry there should come a concentration of population in cities and that with the necessary growth in governmental functions, decentralization in administration

“The whole doctrine of immunity given to a sovereign state was based upon the assumption of the divine right of kings—a king can do no wrong; he is infallible; or, if he do wrong, no subject has any right to complain. This doctrine has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it.” While the sentiment is commendable and the result just, it is to be feared that the doctrine has far more vitality than Judge Wanamaker assumes; (see Comments [1920] 29 Yale Law Journal, 911) and recently Mr. Justice Holmes has sought to prolong its life by a process of reasoning that appears to have escaped its earlier and less learned or logical devotees. He states that the immunity of a sovereign from suit and liability rests upon no “formal conception, or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which that right depends.” *Kawananakoa v. Polyblank* (1907) 205 U. S. 349, 353, 27 Sup. Ct. 526, 527. We shall have occasion hereafter to examine this theory. Whatever the correct theory, whether it dictates liability or immunity, there is no reason why a modern community should not concede its subjection to legal rules of liability, as the countries of Europe have done for decades. The *Fowler* case was overruled by the Ohio Supreme Court, Wanamaker, J. dissenting, in *Aldrich v. City of Youngstown* (1922) 106 Ohio St. 342, 140 N. E. 164.

183 (1851) 5 N. Y. 369, 375.

184 A municipal corporation, says Judge Foote, “possesses two kinds of powers: one governmental and public, and to the extent that they are held and exercised, is clothed with sovereignty; the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter is a corporate legal individual.” See also extracts from *Maximilian v. New York* (1875) 62 N. Y. 160, 164, and *Denver v. Davis* (1906) 37 Colo. 370, 373, 86 Pac. 1027, 1028, quoted by McQuillin, op. cit. supra note 187, sec. 2525.

should be a consequence. The English conception of local self-government, which was adopted in the United States, was not based on any clear-cut distinction of central from local business. Aside from the boroughs, the English local areas, like the counties, towns and school districts in many of our states to-day, were not until very lately considered corporations, but merely local administrative subdivisions of the central authority or state. In the United States, on the other hand, the towns and cities were incorporated at a comparatively early day, like the cities of continental Europe. One of the main purposes of such incorporation, in the light of the common-law notion of the non-suability of unincorporated bodies, was to make these local bodies subjects of private law, enabling them to own property and to sue and be sued. While they were still under strong control by the state legislatures, their growth in population, number and political power gradually brought about a greater constitutional freedom from centralized control and a larger measure of autonomy in local matters, until to-day, under modern state constitutions and charters, our cities possess perhaps most of the powers of government within their territorial jurisdiction.

Yet, while autonomous in many respects, the city is still for some purposes an agent of the state. How sound in theory this segregation of function as an agency of state government now is may be questioned, although its historical basis is not subject to doubt. At all events, the assumed dual character of the city as an autonomous corporation and as an agent of the state has served to create the distinction, not without some justification, between the corporate and the governmental activity of the city and in the first case its suability and responsibility, as in the case of any other corporation, and in the second its immunity from responsibility if not from suit, as a participant and sharer in the sovereign character of the state which it represents. Courts have no difficulty in the first case in regarding the city as a public service corporation of an advanced type, but seem in the second case to find an insuperable obstacle to such recognition in the ancient doctrine of sovereign immunity from suit—although it is believed that the distinction for the most part no longer has any substantial basis. The lack of any sound foundation for the distinction would seem to be admitted by our courts, in practice if not in theory, for otherwise it would be difficult to account for the maze of contrariety which marks the judicial effort to classify particular functions as governmental or corporate. Professor Beale's attempted classification of the activities

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291 In the case of labor unions, the Supreme Court appears to be abandoning this ancient fetish, which, it is believed, other legal systems never adopted. United Mine Workers of America v. Coronado Coal Co. (1921) 259 U. S. 344, 42 Sup. Ct. 570, Comments (1922) 32 Yale Law Journal, 59. See the suggestive article of Wesley A. Sturges, Unincorporated Associations as Parties to Actions (1924) 33 ibid. 383.
of a municipality into governmental, municipal and commercial,

194 does not, it is believed, greatly aid in bringing order out of confusion. Yet

the distinction cannot be regarded as purposeless, for it has been applied

on the continent of Europe for decades to distinguish those functions

of government which are designed for the general welfare, like legis-

lation, the administration of justice, military, naval and police protec-

tion, from those which are more especially commercial or which a

private corporation might well perform, such as the operation of rail-

roads, waterworks, gas and electric plants and similar enterprises.

Until recently, when a tendency to minimize the distinction as one of

degree only, has been noticeable, it served to determine in several

countries the principle of the responsibility of the state for the torts

of its officers, not being applied to cities alone, as with us, but more

logically to all political communities, from the largest, the state, to the

smallest, the village, acting as repositories of the public power as

agents of the people. The immunity from public responsibility for

torts on the continent depends, therefore, in principle, upon the nature

of the function, and not as with us, in addition, upon the size of the

group, state, county or city, which is sued. When it is recalled that

both city and state as public corporations are collective names for

human beings associated in political organization for the purpose of

managing their common affairs, the sharp and apparently vital distinc-
tion we make in their respective legal responsibility seems unjustified.

But of this more will be said hereafter.

In the effort to distinguish governmental from corporate functions

of municipal corporations, the courts have drawn in aid various criteria

or justifications which seemed to them controlling or persuasive. Thus,

aside from the argument derived from the sovereign immunity of the

city as agent of the state, the immunity has been placed on the ground

that the city derives no pecuniary benefit from the exercise of public

functions;195 that in the performance of public governmental duties

the officers are agents of the state and not of the city, and that there-

fore the doctrine of respondeat superior does not apply;198 that cities

\footnote{Notes (1912) 25 Harv. L. Rev. 646; Beale, Cases on Municipal Corporations, (1911) 601.}

\footnote{Hill v. Boston (1877) 122 Mass. 344. 4 Dillon, Municipal Corporations (5th ed. 1911) Sec. 1642. Pecuniary profit seemed to be the material fact, (not altogether warranted, it is believed) to impose liability for negligent operation of gas works in Scott v. Mayor of Manchester (1857, Exch.) 2 H. & N. 204, by Cockburn, C. J. See Paterson v. Erie Railroad Co. (1909) 78 N. J. L. 592, 75 At. 922. 4 Dillon, op. cit., secs. 1634, 1660.}

\footnote{Burrill v. Augusta (1886) 78 Me. 118, 3 Atl. 177, and the many cases cited by Dillon, op. cit. supra note 195, sec. 1655. Judge Dillon's exhaustive criteria as to when the doctrine of respondeat superior is applicable and when not, assumes too much of his conclusion in his premises and for that reason is not believed to be helpful in deciding particular cases. It is, however, a fairly correct synthesis of the involved reasoning and vague criteria which the courts advance from time to time as alleged justifications for their decisions. Dillon presents the following}
cannot properly perform their functions if they are made liable for the torts of their employees; that the city should not be liable for negligence in the performance of duties imposed upon it by the legislature, but only in the case of those voluntarily assumed under general powers; that in determining whether or not to undertake an act the function is governmental, but the execution of the decision in practice is corporate or ministerial; that powers exercised for the benefit of the public at large are governmental, but those conferred for its own benefit and by reason of its nature as a municipal corporation are corporate.

as a criterion to determine when the municipal corporation is liable for the acts of servants or agents:

“If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of respondeat superior applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as independent public or state officers with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable.”

This definition is so broad and loose that it might be deemed to support a decision either way with respect to most officers, e.g., policemen, firemen, health officers, street sweepers, ash cart drivers, court officers, and others.

197 Riddle v. Proprietors of Locks and Canals (1811) 7 Mass. 187; Coolidge v. Brookline (1874) 114 Mass. 596; Hamilton County Commissioners v. Mighels (1857) 7 Ohio St. 109; 3 Abbott, Municipal Corporations (1906) sec. 963; Cooley, Municipal Corporations (1914) sec. 115. This is sometimes expressed in the form that public moneys raised by taxation for public use cannot lawfully be applied to the liquidation of damages caused by the torts of officers. Analogy is drawn from the law governing charitable trusts.

198 Bigelow v. Randolph (1860, Mass.) 14 Gray 541; City of Freeport v. Isabel (1877) 83 Ill. 440; Dickinson v. Boston (1905) 188 Mass. 395, 75 N. E. 68; Evans v. City of Sheboygan (1917) 153 Wis. 289, 141 N. W. 265; Boise Dev. Co. v. Boise City (1917) 30 Idaho, 675, 167 Pac. 1082; see McQuillin, op. cit. supra note 187, sec. 2623; see on this subject a valuable note in (1920) 34 Harv. L. Rev. 66.

199 Ashley v. Port Huron (1877) 35 Mich. 206; Ely v. St. Louis (1904) 187 Mo. 723, 81 S. W. 168; Fowler v. City of Cleveland (1919) 100 Ohio St. 158, 126 N. E. 72; see 4 Dillon, op. cit. supra note 195, sec. 1725, note 1. This is sometimes expressed in the form that discretionary, i.e., legislative or judicial functions, impose no liability, whereas those which are “absolute and perfect” or merely ministerial, impose liability for negligence. Rochester White Lead Co. v. Rochester (1852) 3 N. Y. 453; City of Denver v. Kennedy (1905) 33 Colo. 80; 80 Pac. 122; Johnston v. District of Columbia (1886) 118 U. S. 19, 6 Sup. Ct. 923; Chicago v. Sebem (1897) 165 Ill. 371, 46 N. E. 244; 19 R. C. L. 1086, note 3, and cases there cited.

200 City of Pass Christian v. Fernandez (1911, Miss.) 100 Miss. 76, 56 So. 330; Ehring v. Mayor (1884) 96 N. Y. 264, 273; Wright v. Augusta (1886) 76 Ga. 241; Johnston v. Chicago (1913) 258 Ill. 494, 101 N. E. 960, Ann. Cas. 1914 B
It is believed that not one of these alleged criteria or justifications is sound, and that all of them can be found to have been denied validity in decided cases. Pecuniary benefit to the tort-feasor has not been regarded as a basis for determining tort liability, and recognition of that fact is to be found in the many cases holding municipal corporations liable for various torts committed by firemen, health officers, sewer inspectors, etc. The fact of agency is not normally determined by the character of the service or function but by the control exercised by the principal over the agent, and this fact again is recognized by the many cases holding municipal corporations liable for the torts committed by drivers of garbage and ash carts, library delivery wagons, etc.

Just why public functions cannot be performed properly unless the city is immune from responsibility for the torts of its officers is not apparent. On the contrary, it might be more convincingly argued that greater efficiency and justice would be attained by accompanying power with responsibility, and if this does not induce greater respect for law, it would at least respond more satisfactorily to a public sense of justice if losses inflicted on the individual by the wrongful acts of agents of the community are spread over the community as a whole rather than allowed to rest upon the unfortunate victim alone. The reason assigned by Ashurst, J. in Russell v. Men of Devon for holding a county not liable for injuries resulting from a defective bridge, namely, that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience," is to-day no more palpably immoral than the frequently uttered explanation that public moneys raised by taxation for public uses cannot lawfully be applied to the payment of damages caused by the wrongful acts of public officers. An outraged sense of justice is probably responsible for such cleavage with precedent as Fowler v. Cleveland, holding the city liable for 339. See also Hill v. Boston, supra, and 4 Dillon, op. cit. supra note 195, sec. 1643, 1660; (1942) 10 Mich. L. Rev. 306-310.

A definition of the distinction between governmental and corporate powers which sought to combine several of the criteria just mentioned was essayed by Judge Shipman in the case of Hart v. Bridgeport (1876, C. C. D. Conn.) 11 Fed. Cas. No. 6149, 13 Blatchf. 289. He there said:

"Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Private or corporate powers are those which the city is authorized to execute for its own emolument, or from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit."

41 (1919) 100 Ohio St. 158, 126 N. E. 72. See also Jaked v. Board of Education
injuries inflicted by the negligent act of the driver of a municipal fire engine, though respect for traditional formulas persuaded the court to hold the act of returning from a fire to be "ministerial." Nor is it clear why a voluntary assumption of duty should lead to responsibility in contrast to a duty imposed by law; such a principle would be unique in the law. Its unsoundness would seem to be challenged by the fact that a considerable number of cases come to the opposite conclusion.\textsuperscript{204}

The distinction as a basis for liability, between (1) determining whether an act shall be done and (2) then acting upon and executing the determination, has justification only to the extent that deliberation and action as to policy is legislation and hardly an operative fact imposing legal duties, and for the exertion of power in determining policies it would therefore be inappropriate to predicate tort liability. On the other hand, to impose tort responsibility in connection with acts performed in execution of legislation would, if uniformly applied, do away with most of the alleged distinctions between governmental and corporate functions and would make the city responsible whenever there was a breach of legal duty running to the injured individual. This perhaps is the soundest basis for predating legal responsibility and would render irrelevant a distinction between acts of omission and commission, between nonfeasance and misfeasance, with which the English courts in particular have been much concerned.\textsuperscript{205} The important criterion would be the existence of a legal duty running to an individual, and the search for this legal relation would not preclude judicial empiricism in the enlargement of the concept of legal duty and its divorce from its existing rather mechanical fetters when dealing with the relation of the public to the individual.

The alleged distinction between acts beneficial to the public at large and those beneficial to the city itself or the local community alone as a test of liability seems devoid of substantial foundation. To find that the building or operation of a drawbridge,\textsuperscript{206} the maintenance of a city

\footnotesize{(1921, 3rd Depl.) 198 App. Div. 113, 189 N. Y. Sup. 697, aff'd 234 N. Y. 591; NOTES AND COMMENTS (1921) 7 CORN. L. Q'RT. 176. The Fowler case has been overruled by Aldrich v. City of Youngstown (1922) 106 Ohio St. 342, 140 N. E. 164, holding the city not liable for injury caused by a negligently driven police patrol wagon.}

\footnotesize{\textsuperscript{204} See Bruce, C. J. in Moulton v. City of Fargo (1918) 39 N. D. 562, 510, 167 N. W. 717, 720: "There is no good reason why a liability to a private action should be imposed when a municipality voluntarily entered upon such a beneficial work and to withhold it when it performs the service under the request of an imperative law." See also Tindley v. City of Salem (1883) 137 Mass. 171; Wison v. Newport (1881) 13 R. I. 454; Idaho v. Board of Education, supra note 203; McQuillin, op. cit. supra note 187, sec. 2626.}

\footnotesize{\textsuperscript{205} See article by W. H. Moore, Misfeasance and Nonfeasance in the Liability of Public Officers (1924) 30 L. QUART. REV. 276, 415.}

\footnotesize{\textsuperscript{206} Daly v. New Haven (1897) 69 Conn. 644, 36 Atl. 397; Evans v. Sheboygan (1912) 153 Wis. 287, 141 N. W. 265.}
hall and other municipal buildings, driving an ambulance, maintaining a city hospital, are for the general benefit of the public at large, whereas cleaning the streets, constructing sewers, maintaining a city prison, or driving an ash cart, are for the local benefit seems an unconvincing distinction. It is, in fact, used merely as one of the criteria to distinguish governmental from corporate functions. In this respect, it is no more useful than several other of the criteria already mentioned, and justifies the remark of the Missouri court in Young v. Metropolitan Street Railway Co.

"The reasons given for liability and for non-liability of municipal corporations, we admit, are not logical or consistent. Some of the reasons given for non-liability will apply just as forcibly to cases where liability is asserted and vice versa."

The fact is that all functions performed by a municipality are for the public benefit, otherwise they could hardly be undertaken with public funds or by public officers. And it would seem to make little difference whether the group in whose name the officer acts or speaks is large or small, or whether profit is derived from the undertaking or not. Nor can we give serious consideration to the attempt of certain courts to explain municipal exemption from responsibility for the torts of officers in the performance of "governmental" acts or its so-called police powers on the ground that illegal or unlawful acts of officers in such cases are ultra vires and therefore incapable of rendering the municipality liable. This discredited idea once had considerable vogue on the continent in freeing all corporations from responsibility for the torts of their agents, but it has long been discarded in most civilized jurisdictions and its spasmodic revival can only be attributed to insufficient analysis or carelessness.

When it is recalled that historically, so long as the forms of action survived, nonfeasance was not trespass, that no private action lay against a town for breach of a public duty, but the correct procedure was by way of indictment, that subsequently the inability to sue for failure to perform public duties was placed upon the lack of incorpo-

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212 City of Chicago v. Williams (1899) 182 Ill. 135, 55 N. E. 123; see infra.
213 Six Carpenters Case (1611, K. B.) 8 Coke 146a; 1 Chitty, Pleading (16th ed. 1879) *191.
214 Ely v. St. Louis (1904) 181 Mo. 723, 81 S. W. 168; Donohue v. Kansas City (1899) 136 Mo. 657, 38 S. W. 571.
216 Schwalk's Adm. v. Louisville (1909) 135 Ky. 570, 122 S. W. 860.
218 Tollefson v. Ottawa (1907) 228 Ill. 134, 81 N. E. 823.
219 Young v. Metropolitan Street R. Co. (1907) 126 Mo. App. 1, 103 S. W. 135.
216 City of Chicago v. Williams (1899) 182 Ill. 135, 55 N. E. 123; see infra.
217 Bro. Abr., Accion sur le case, pl. 93. This was to avoid a multiplicity of suits.
217 Inst. 701; Cro. Car. 365.
GOVERNMENT LIABILITY IN TORT

— we have a sufficient historical explanation of the immunity of cities and towns for failure to take legislative action, to enforce by-laws, and even to abate certain types of nuisances, like coasting on the city streets. But after incorporation had taken away the principal defense, it would seem to require only the establishment of a positive duty to the injured individual to justify the imposition of municipal liability for breach or negligent performance; so that the encrustation of the law with supposed distinctions between governmental and corporate duties and the alleged criteria for determining the correct classification are for the most part unsound. Hence the confusion among the courts in their efforts to work out a consistent system. When it is recalled that every duty performed by the agents of the corporation is designed to effect some community purpose, and if we admit, as some courts or legislatures may generally be found to have done, that there are very few of these duties the negligent performance or breach of which to the injury of an individual may not result in municipal liability, we may come to the conclusion that the mere size of the group—city, county or state—on whose behalf the officer acts, cannot and should not create a difference in principle. The continental distinction between private and public functions of the administration, whether of city, county or state, was largely for the purpose of determining the applicability of the rules of private and public law, respectively, and it is only within recent years that public law, reasoning by analogy from rules of private law, has been found sufficiently elastic to impose group responsibility for the torts of many public officers. But our difficulty has been to overcome the belief that the relation of agency or respondeat superior could not exist between the group and the officer when he was performing a

See Thomas v. Sorrell (1706, C. P.) Vaugh. 330, 340, 124 Eng. Rep. 1098, 1104; see also Russell v. Men of Devon (1788, K. B.) 2 T. R. 667, 672, 100 Eng. Rep. 359, 362; Mewer v. Leicester (1812) 9 Mass. 247 (see editor's note questioning the applicability of Russell v. Men of Devon, because the town was incorporated); Bartlett v. Crosier (1820, N. Y.) 17 John. 439. These were all actions for damages resulting from failure to keep a bridge or highway in repair. By 1788, in Russell v. Men of Devon, Kenyon, J., thought the common law had become definitely established against an action by the injured individual against the inhabitants. Ashhurst, J., announced the view, not deemed very sound, that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 2 T. R. 667, 672, 100 Eng. Rep. 359, 362.

Thus the mere failure to furnish adequate fire or police protection, or maintain schools, hospitals, poorhouses or other public works could hardly impose legal liability. Dillon, op. cit., secs. 1656, 1658, 1660; McQuillin, op. cit., secs. 2430, 2431, 2623, 2643, 2666, 2675 and cases there cited. So for failure to pass or enforce ordinances. Rose v. Gypsum City (1919) 104 Kan. 412, 179 Pac. 348; McQuillin, op. cit. sec. 2631 and cases there cited. See also 19 R. C. L. 1100, and note exceptional cases like Cohen v. New York (1889) 113 N. Y. 532, 21 N. E. 700, which may be explained on the ground of negligence in maintaining the safety of its streets. So for failure to abate nuisances, except on its own property; see 19 R. C. L. 1102 and cases cited.
so-called governmental or public function. If this difficulty has been to a considerable degree overcome, at least in principle and logically, when the group is the city or incorporated town, there should not be much difficulty in securing legislative permission to impose liability and thus satisfy the demands of justice, when the group represented is the county or the state. The historical anachronism which enables the community, when organized as a county or state, to escape subjection to the customary rules of law, should be repealed by a frank recognition of its unsoundness and injustice under present conditions.

In order not to leave the inconsistency and confusion of the courts in applying the distinction between governmental and corporate duties in the realm of mere assertion, it may be useful to discuss briefly the judicial effort to apply the distinction to particular facts.

PROPERTY

To judge from a long series of decided cases, it might readily be concluded that an injury to property receives much greater protection from the law than an injury to the person. Whenever the city through its council or governing body authorizes or ratifies an invasion of the property rights of an individual, an action for the trespass seems to lie. This often occurs in the negligent construction or operation of public works or improvements. Yet if the state legislature expressly or impliedly authorized the city to construct the public work in the injurious way in which it was built—and usually only then—the city will be able to shield itself behind the state's alleged impossibility to commit or authorize a tort. The fallacy of this plausible explanation, which would make every official wrongful invasion of private rights ultra vires, has already been exposed. Nevertheless, when the injury to the property is serious and direct—and lines here are difficult to draw—the constitutional protection of the owner of property against uncompensated “taking” for public use, aids him in recovering from the city in an action sounding in tort. If the city's public property is used so as to constitute a nuisance to private property, the owner of the latter may recover as he would against any other

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203 Hickman v. Kansas City (1894) 120 Mo. 110, 25 S. W. 225; Swift v. Newport News (1906) 105 Va. 108, 52 S. E. 821. In these cases, it is assumed that the legislature has not authorized a method of procedure under eminent domain for the ascertainment and recovery of damages. Parish v. Yorkville (1913) 96 S. C. 24, 79 S. E. 635.
private owner of land, but, curiously, if that same public property thus used causes an injury to the person, recovery would be most exceptional. Whether this difference can be satisfactorily explained, as has been attempted, by the fact that the governing authorities acting as the corporation are presumed to be aware of continuing nuisances, whereas the defective condition of public property causing personal injuries is usually due to the negligence of some individual caretaker, is more than doubtful. Professor Goodnow, who as early as 1895 sensed a growing disposition of the courts to hold municipalities liable for the negligent maintenance or management of public property, explains the assumed exception to the ordinary rule of immunity by stating that the duty to keep property under the control of the municipal corporation in a safe condition "is in all cases considered to be a private, municipal or corporate duty." Whether this thesis is sustainable, except with respect to injuries to private property, or in respect of such public property as is used for purposes of revenue, like public markets, gas and water works and similar enterprises, is open to question. Certainly many of the cases of the twentieth century, in dealing with personal injuries arising out of the negligent management of public property, such as city halls, hospitals, police stations, firehouses, etc., still seek to maintain the traditional distinction between property used for "governmental" and for "corporate" purposes, which Professor Goodnow says, in the light of the disposition of some courts to disregard the tradition, led to "a conflict in the decisions which is absolutely irreconcilable."

It is when we come to injuries to the person that we find the courts commonly invoking the distinctions between governmental and corporate, even as to injuries sustained by the defective condition or management of public buildings. Thus, the negligent operation of an elevator in a city hall or other defective condition producing injury has been held—though not uniformly—to exempt the city from liability on the theory that a city hall is used for public and "governmental" purposes. But when the city hall is rented out, at least in Massa-


227 Goodnow, Municipal Home Rule (1916) 130 et seq.

228 Snider v. St. Paul (1920) 51 Minn. 466, 53 N. W. 763; Schwalk v. City of Louisville (1909) 135 Ky. 579, 122 S. W. 856, 25 L. R. A. (n. s.) 88 (negligently constructed or operated elevator). So with respect to elevator in federal post-
chusetts, for private or even public purposes from which a revenue is derived, though leased to the state for the use of its legislature, the immunity is lost. Not so, however, the immunity of the state, when it leases its armory for a private exhibition. The state cannot like a city throw off its sovereign immunities by renting out its public property, a distinction the layman will not easily grasp or the lawyer easily explain.

Education being deemed a governmental state function, it has been customary to exempt the city or board of education, regarded as acting for the state, from liability for injuries resulting from the defective condition of school buildings or the negligence of persons in charge thereof. Yet even this conclusion is not unanimous, New York dissenting vigorously, and where the defective condition constitutes a nuisance to other property, the usual rule of protecting private property against nuisances is revived to impose liability on the office building. Bigby v. United States (1903) 188 U. S. 188 U. S. 400, 23 Sup. Ct. 468; Eastman v. Meredith (1898) 36 N. H. 284 (cave-in of defective floor); Kelley v. Boston (1907) 186 Mass. 71, 71 N. E. 299 (snow and ice negligently thrown from the roof); so in case of a negligently unguarded pit near the approach to a courthouse. Cunningham v. St. Louis (1886) 96 Mo. 53, 8 S. W. 787. But Illinois, Pennsylvania and one or two other jurisdictions have come to the opposite conclusion, holding the city liable without attempting to make the traditional distinction between "governmental" and "corporate." Chicago v. Dermody (1871) 61 Ill. 331 and Chicago v. O'Brennan (1872) 65 Ill. 150 (falling roof or ceiling); Fox v. Philadelphia (1904) 208 Pa. 157, 57 Atl. 356 (negligent operation of elevator in city hall); McCaughey v. Tripp (1879) 12 R. I. 449 (collapse of improperly constructed part of building); White, op. cit. supra note 224, secs. 95 et seq.


Hill v. Boston (1877) 122 Mass. 344; Wilson v. Newport (1881) 13 R. I. 454; Ernst v. West Covington (1903) 116 Ky. 860, 76 S. W. 1089; Folk v. Milwaukee (1900) 108 Wis. 595, 84 N. W. 420; Kinnare v. Chicago (1898) 171 Ill. 332, 49 N. E. 536, and cases cited in 25 L. R. A. (n. s.) 89. As to hospitals see Benton v. Trustees of the Boston City Hospital (1885) 140 Mass. 13, 1 N. E. 836; see (1923) 2 Wis. L. Rev. 250, and note 101, supra.

city. Although school districts as governmental subdivisions of the state are as a rule immune from responsibility in tort, a statute of Washington permitting counties, school districts and incorporated towns to be sued for injury "arising from some act or omission of such county or other public corporation" was construed, prior to the repeal of the statute, to render the school district liable for injuries sustained from a defective condition of a school building and its appurtenances. Similar statutes have been construed to the precisely opposite effect in Minnesota and Oregon; in Washington we had the anomalous result, prior to the repeal of the statute, that a school district was liable, whereas a strictly municipal corporation was not, for injuries resulting from defects or negligence in school buildings.

In the case of buildings used as police stations, prisons or jails there appears to be more than ordinary uniformity in considering the building as a "governmental" agency, and on that account considering the city immune from responsibility for injuries occurring therein through negligence of municipal officers. Thus, negligence in leaving open the door of an elevator shaft in a police station was deemed to render the city immune, though the negligent employee was not a policeman, and though there are cases which hold that in transporting policemen from the station to their posts or beats, the city is not performing a governmental function. Only a few courts seem to realize that policemen perform many functions not strictly police in their nature, most courts being wedded to the theory that the act of a police officer must be "governmental." Yet where a nuisance to property caused by a police station or similar building can be worked out, there is greater judicial disposition to allow the nuisance to submerge the police causation of the injury and to hold the city liable, as well as in some, though not all, cases where the nuisance, caused or tolerated by the police, makes a street unsafe for travel and a person

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235 Howard v. Tacoma School District, No. 10 (1915) 88 Wash. 167, 152 Pac. 1004. This statute was repealed in 1917 and the usual rule of immunity re-established. Stevall v. School District (1920) 110 Wash. 97, 188 Pac. 12, 9 A. L. R. 908.
237 See (1910) 4 CALIF. L. REV. 254.
238 Wilcox v. Rochester (1907) 190 N. Y. 137, 82 N. E. 1119, 17 L. R. A. (n. s.) 741. See the strong dissenting opinion of Haight, J. who, contended that transporting policemen in the building is no different from transporting them out of the building, and that there was no "governmental" or "police" function in having a city employee, not even a policeman, run an elevator.
is injured. Here the municipal duty to keep its streets in safe condition is deemed to outweigh the fact that the police caused the injury.\textsuperscript{244} The temporary care of persons under arrest or punishment may be deemed incidental to the administration of justice, and hence governmental in its nature. At all events, there seems to be unusual agreement in relieving the city of liability to prisoners or others by reason of insufficiently heated, unsanitary or negligently managed jails and workhouses,\textsuperscript{245} though even here there is not entire unanimity.\textsuperscript{243}

Negligently constructed or operated fire-houses have not often been instrumental in producing injuries, yet the few cases dealing with them have not resulted in uniform conclusions. In the case of \textit{Kies v. City of Erie},\textsuperscript{244} recovery was allowed against a city for injuries caused by the negligent construction of doors to a firehouse, which were suddenly swung across the pavement, although the court added, in the earlier consideration of the same case, that the city would not be liable had the doors been negligently operated by a fireman, an artificial distinction not easy to justify. Failure to repair the floor of a fire station has in one case entailed municipal responsibility,\textsuperscript{246} whereas injuries caused by falling through an unguarded hole in the floor of a firehouse have in another case not involved municipal responsibility.\textsuperscript{246}

\textsuperscript{244} \textit{Twist v. City of Rochester} (1900, 4th Dept.) 37 App. Div. 307, 55 N. Y. Supp. 850, aff'd 165 N. Y. 669, 59 N. E. 1131 (contact of pedestrian with fallen patrol wire belonging to city, used only by police department); \textit{Neuer v. City of Boston} (1870) 120 Mass. 338 (same with respect to wire used by fire department); \textit{Hillsboro v. Ivy} (1892) 1 Tex. Civ. App. 653, 20 S. W. 1012 (negligence of city marshal in removing carcasses of animals from street); \textit{Schinnick v. Marshalltown} (1908) 137 Iowa, 73, 114 N. W. 542 (plaintiff ran into rope placed across street by police officer to stop travel); \textit{Carrington v. St. Louis} (1886) 89 Mo. 208, 1 S. W. 240 (plaintiff fell over door negligently open in street leading to a cellar under police station). See also \textit{Kunz v. Troy} (1887) 104 N. Y. 344, 10 N. E. 442 and \textit{contra}: \textit{Altwater v. Baltimore} (1869) 31 Md. 462.


\textsuperscript{246} (1895) 169 Pa. St. 506, 32 Atl. 621, see also earlier case in (1890) 135 Pa. 144, 19 Atl. 942. See also \textit{Mulcairne v. City of Jonesville} (1886) 67 Wis. 24, 29 N. W. 563 (negligent construction of cistern for fire department, under superintendence of employee not a fireman).

\textsuperscript{246} \textit{Bowden v. Kansas City} (1904) 69 Kan. 587, 77 Pac. 573.

\textsuperscript{248} \textit{Brown v. District of Columbia} (1907) 29 App. D. C. 273; cf. the conflicting decisions of \textit{City of Lafayette v. Alick} (1881) 81 Ind. 166, where the city was
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Buildings used as municipal markets are not regarded as instrumentalties of "government," but as "corporate" enterprises, negligence in the operation of which creates municipal responsibility. A similar position appears to be generally maintained by the courts with respect to the negligent management of buildings used for municipal profit, such as waterworks, gas works, electric lighting plants and municipal washhouses, although there does not appear to be any sound reason why these enterprises, often conducted at a loss, should be regarded as having a status vitally different from those conducted in other public buildings. It is of course plausible to assume that in performing these functions the city is acting like a private corporation or individual, and should be subject to the same rules of law, whereas in the administration of its judicial, police, health, and fire departments it is acting as only a government can, and this distinction has in fact on the continent sustained the distinction in the application to community acts of private law and resulting tort responsibility. It would be more just, however, were all public buildings, which after all are erected for community purposes, regarded as constituting a single class, the negligent operation of which should impose liability as in the case of any private building. Indeed, in a well-reasoned case holding a city liable for the failure of a fire-marshall to repair the floor of a fire station, the distinction between governmental and corporate functions was expressly repudiated, the court merely asserting that the duty was "public" and was negligently performed to the injury of a private citizen and that this was sufficient to invoke municipal responsibility.

(To be concluded)

held liable for the bursting of a defective boiler of a fire-engine, and Wild v. Paterson (1885) 47 N. J. L., 406, 1 Atl. 490, where the city was held immune for injuries arising out of a defective brake on a fire-engine. Savannah v. Cullens (1868) 38 Ga. 334; Barron v. Detroit (1893) 94 Mich. 601, 54 N. W. 273; see White, op. cit. supra note 224, sec. 98.

Hand v. Brookline (1879) 126 Mass. 324; Henderson v. Kansas City (1903) 177 Mo. 477, 76 S. W. 1045 (waterworks); Glase v. Philadelphia (1895) 169 Pa. 488, 32 Atl. 600 (manhole in roof of pumping station, although roof used by public as place of recreation); Kibele v. Philadelphia (1884) 105 Pa. 41 (gas works); Bullmaster v. St. Joseph (1897) 70 Mo. App. 60, aff'd 155 Mo. 58, 55, S. W. 1015 (electric lighting plant). Cowley v. Sutherland (1851) 6 H. & N. 565 (washhouse). See also Toledo v. Cone (1884) 41 Ohio St. 149 (public cemeteries); Seaman v. New York (1880) 80 N. Y. 239 (public docks); Jones, Negligence of Municipal Corporations (1892) 71. Moulton v. Scarborough (1880) 71 Me. 267 (animal on poor farm permitted to run at large).

Bowen v. Kansas City (1904) 69 Kan. 587, 77 Pac. 573. So in the case of Galvin v. New York (1889) 112 N. Y. 223, 19 N. E. 675, a defective grating in a municipal court house afforded a ground for liability, no mention being made of the distinction between "governmental" and "corporate" functions. See also cases cited in note 228 supra.