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THE TORT LIABILITY OF AMERICAN MUNICIPALITIES*

By CHESTER JAMES ANTIEAU*

For torts committed in the performance of activities ultra vires the municipal corporation, the city is customarily immune from liability.¹ The great majority of courts further deny municipal liability when negligent torts are committed beyond the authorized powers of particular agents, but infra vires the municipal corporation,² although there are well-reasoned cases contra.³ Although cities are occasionally held responsible for the wilful torts of employees,⁴ the majority rule is contrary.⁵ Municipalities have by adoption or ratification been held liable for torts of agents unauthorized but within the power of the municipal corporation.⁶ Municipalities are regularly not liable for torts when the actor is an independent contractor.⁷ Cases are more widely split when the

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¹ Radford v. Clark, 113 Va. 199, 73 S.E. 571 (1912), noted in 25 HARV. L. REV. 648 (1913); Whitacre v. City of Charlotte, 216 N.C. 687, 6 S.E. 2d 558, 126 A.L.R. 438 (1940); Posey v. North Birmingham, 154 Ala. 511, 45 S. 633 (1907). Occasional courts indicate a lack of sympathy with the defense of ultra vires. Shunnick v. City of Marshalltown, 137 Iowa 72, 114 N.W. 542 (1908); Augustine v. Town of Brandt, 249 N.Y. 198, 163 N.E. 732 (1928), noted in 14 CORN. L. Q. 351 (1929); Bator v. Ford Motor Co., 269 Mich. 648, 257 N.W. 906, 913 (1934). "However, if the wrongful act is one which the municipality has the right to do under some circumstances or in some manner, then it is not ultra vires in the respect of relieving the city for liability for tort." See, generally, Gettys, *Liability of Municipal Corporations for Ultra Vires Tortious Acts*, 8 TEMPLE L. Q. 133 (1934).

Johnson v. City of Iola, 109 Kan. 670, 202 Pac. 84 (1921); Brindamour v. Murray, 7 Cal. 2d 73, 59 P. 2d 1009 (1936); Lazich v. City of Butte, 116 Mont. 386, 154 P. 2d 260 (1944); City of Danville v. VanArsdale, 243 Ky. 338, 48 S.W. 2d 5 (1932).

² Norton v. City of New Bedford, 166 Mass. 48, 43 N.E. 1034 (1896); Rafsky v. City of New York, 12 N.Y. 2d 560, 257 App. Div. 855 (1939); Shunnick v. City of Marshalltown, 137 Iowa 72, 114 N.W. 542 (1908); Barree v. Cape Girardeau, 197 Mo. 382, 95 S.W. 330 (1906).

³ Ospoff v. City of New York, 286 N.Y. 422, 36 N.E. 2d 646 (1941); Munick v. Durham, 181 N.C. 188, 106 S.E. 665, 24 A.L.R. 538 (1921); Prest v. Farmington, 117 Me. 348, 104 A. 521, 2 A.L.R. 1390 (1918).

Wiersma v. City of Long Beach, 41 Cal. A. 2d 8, 106 P. 2d 45 (1940); Archer v. City of Cisco, (T. Civ. A. 1948), 211 S.W. 2d 955; Horton v. Newell, 17 R.I. 571, 23 A. 910 (1892); Kansas City v. Lemen, 57 Fed. 905 (CA 8th 1893).

⁴ Omaha v. Croft, 60 Neb. 57, 82 N.W. 120 (1900); Oklahoma City v. Hill, 6 Okla. 114, 50 Pac. 242 (1897).

⁵ Laurel v. Ingram, 148 Miss. 774, 114 S. 881 (1928); Harvey v. City of Hillsdale, 86 Mich. 330, 49 N.W. 141 (1891); Shute v. Princeton Tp., 58 Minn.

tort was occasioned by the negligence of a tenant or lessee of the municipality.⁸

When a municipality has constructed or maintained a nuisance it is customarily liable for damages to property,⁹ and sometimes to person.¹⁰ So, many cases recognize municipal liability for injuries to children under the theory of an attractive nuisance.¹¹ Cities are also generally held liable for trespasses to private property¹²

Occasionally attempted distinctions are drawn between mandatory and permissive powers of municipalities,¹³ between discretionary and ministerial activities,¹⁴ and between non-feasance and misfeasance¹⁵ but they are generally repudiated.

337, 59 N.W. 1050 (1894). Where damage is due not to the negligence of the contractor but the orders of the municipality, the latter has been held liable. *Sewall v. City of St. Paul*, 20 Minn. 511 (1874). See Hepburn, *The Liability of the Municipal Corporation for the Negligent Acts of the Independent Street Contractor*, NOTRE DAME LAWYER 35 (1930). N

Liable: *Douglas v. Hollis*, 86 N.H. 578, 172 A. 433 (1934). Not liable: *Wiersma v. City of Long Beach*, 41 Cal. A. 2d 8, 106 P. 2d 45 (1940).

⁹ *Jeakins v. City of El Dorado*, 143 Kan. 206, 53 P. 2d 798 (1936); *Alberts v. City of Muskegon*, 146 Mich. 210, 109 N.W. 262 (1906); *Oklahoma City v. Tytemcz*, 171 Okla. 519, 43 P. 2d 747 (1935), noted in 35 Mich. L. Rev. 157 (1936); *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 N.W. 2d 435 (1942). Note, 75 A.L.R. 1196.

¹⁰ *Bush v. City of Norwalk*, 122 Conn. 426, 189 A. 608 (1937); *Hoffman v. Bristol*, 113 Conn. 386, 155 A. 499 (1931), noted in 30 Mich. L. Rev. 471 (1932); *Fort Worth v. Wiggins*, (T. Com. A. 1928), 5 S.W. 2d 761. *Contra*: *Virovatz v. City of Cudahy*, 211 Wis. 357, 247 N.W. 341 (1933); criticized in 9 Wis. L. Rev. 202 (1934); *Bojko v. Minneapolis*, 154 Minn. 167, 191 N.W. 399 (1923); *Braunstein v. Louisville*, 146 Ky. 777, 143 S.W. 372 (1912). Note, 75 A.L.R. 1196.

¹¹ *Capp v. St. Louis*, 251 Mo. 345, 158 S.W. 616, 46 L.R.A. (n.s.) 731 (1915); *Indianapolis v. Williams*, 58 Ind. A. 447, 108 N.E. 387 (1915); *Stedwell v. City of Chicago*, 297 Ill. 486, 130 N.E. 729 (1921); *Smith v. Iowa City*, 213 Iowa 391, 239 N.W. 29 (1931). Notes, 36 A.L.R. 34, 153; 45 A.L.R. 982, 989; 60 A.L.R. 1444, 1451.

¹² *Persons v. Valley City*, 26 N.D. 342, 144 N.W. 675 (1913); *Ferris v. Board of Education*, 122 Mich. 315, 81 N.W. 98 (1899); *Rix v. Town of Alamogordo*, 42 N.M. 325, 77 P. 2d 765 (1938); *Mayor of Havre De Grace v. Maxa*, 177 Md. 168, 9 A. 2d 235 (1939). Constitutional provisions against taking private property for public use without fair compensation influence recoveries. *Seifert v. Brooklyn*, 101 N.Y. 136, 4 N.E. 321 (1886); *City of Mansfield v. Balliett*, 65 Oh. St. 451, 63 N.E. 86 (1902). *Peterson, Governmental Responsibility for Tort in Minnesota*, 26 MINN. L. REV. 854, 867 (1942).

¹³ *Storti v. Town of Fayal*, 194 Minn. 628, 261 N.W. 463 (1935); *Green v. City of Birmingham*, 241 Ala. 684, 4 S. 2d 394 (1941); *Evans v. City of Sheboygan*, 153 Wis. 287, 141 N.W. 265 (1913). Repudiated: *Heino v. City of Grand Rapids*, 202 Mich. 363, 168 N.W. 512 (1918); *Gillies v. City of Minneapolis*, 66 F. Supp. 467 (D. Minn. 1946); *Reynolds v. City of Nashua*, 93 N.H. 28, 35 A. 2d 194 (1943).

¹⁴ *Jones v. Sioux City*, 185 Iowa 1178, 170 N.W. 445 (1919); *Bedtke v. City of Chicago*, 240 Ill. A. 493 (1926); *Norberg v. Hagna*, 46 S.D. 568, 195 N.W. 438 (1923); *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939).

¹⁵ *Moore, Misfeasance and Nonfeasance in the Liability of Public Authorities*, 30 L.Q.R. 276, 415 (1914); *Smith, Municipal-Tort Liability*, 48 Mich. L. Rev. 41,

Most frequently in determining the existence of municipal tort liability courts distinguish between "governmental" or "public" and "proprietary" or "private" activities, admitting civic liability for the latter but not for the former.¹⁶ The distinction is unserviceable and has been criticized by innumerable courts and scholars¹⁷ but its use continues and must be reckoned with. The exaction of charges from users or profit-making by the city will often induce courts to call an activity proprietary¹⁸ although it is frequently said that "an incidental pecuniary advantage accruing to a municipality from the performance of a function characteristically public does not transfer a public function into a private one,"¹⁹ and many cases deny municipal liability notwithstanding charges or profits.²⁰ The test of "governmental" is often said to be whether the activity is for the common good of all the people of the state and for the benefit of the public at large.²¹

The function of legislating for the community will certainly be described as governmental and tort suits against a municipality for damages allegedly incurred by the passage of or failure to pass

55 (1949). New Jersey follows an "active wrongdoing" test. *Jersey City v. Kiernan*, 50 N.J.L. 246, 13 A. 170 (1888). Weintraub and Conford, *Tort Liability of Municipalities*, 3 MERCER BEASLY L. REV. 142, 159 (1934).

¹⁶ The test was originated in *Bailey v. Mayor of New York*, 3 Hill 531, 539-540 (1842). Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937). Notes, 25 L.R.A. (n.s.) 88, 57 A.L.R. 419, 64 A.L.R. 1545, 89 A.L.R. 394, 114 A.L.R. 428, 120 A.L.R. 1376.

¹⁷ *Fowler v. City of Cleveland*, 100 Oh. St. 158, 126 N.E. 72 (1919); *Irvine v. Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911). Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); Doddridge, *Distinction between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1925); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924), 36 YALE L.J. 759, 1039 (1926); Note, *Should We Abandon the Distinction between Governmental and Proprietary Functions*, 34 HARV. L. REV. 66 (1920).

¹⁸ *Foss v. City of Lansing*, 237 Mich. 633, 212 N.W. 952, 52 A.L.R. 185 (1927); *Borwege v. City of Owatonna*, 190 Minn. 394, 251 N.W. 915 (1933). "The fact that a particular activity produces a net profit has been consistently held to be conclusive of the proprietary character of the enterprise." Peterson, *Government Responsibility for Tort in Minnesota*, 26 MINN. L. REV. 293, 340 (1942). Note, 24 VA. L. REV. 430, 436 (1938).

¹⁹ *Day v. City of Berlin*, 157 F. 2d 323, 325 (CA 1st 1946). See also: *Petty v. Atlanta*, 40 Ga. A. 63, 148 S.E. 747 (1929); *Johnson v. Board of Road Commissioners*, 253 Mich. 465, 235 N.W. 221 (1931).

²⁰ *Shoemaker v. City of Parsons*, 154 Kan. 387, 118 P. 2d 508 (1941); *St. John v. City of St. Paul*, 179 Minn. 12, 228 N.W. 170 (1929); *Thrasher v. City of Cincinnati*, 13 Oh. Supp. 143 (1944).

²¹ *Huffman v. City of Columbus*, (Oh. App. 1943), 51 N.E. 2d 410; *Johnson v. City of Chicago*, 258 Ill. 494, 101 N.E. 960 (1913); *Hoppe v. Winona*, 113 Minn. 252, 129 N.W. 577 (1911); *City of Pass Christian v. Fernandez*, 100 Miss. 76, 56 S. 329 (1911).

a municipal ordinance uniformly fail.²² And municipalities are generally not liable for wrongful legal proceedings instituted by its officers for its benefit.²³ Somewhat similarly, injuries sustained at city halls are overwhelmingly non-compensable.²⁴ So also injuries incurred through the negligent maintenance of election buildings and machinery²⁵ Generally speaking, municipal liability because of negligent operation of buildings, as well as vehicles, depends upon whether the particular use is labelled "governmental" or "proprietary." Where a building is used for both governmental and proprietary functions, liability is apt to be recognized.²⁶

Municipal protection against, and suppression of, fires is overwhelmingly considered a governmental function.²⁷ So, there is no recovery for being struck by fire engines.²⁸ And at common law the municipality was immune from liability for the destruction of property to prevent the spread of a conflagration,²⁹ although statutes frequently change the result today³⁰ The cases are somewhat more split on the liability for failure to keep watermains free

²² *Fidelity Laboratories v. Oklahoma City*, 191 Okla. 473, 130 P. 2d 834 (1942); *Yellow Cab Co. v. City of Chicago*, 186 F. 2d 946 (CA 7th 1951); *Bagni v. City of Bristol*, 127 Conn. 38, 14 A. 2d 716 (1940); *Bean v. City of Moberly*, 350 Mo. 975, 169 S.W. 2d 393 (1943).

²³ *Doyle v. City of Sandpoint*, 18 Ida. 654, 112 Pac. 204 (1910). Note, 32 L.R.A. (n.s.) 34.

²⁴ *Smider v. St. Paul*, 51 Minn. 466, 53 N.W. 763 (1892); *Schwalk v. City of Louisville*, 135 Ky. 570, 122 S.W. 860 (1909); *Huffman v. City of Columbus*, (Oh. App. 1943), 51 N.E. 2d 410. *Contra: Chicago v. Dermody*, 61 Ill. 431 (1871); *Fox v. Philadelphia*, 208 Pa. 127, 57 A. 356 (1904).

²⁵ *Eastman v. Meredith*, 36 N.H. 284, 72 Am. Dec. 302 (1858); *Kraeling v. Borough of Dormont*, 352 Pa. 644, 44 A. 2d 274 (1945).

So also courthouses, *Hartford County v. Love*, 173 Md. 429, 196 A. 122 (1938).

²⁶ *Bell v. Pittsburgh*, 297 Pa. 185, 146 A. 567 (1929). Note, 64 A.L.R. 1542. *Contra: Pleasants v. Greensboro*, 192 N.C. 820, 135 S.E. 321 (1926).

²⁷ *Rogers v. City of Atlanta*, 143 Ga. 153, 84 S.E. 555 (1915); *Koward v. City of Stillwater*, 171 Minn. 391, 214 N.W. 656 (1929); *Powell v. Village of Fenton*, 240 Mich. 94, 214 N.W. 968 (1927). Notes, 9 A.L.R. 143, 33 A.L.R. 688, 84 A.L.R. 514, 110 A.L.R. 1117, 113 A.L.R. 661. However, liability is occasionally admitted: *Kiss v. City of Erie*, 169 Pa. St. 598, 32 A. 621 (1895); *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 573 (1904); *City of Pass Christian v. Fernandez*, 100 Miss. 76, 56 S. 329, 39 L.R.A. (n.s.) 649 (1911).

²⁸ *Frederick v. City of Columbus*, 58 Oh. St. 538 (1898); *Hooper v. City of Childress* (T. Civ. A. 1931), 34 S.W. 2d 907. *Contra: City of Tallahassee v. Kaufman*, 87 Fla. 117, 100 S. 150 (1924).

²⁹ *McDonald v. City of Red Wing*, 13 Minn. 38 (1868); *White v. Charleston*, 2 Hill 571 (S.C. 1835). So, generally, for fire loss: *Springfield Fire and Marine Ins. Co. v. Keeseville*, 148 N.Y. 46, 42 N.E. 405, (1895); *Steitz v. Beacon*, 295 N.Y. 51, 64 N.E. 2d 704 (1945).

³⁰ *Hall and Wigmore, Compensation for Property Destroyed to Prevent Spread of Conflagration*, 1 Ill. L. Rev. 501 (1907).

from obstruction and negligent installation and maintenance of fire hydrants, although the majority deny municipal liability³¹

Municipalities are similarly immunized for torts incurred in the preservation of the peace, the enforcement of the law and the apprehension of criminals.³² Cities are not ordinarily liable for unlawful arrest or false imprisonment by police officers,³³ nor usually for arrest and imprisonment under an invalid ordinance,³⁴ nor for assault by peace officers.³⁵ Likewise the maintenance of jails is considered a governmental function and the community is not ordinarily liable for torts occasioned by unsanitary conditions in jails,³⁶ for deaths and injuries due to the burning of jails,³⁷ or for damages due to the misconduct or negligence of those in charge of prisoners.³⁸ Police officers are frequently held liable for their own torts, of course,³⁹ and there are salutary holdings recognizing

³¹ *Mendel v. Wheeling*, 28 W Va. 233 (1886); *City of Columbus v. McIlwan*, — Miss. 38 S. 2d 921 (1949); *Steitz v. Beacon*, 295 N.Y. 51, 64 N.E. 2d 704, 163 A.L.R. 342 (1946), noted in 59 HARV. L. REV. 804 (1946); *Brink v. City of Grand Rapids*, 144 Mich. 472, 108 N.W. 430 (1906). *Contra*: *Oklahoma City v. Reed*, 17 Okla. 518, 87 Pac. 645 (1906). Note, 113 A.L.R. 661.

³² *Tzatzken v. City of Detroit*, 198 N.W. 214, 226 Mich. 603 (1924). Comment, *Municipal Responsibility for Torts of Policemen*, 42 YALE L.J. 241 (1932). Notes, 15 L.R.A. 783, 12 L.R.A. (n.s.) 537, 42 L.R.A. (n.s.) 915, L.R.A. 1915E, 460, 46 A.L.R. 94, 50 A.L.R. 268, 61 A.L.R. 569, 110 A.L.R. 1117. Liability is occasionally recognized: *Jones v. Sioux City*, 185 Iowa 1178, 170 N.W. 445 (1919); *Shinnick v. Marshalltown*, 137 Iowa 72, 114 N.W. 542 (1908); *Carrington v. St. Louis*, 89 Mo. 208, 1 S.W. 240 (1886); *Kelly v. City of Niagara Falls*, 229 N.Y.S. 328, 131 Misc. 934 (1928) (statute).

³³ *Bartlett v. Columbus*, 101 Ga. 300 (1897); *Gullikson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1894); *City of Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949 (1896). Note, 44 L.R.A. 795.

³⁴ *McFadin v. San Antonio* (T. Civ. A. 1899), 54 S.W. 48, and cases cited therein. Note, 47 L.R.A. 593.

³⁵ *McSheridan v. City of Talladega*, 243 Ala. 162, 8 S. 2d 831 (1942); *Lamont v. Stavannah*, 129 Minn. 321, 152 N.W. 720 (1915).

³⁶ *Evans v. City of Kankakee*, 231 Ill. 223, 83 N.E. 223 (1907); *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426 (1891); *Eddy v. Ellicottville*, 54 N.Y.S. 800, 35 App. Div. 256 (1898); *Gullikson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1895); *Wilcox v. City of Rochester*, 190 N.Y. 137, 82 N.E. 1119 (1907).

³⁷ *Brown v. City of Craig*, 350 Mo. 836, 168 S.W. 2d 1080 (1943); *Archer v. City of Austell*, 68 Ga. A. 493, 23 S.E. 2d 512 (1942); *Nichols v. Fountain*, 165 N.C. 1059, 80 S.E. 1059, 46 A.L.R. 90 (1914). But see *Lewis v. Miami*, 127 Fla. 426, 173 S. 150 (1937).

³⁸ *Detroit v. Laughna*, 34 Mich. 402 (1876); *Brown v. Eustis*, 92 Fla. 931, 110 S. 873 (1926); *McSheridan v. City of Talladega*, — Ala. — 8 S. 2d 831 (1942); *Kelly v. City of Chicago*, 324 Ill. A. 382, 58 N.E. 2d 278 (1944); *Birmingham v. Brock*, — Ala. — 6 S. 2d 499 (1942). Compare *Hillman v. Anniston*, 216 Ala. 661, 114 S. 55 (1927). Notes, 46 A.L.R. 94, 50 A.L.R. 268, 61 A.L.R. 569.

³⁹ *Union Indemnity v. Cunningham*, 22 Ala. A. 226, 114 S. 285 (1927); *Holloway v. Moser*, 193 N.C. 185, 136 S.E. 375 (1927); *Kosowsky v. Fidelity & D. Co.*, 245 Mich. 255, 222 N.W. 153 (1928).

municipal liability for the retention of policemen known to be unsuited for the work.⁴⁰

For torts occurring in the care and preservation of the public health cities are generally not liable.⁴¹ So liability is customarily denied for injuries sustained from ambulances.⁴² Probably the weight of authority denies liability for torts at municipal hospitals,⁴³ and there are cases immunizing cities even when charges have been made.⁴⁴ However, many cases now recognize municipal liability for hospital torts,⁴⁵ especially when patients have paid for the services.⁴⁶

According to the majority rule there is no civic liability for torts arising from the collection, removal and disposal of garbage, refuse and ashes.⁴⁷ However, there are many *contra* cases,⁴⁸ especially when charges or profits have been made by the municipality.⁴⁹

Generally, municipalities are not liable for injuries sustained due to defective conditions at educational institutions or the negli-

⁴⁰ *McCrnk v. City of New York*, 296 N.Y. 99, 71 N.E. 2d 419 (1947).

⁴¹ *Nicholson v. Detroit*, 129 Mich. 246, 88 N.W. 695 (1902); *Evans v. Kankakee*, 231 Ill. 223, 83 N.E. 223 (1907); *Bryant v. City of St. Paul*, 33 Minn. 289, 23 N.W. 220 (1885); *City of Brunswick v. Barnett*, 58 Ga. A. 792, 199 S.E. 901 (1939). Note, 49 A.L.R. 379. The liability of the individual health officer is recognized. *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942 (1904).

⁴² *Foley v. Wesson Memorial Hospital*, 246 Mass. 363, 141 N.E. 113 (1923); *Watson v. City of Atlanta*, 136 Ga. 370, 71 S.E. 664 (1911); *Nichitta v. City of New York*, 228 N.Y.S. 528, 223 App. Div. 428 (1928).

⁴³ *Butler v. Kansas City*, 97 Kan. 239, 155 Pac. 12 (1916); *Murtaugh v. St. Louis*, 44 Mo. 479 (1869); *Shawnee v. Jeter*, 96 Okla. 272, 221 Pac. 758 (1923); *Martinson v. City of Alpena*, 328 Mich. 595, 44 N.W. 2d 148 (1950); *Beakey v. Town of Billerica*, 324 Mass. 290, 85 N.E. 2d 620 (1949).

⁴⁴ *City of McAllen v. Gartman*, (T. Civ. A. 1935), 81 S.W. 2d 147; *Gillies v. City of Minneapolis*, (D. Minn. 1946), 66 F. Supp. 467.

⁴⁵ *City of Miami v. Oates*, 152 Fla. 21, 10 S. 2d 721 (1942). *Borchard, op. cit.* note 17 at 246.

⁴⁶ *Browege v. City of Owatonna*, 190 Minn. 394, 251 N.W. 915 (1933); *City of Shawnee v. Roush*, 101 Okla. 60, 223 Pac. 354 (1924), noted in 24 COL. L. REV. 679 (1924); *City of Okmulgee v. Carlton*, 180 Okla. 605, 71 P. 2d 722 (1937).

⁴⁷ *Behrmann v. St. Louis*, 273 Mo. 578, 201 S.W. 547 (1918); *Scibilia v. Philadelphia*, 279 Pa. 549, 124 A. 273 (1924); *James v. Charlotte*, 183 N.C. 630, 112 S.E. 423 (1922); *Love v. Atlanta*, 95 Ga. 129, 22 S.E. 29 (1894); *Manning v. Pasadena*, 58 Cal. A. 666, 209 Pac. 253 (1922). Notes, 14 A.L.R. 1473, 32 A.L.R. 988, 52 A.L.R. 187, 60 A.L.R. 101, 63 A.L.R. 332, 110 A.L.R. 1117.

⁴⁸ *Young v. Metropolitan Street Railway*, 126 Mo. App. 1, 103 S.W. 135 (1907); *Missano v. New York*, 160 N.Y. 123, 54 N.E. 744 (1899); *Bedtke v. City of Chicago*, 240 Ill. A. 493 (1926); *Pass Christian v. Fernandez*, 100 Miss. 76, 56 S. 329 (1911); *Kress Co. v. City of Pittsburgh*, 333 Pa. 121, 4 A. 2d 528 (1939), cert. dnd. 308 U.S. 562; *Chardkoff Junk Co. v. City of Tampa*, 102 Fla. 501, 135 S. 457 (1931).

⁴⁹ *Foss v. City of Lansing*, 237 Mich. 633, 212 N.W. 952, 52 A.L.R. 185 (1927). Notes, 9 Nebr. L. Bull. 349 (1931); 13 CHI.-KENT L. REV. 371 (1935); 28 GEO. L.J. 705 (1940).

gence of persons there in charge.⁵⁰ At common law there is a similar immunity from liability for torts arising from the transportation of school pupils.⁵¹ For accidents at school playgrounds, the municipal corporation is ordinarily not liable,⁵² but when charges and profits are made from athletic contests there is authority recognizing municipal liability.⁵³

The older cases, representing what is still the weight of authority hold a municipal corporation immune from tort damages for accidents at parks and recreational centers.⁵⁴ However a great many recent cases hold cities liable,⁵⁵ and the trend has been said to recognize municipal liability.⁵⁶ Cases can usually be found for

⁵⁰ Hill v. Boston, 122 Mass. 344 (1877); Kinnare v. Chicago, 171 Ill. 332, 49 N.E. 536 (1898); Folk v. Milwaukee, 108 Wis. 359, 84 N.W. 420 (1900); Daskewicz v. Detroit Board of Education, 301 Mich. 212, 3 N.D. 2d 71 (1942); Bank v. Bramerd School District, 49 Minn. 106, 51 N.W. 814 (1892). Rosenfield, *Governmental Immunity from Liability for Torts in School Accidents*, 5 LEGAL NOTES ON LOCAL GOVT. 358 (1940); Musselman, *Michigan Law on the Liability of School Districts for Torts*, 2 U. DET. L.J. 63 (1933); Seitz, *School District Responsibility for Negligent Supervision of Pupils*, 25 MARQ. L. REV. 115 (1941). Recognizing liability: Jaked v. Board of Ed. of Albany, 234 N.Y. 591, 138 N.E. 458 (1922); Miles v. Worcester, 154 Mass. 511, 28 N.E. 676 (1891) (on theory of nuisance). Note, 46 HARV. L. REV. 305 (1932).

⁵¹ Bradfield v. Bd. of Education, 128 W.Va. 228, 36 S.E. 2d 512 (1945). See statutory changes below.

⁵² Bank v. Bramerd School District, 49 Minn. 106, 51 N.W. 814 (1892).

⁵³ Morris v. Union High School District A, 160 Wash. 121, 294 Pac. 998 (1931); Briscoe v. School District, 32 Wash. 2d 353, 201 P. 2d 697 (1949) (but note statute). *Contra*: Mokovich v. Independent School District No. 22, 177 Minn. 446, 225 N.W. 292 (1929). And see Watson v. Bay City School District, 324 Mich. 1, 36 N.W. 2d 195 (1949) affirming 4-4 judgment for school district in suit arising out of parking lot injury at athletic contest where charges made.

⁵⁴ Clark v. Waltham, 128 Mass. 567 (1880); Blair v. Granger, — R.I. — 51 A. 1042 (1902); Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605 (1894); Caughlan v. Omaha, 103 Neb. 726, 174 N.W. 220 (1919); Park Commrs. v. Prinz, 127 Ky. 460, 105 S.W. 948 (1907). See generally, Schroeder, *Municipal Liability to Individuals for Nonfeasance in the Operation of Parks*, 59 U. PA. L. REV. 400 (1911); Stern, *Tort Liability for Injuries Received in Parks and Playgrounds*, 14 N.C.L. REV. 388 (1936); Note, 24 VA. L. REV. 430 (1938). Notes, 29 A.L.R. 863, 42 A.L.R. 263, 99 A.L.R. 686.

⁵⁵ Collentine v. City of New York, 279 N.Y. 119, 17 N.E. 2d 792 (1939); City of Terre Haute v. Webster, 112 Ind. A. 101, 40 N.E. 2d 972 (1942); Howard v. Village of Chisholm, 191 Minn. 245, 253 N.W. 766 (1934); Augustine v. Town of Brant, 249 N.Y. 198, 163 N.E. 732 (1928); Capp v. City of St. Louis, 251 Mo. 345, 158 S.W. 616 (1913). Statutes frequently create municipal liability: Felt v. Toledo, 47 Oh. App. 461, 192 N.E. 11 (1933); Edwards v. San Diego, 126 Cal. A. 1, 14 P. 2d 119 (1932).

⁵⁶ "in all the jurisdictions where for the first time question of the liability of a city in the care of its public parks has arisen in the past ten years, the courts have classified this function as proprietary and imposed liability." Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, 105-6 (1932). Note, 20 Nat. Mun. Rev. 298 (1931); Note, 3 CEN. L. REV. 183 (1929); Note, 44 W.V. L.Q. 159 (1938); Note, 34 MICH. L. REV. 1250 (1936); Note, 19 ST. L.L. REV. 257 (1934); Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 L.C.P. 214, 227 (1942); Note, 24 GEO. L.J. 1027 (1936); Note, 24 WASH. U.L.Q. 423 (1939); Note, 16 MICH. S.B.J. 590 (1938).

both positions concerning liability for injuries at swimming pools and bathing beaches,⁵⁷ zoos,⁵⁸ summer camps,⁵⁹ ornamental pools and ponds,⁶⁰ and carnivals.⁶¹ So, too, for damages sustained by falling through the ice,⁶² by the fall of monuments,⁶³ from miniature trains,⁶⁴ due to defective slides,⁶⁵ toboggan slides,⁶⁶ swings,⁶⁷ seesaws,⁶⁸ teeter-totters,⁶⁹ merry-go-rounds,⁷⁰ and from athletic equipment and contests generally.⁷¹ Where a municipality charges for or profits from, a recreational activity there is a far greater chance of tort liability.⁷² And liability has been recognized where

⁵⁷ Liable: *City of Longmont v. Swearingen*, 81 Colo. 246, 254 Pac. 1000 (1927); *Burton v. Salt Lake City*, 69 Utah 186, 253 Pac. 443 (1926); *Norberg v. City of Watertown*, 53 S.D. 600, 221 N.W. 700 (1928); *Carta v. City of Norwalk*, 108 Conn. 697, 145 A. 158 (1929); *Felton v. City of Great Falls*, 118 Mont. 586, 169 P. 2d 229 (1946) collecting many cases both ways. The collection of fees and charges influences findings of liability. Note, 24 VA. L. REV. 430, 436 (1938).

Not liable: *Bolster v. City of Lawrence*, 225 Mass. 387, 114 N.E. 722, L.R.A. 1917B, 1285 (1917); *Hemo v. City of Grand Rapids*, 202 Mich. 363, 168 N.W. 512 (1918); *Gilliland v. City of Topeka*, 124 Kan. 726, 262 Pac. 493 (1928); *St. John v. City of St. Paul*, 179 Minn. 12, 228 N.W. 170 (1929) noted in 5 N.D. LAWYER 342 (1930).

Borchard, Municipal Liability in Tort in Swimming Pools, 4 LEGAL NOTES ON LOCAL GOVT. 385 (1939). Notes, 51 A.L.R. 370, 57 A.L.R. 406.

⁵⁸ Liable: *Hyde v. City of Utica*, 20 N.Y.S. 2d 335, 259 App. Div. 477 (1940); *Fort Worth v. Wiggins*, (T. Com. A. 1928), 5 S.W. 2d 761, *Mathews v. Detroit*, 291 Mich. 161, 289 N.W. 115 (1939) (miniature train for which charge made). Not liable: *Hibbard v. City of Wichita*, 98 Kan. 493, 159 Pac. 399 (1916) noted in 15 MICH. L. REV. 180 (1916), 26 YALE L.J. 77 (1916).

⁵⁹ Not liable though charge made: *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919).

⁶⁰ Not liable: *Harper v. City of Topeka*, 92 Kan. 11, 139 Pac. 1018 (1914).

⁶¹ Liable: *Scroggins v. City of Harlingen*, 131 Tex. 237, 112 S.W. 2d 1035, 114 S.W. 2d 853 (1938). Not liable: *Bisbing v. Asbury Park*, 80 N.J.L. 416, 78 A. 196 (1910). Note, 29 YALE L.J. 117 (1919).

⁶² Not liable: *City of Cleveland v. Walker*, 52 Oh. App. 477, 3 N.E. 2d 990 (1936).

⁶³ Not liable: *Griffin v. City of Chicago*, 317 Ill. A. 368, 45 N.E. 2d 890 (1943).

⁶⁴ Liable: *Mathews v. Detroit*, 291 Mich. 161, 289 N.W. 115 (1939).

Not liable: *Meyer v. City and County of San Francisco*, 9 Cal. A. 2d 361, 49 P. 2d 893 (1935).

⁶⁵ Liable: *Warden v. City of Grafton*, 99 W. Va. 249, 128 S.E. 375 (1925).

Not liable: *Grnde v. City of Watertown*, 232 Wis. 551, 288 N.W. 196 (1939).

⁶⁶ Not liable: *Cegelski v. Green Bay*, 231 Wis. 89, 285 N.W. 343 (1939).

⁶⁷ Liable: *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 Pac. 710 (1925).

Not liable: *Epstein v. City of New Haven*, 104 Conn. 283, 132 A. 467 (1926); *Royston v. City of Charlotte*, 278 Mich. 255, 270 N.W. 288 (1936).

⁶⁸ Not liable: *Piasecny v. Manchester*, 82 N.H. 458, 136 A. 357 (1926).

⁶⁹ Not liable: *Smith v. Iowa City*, 213 Iowa 391, 239 N.W. 29 (1931).

⁷⁰ Liable: *Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040 (1913); *Malchow v. City of Leoti*, 95 Kan. 787, 149 Pac. 687 (1915).

⁷¹ Liable: *City of Jackson v. McFadden*, 181 Miss. 1, 177 S. 755 (1938) (football game). Not liable: *Howard v. Village of Chusholm*, 191 Minn. 245, 253 N.W. 766 (1934) (hockey game).

⁷² *Belton v. Ellis* (T. Civ. A. 1923), 254 S.W. 1023; *Burton v. Salt Lake City*, 69 Utah 186, 253 Pac. 443 (1926). Note, 24 VA. L. REV. 430, 436 (1938).

activity within a municipal park results in either trespass to adjoining property⁷³ or injury to persons outside the recreational area.⁷⁴ The majority of cases deny liability for injuries due to municipal fireworks displays,⁷⁵ and for having licensed or permitted private exhibitions⁷⁶ although there is in the latter situation occasional liability.⁷⁷ Cases are split on liability for injuries sustained at municipal auditoria and convention halls.⁷⁸

Municipalities are overwhelmingly held liable for the negligent operation of transit systems.⁷⁹ Generally they are similarly liable for torts arising from electric light utilities,⁸⁰ although a distinction has at times been drawn resulting in immunization from liability for torts in connection with the lighting of streets.⁸¹ Cities are also liable for torts in connection with municipal telephone⁸² and gas⁸³ systems. There is a wider split in connection with municipal water system maintenance, with the majority recognizing liability.⁸⁴ Thus, a city is customarily liable for having supplied polluted or contaminated water.⁸⁵ Again a distinc

⁷³ *Crino v. City of Campbell*, 68 Oh. App. 391, 41 N.E. 2d 583 (1942). *Contra: Hennessy v. City of Boston*, 265 Mass. 559, 164 N.E. 470 (1929). Note, 62 A.L.R. 780.

⁷⁴ *Honaman v. City of Philadelphia*, 322 Pa. 535, 185 A. 750 (1936).

⁷⁵ *Kerr v. Brookline*, 208 Mass. 190, 94 N.E. 257 (1911); *Pope v. New Haven*, 91 Conn. 79, 99 A. 51 (1916). Note, 93 A.L.R. 1356.

⁷⁶ *Reinart v. Incorporated Town of Manning*, 210 Iowa 664, 231 N.W. 326 (1930) noted in 15 MINN. L. REV. 248 (1930); *Fifield v. Common Council of City of Phoenix*, 4 Ariz. 283, 36 Pac. 916 (1894).

⁷⁷ *Moore v. City of Bloomington*, 51 Ind. A. 145, 95 N.E. 374 (1911); *Spier v. Brooklyn*, 139 N.Y. 6, 34 N.E. 727 (1893).

⁷⁸ Liable: *Sanders v. City of Long Beach*, 54 Cal. A. 2d 651, 129 P. 2d 511 (1942) (auditorium); *Leeds v. Atlantic City*, 13 N.J. Misc. 868, 181 A. 892 (1936) (conv. hall). Not liable: *Roberts v. Savannah*, 54 Ga. A. 375, 188 S.E. 39 (1936) (auditorium).

⁷⁹ *Karsey v. San Francisco*, 130 Cal. A. 655, 20 P. 2d 751 (1933); *Tobin v. Seattle*, 127 Wash. 664, 221 Pac. 583 (1923); *Borski v. City of Wakefield*, 239 Mich. 656, 215 N.W. 19 (1927); *Johnson v. Monroe*, — La. — 164 S. 456 (1935). Note, 31 A.L.R. 1306.

⁸⁰ *Hamilton v. Rocky Mount*, 199 N.C. 504, 154 S.E. 844 (1930) noted in 44 HARV. L. REV. 302 (1930); *Bullmaster v. St. Joseph*, 80 Mo. App. 60, affd. 155 Mo. 58, 55 S.W. 1015 (1897); *Bathke v. Traverse City*, 308 Mich. 1, 13 N.W. 2d 184 (1944). Note, 43 L.R.A. (n.s.) 862.

⁸¹ *Hodgins v. Bay City*, 156 Mich. 687, 121 N.W. 274 (1909); *Martin v. Canton*, 41 Oh. App. 420, 180 N.E. 78 (1931).

⁸² *Storti v. Town of Fayal*, 194 Minn. 628, 261 N.W. 463 (1935).

⁸³ *Kibele v. Philadelphia*, 105 Pa. 41 (1884); *Richmond v. James*, 170 Va. 553, 197 S.E. 416 (1938); *Brantman v. Canby*, 119 Minn. 396, 138 N.W. 671 (1912).

⁸⁴ *Pearl v. Inhabitants of Town of Revere*, 219 Mass. 604, 107 N.E. 417 (1914); *McGinley v. Cherryvale*, 141 Kan. 155, 40 P. 2d 377 (1935); *Henderson v. Kansas City*, 177 Mo. 477, 76 S.W. 1045 (1903); *Glase v. Philadelphia*, 169 Pa. 488, 32 A. 600 (1895); *Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 138 S.E. 503 (1927). Notes, 24 A.L.R. 545, 28 A.L.R. 822, 54 A.L.R. 1497.

⁸⁵ *Keever v. City of Mankato*, 113 Minn. 55, 129 N.W. 158, 33 L.R.A. (n.s.)

tion is sometimes drawn here so as to immunize a municipality when the water is provided for purposes considered governmental, such as fire fighting.⁸⁶

Cities are generally held liable for torts occurring at municipal airports,⁸⁷ parking lots,⁸⁸ wharves,⁸⁹ docks,⁹⁰ ferries,⁹¹ markets,⁹² and cemeteries.⁹³

A city is under no tort liability for failure to install sewers or drains,⁹⁴ nor is it customarily liable for defects in plans for such.⁹⁵ However, some cases hold a municipality liable where a sewer originally of ample size has become inadequate due to the growth or development of the territory.⁹⁶ For damages caused by extra-

339 (1910); *Stubbs v. Rochester*, 226 N.Y. 516, 124 N.E. 137 (1919); *Campbell v. City of Helena*, 92 Mont. 366, 16 P. 2d 1 (1932). However, liability on sales warranty is generally denied: *Canavan v. City of Mechemville*, 229 N.Y. 473, 128 N.E. 882 (1920) noted in 5 CORN. L.Q. 479 (1920), 4 MINN. L. REV. 74 (1919) (lower court), 5 MINN. L. REV. 326 (1921). Notes, 5 A.L.R. 1402, 13 A.L.R. 1132, 61 A.L.R. 452.

⁸⁶ *Aschoff v. Evansville*, 34 Ind. A. 25, 72 N.E. 279 (1904); *Miralgo v. Village of Kenilworth*, 290 Ill. A. 244, 7 N.E. 2d 602 (1937) noted in 32 LL. L. REV. 372 (1937).

⁸⁷ *Mobile v. Lartigue*, 23 Ala. A. 479, 127 S. 257 (1930) noted in 17 Va. L. Rev. 81 (1930); *Pignet v. City of Santa Monica*, 29 Cal. A. 2d 286, 84 P. 2d 166 (1938); *Peavey v. City of Miami*, 146 Fla. 629, 1 S. 2d 614 (1941); *Finferra v. Thomas* (CA 6th 1941), 119 F. 2d 28; *Christopher v. City of El Paso*, (T. Civ. A. 1936), 98 S.W. 2d 394. Contra: *Mayor of Savannah v. Lyons*, 54 Ga. A. 661, 189 S.E. 63 (1937). There are a number of statutes immunizing cities for airport torts. Generally, see Rhyne, *The Legal Experience of Airports*, 11 J. AM. LAW & COM. 294, 303-310 (1940); Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 L. & C.P. 214, 228 (1942).

⁸⁸ *Automobile Underwriters v. City of Pittsburgh*, (Pa. C.P. 1942) 44 D. & C. 63; *Dunham v. City of New York*, 34 N.Y.S. 2d 239, 264 App. Div. 732 (1942).

⁸⁹ *Berwind-White Coal Co. v. City of New York*, (CA 2d 1943), 135 F. 2d 443; *The President Madison*, (CA 9th 1937), 91 F. 2d 835; *Blue v. City of Union*, 159 Ore. 5, 75 P. 2d 977 (1938); *Savannah v. Harman*, 20 Ga. A. 395, 93 S.E. 41 (1917).

⁹⁰ *Seaman v. New York*, 80 N.Y. 239 (1880); *Oakland v. American Dredging Co.*, 3 Cal. 2d 220, 44 P. 2d 309 (1935).

⁹¹ *City of Portsmouth v. Madrey*, 191 S.E. 595, 168 Va. 517 (1937); *Davis v. Boston*, 190 Mass. 194, 76 N.E. 663 (1906); *Jacoby v. Chouteau County*, 112 Mont. 70, 112 P. 2d 1068 (1941).

⁹² *Mayor of Savannah v. Cullens*, 38 Ga. 334, 95 Am. Dec. 398 (1868); *Barron v. Detroit*, 94 Mich. 601, 54 N.W. 273, 19 L.R.A. 452 (1893); *Reed v. Baltimore*, 171 Md. 115, 188 A. 15 (1936); *Zerbe v. City of Springfield*, (Oh. App. 1945), 60 N.E. 2d 793; *Bucklew v. New Brunswick*, 115 N.J.L. 112, 178 A. 785 (1935).

⁹³ *Toledo v. Cone*, 41 Oh. St. 149 (1884); *Hollman v. City of Platteville*, 101 Wis. 94, 76 N.W. 1119 (1898); *City of Atlanta v. Rich*, 64 Ga. A. 193, 12 S.E. 2d 436 (1941); *Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931).

⁹⁴ *McCutcheon v. Village of Peekskill*, 3 N.Y.S. 2d 277, 167 Misc. 460 (1938); *Boone v. City of Akron*, 69 Oh. App. 95, 43 N.E. 2d 315 (1942); *Strauch v. City of Scranton*, 353 Pa. 10, 44 A. 2d 258 (1945).

⁹⁵ Notes, 43 A.L.R. 964, 70 A.L.R. 1347, 71 A.L.R. 753. But see *Ashley v. Port Huron*, 35 Mich. 296 (1877) and *Bowman v. Town of Chenango*, 227 N.Y. 459, 125 N.E. 809 (1920), noted in 20 COL. L. REV. 619 (1920).

⁹⁶ *Boyer v. City of Tacoma*, 156 Wash. 280, 286 Pac. 659 (1930). Contra: *Springfield v. Spence*, 39 Oh. St. 665 (1884). Note, 70 A.L.R. 1347.

ordinary floods or rains a municipality is usually immune.⁹⁷ Municipalities are generally held liable for damages to property resulting from faulty construction⁹⁸ or negligent maintenance⁹⁹ of sewers, drains and ditches. Cities are regularly held liable in tort for pollution of streams by sewage.¹⁰⁰ And, for damage to property there is always the possibility of municipal liability for having created or maintained a nuisance.¹⁰¹ The cases, on the other hand, indicate a considerable reluctance to permit recovery against a municipality on any theory, for injury to the person.¹⁰² A city is not liable because surface water naturally accumulates on an owner's land,¹⁰³ but if it diverts surface water or a water course onto private property it will generally be held responsible.¹⁰⁴

Although there are today many statutory impositions of liability,¹⁰⁵ even at common law the majority of jurisdictions held municipalities responsible for torts occasioned by the negligent construction or maintenance of streets,¹⁰⁶ notwithstanding the

⁹⁷ *Hamilton v. City of Bismarck*, 71 N.D. 321, 300 N.W. 631 (1941); *Trustees of University Co-op. Co. v. City of Madison*, 233 Wis. 100, 288 N.W. 742 (1939); *City of Louisville v. Cope*, 296 Ky. 207, 176 S.W. 2d 390 (1944).

⁹⁸ *Durante v. City of Oakland*, 19 Cal. A. 2d 543, 65 P. 2d 1326 (1937); *Bean v. City of Moberly*, 350 Mo. 975, 169 S.W. 2d 393 (1943); *Defer v. Detroit*, 67 Mich. 346, 34 N.W. 680 (1887); *Ostrander v. City of Lansing*, 111 Mich. 693, 70 N.W. 332 (1897); *Stoddard v. Village of Saratoga Springs*, 127 N.Y. 261, 27 N.E. 1030 (1891).

⁹⁹ *Clinard v. Kernersville*, 215 N.C. 745, 3 S.E. 2d 267 (1939); *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P. 2d 480 (1943); *Stone v. City of Ashland*, (Oh. App. 1941), 32 N.E. 2d 560; *Oklahoma City v. Myers*, 177 Okla. 622, 61 P. 2d 653 (1936); *City of Montgomery v. Stephens*, 14 Ala. A. 274, 69 S. 970 (1915) noted in 14 M'3 L. R51. 352 (1916). Contra: *Gotcher v. City of Farmersville*, 137 Tex. 12, 151 S.W. 2d 565 (1940); *Erickson v. West Salem*, 205 Wis. 107, 236 N.W. 579 (1931). Notes, 43 A.L.R. 964, 70 A.L.R. 1347, 71 A.L.R. 753.

¹⁰⁰ *Huber v. City of Blue Earth*, 213 Minn. 319, 6 N.W. 2d 471 (1942); *Doheny v. City of Birmingham*, 301 Mich. 30, 2 N.W. 2d 907 (1942); Contra: *Oates v. City of Easley*, 182 S.C. 91, 188 S.E. 504 (1937).

¹⁰¹ *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P. 2d 30 (1938); *Hasslinger v. Village of Hartland*, 234 Wis. 201, 290 N.W. 647 (1940).

¹⁰² *Hughes v. City of Auburn*, 161 N.Y. 96, 55 N.E. 389 (1899); *Johnson's Administrator v. Commrs. of Sewerage of Louisville*, 160 Ky. 356, 169 S.W. 827 (1914); *Williams v. Greenville*, 130 N.C. 93, 40 S.E. 977 (1902).

¹⁰³ *A. L. Lakey Co. v. City of Kalamazoo*, 138 Mich. 644, 101 N.W. 841, 67 L.R.A. 931 (1904); *Wright v. City of Oneonta*, 1 N.Y.S. 2d 295, 165 Misc. 492 (1938).

¹⁰⁴ *Los Angeles Brick & Clay Products v. City of Los Angeles*, 60 Cal. A. 2d 478, 141 P. 2d 46 (1943); *Pennoyer v. City of Saginaw*, 8 Mich. 534 (1860); *Kehoe v. Borough of Rutherford*, 74 N.J.L. 659, 65 A. 1046 (1907); *City of Rome v. Brown*, 54 Ga. A. 6, 186 S.E. 708 (1936); *Talbert v. City of Winchester*, 277 Ky. 164, 125 S.W. 2d 1002 (1939); *Ryder v. Town of Lexington*, 303 Mass. 281, 21 N.E. 2d 382 (1939). Note, 5 A.L.R. 2d 57.

¹⁰⁵ See note 140 below.

¹⁰⁶ *Borchard, Government Liability in Tort*, 34 YALE L.J. 229 (1924); 43 C.J. 974, sec. 1755.

“governmental” nature of the function. A minority of the courts immunized the city¹⁰⁷ and others have emphasized the need for the city to have full and complete control over the streets before liability is admitted.¹⁰⁸ Municipalities are often held liable for injuries sustained due to excavations¹⁰⁹ or obstructions in the road¹¹⁰ that were known, or should have been known,¹¹¹ to the city and which could not have been discovered by a driver exercising due care. Duty may well include the obligation to erect barriers and railings,¹¹² and post warning signs¹¹³ except where the peril is obvious to anyone exercising due care.¹¹⁴ Municipal liability further extends to traffic hazards and liability should be recognized, although the cases are often split, for the fall of “silent policemen” at corners,¹¹⁵ the fall of stop signs at intersections,¹¹⁶

¹⁰⁷ *Doddridge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 335 (1925). Notes, 1 A.L.R. 355, 12 A.L.R. 333, 39 A.L.R. 781, 42 A.L.R. 1281, 51 A.L.R. 575, 60 A.L.R. 101, 119 A.L.R. 841.

¹⁰⁸ *Pyman v. City of Grand Rapids*, 327 Mich. 543, 42 N.W. 2d 739 (1950).

¹⁰⁹ *Cone v. Detroit*, 191 Mich. 198, 157 N.W. 417 (1916). Notes, 63 A.L.R. 208, 109 A.L.R. 605.

¹¹⁰ *Bernien County v. Vickers*, 73 Ga. A. 863, 38 S.E. 2d 619 (1946); *Vicksburg v. Harralson*, 136 Miss. 872, 101 S. 713 (1924); *Titus v. Bloomfield*, 80 Ind. A. 483, 141 N.E. 360 (1923). Notes, 1 A.L.R. 355, 12 A.L.R. 333, 39 A.L.R. 781, 42 A.L.R. 1281, 51 A.L.R. 575, 60 A.L.R. 101, 119 A.L.R. 841, 7 A.L.R. 2d 226.

Contributory negligence, of course, generally bars recovery, *Owens v. Town of Boonville*, — Miss. — 40 S. 2d 158 (1949), and courts often find contributory negligence or assumption of risk in using streets closed to public travel. Note, 119 A.L.R. 841.

¹¹¹ *Coleman, Municipal Liability for Tort in Michigan*, 13 MICH. S.B.J. 165, 168 (1934); *Sahm, Municipal Liability in Pennsylvania for Defective Streets*, 45 DICK. L. REV. 113 (1941); *Sayfaus v. Rochester*, 113 N.Y.S. 840 (1908); *Stanke v. St. Paul*, 71 Minn. 51, 73 N.W. 629 (1898).

¹¹² *Mackey v. Vicksburg*, 64 Miss. 777, 2 S. 178 (1887); *Keller v. Port Washington*, 200 Wisc. 87, 227 N.W. 284 (1929); *Phoenix v. Mayfield*, 41 Ariz. 537, 20 P. 2d 296 (1933). Notes, 86 A.L.R. 1389, 100 A.L.R. 1386. Note, 13 N.C.L. REV. 245 (1935).

¹¹³ *Willis v. New Bern*, 191 N.C. 507, 132 S.E. 286 (1926); *Pardini v. City of Reno*, 50 Nev. 392, 263 Pac. 768 (1928) noted in 15 VA. L. REV. 595 (1929).

¹¹⁴ *Loehe v. Village of Fox Point*, 253 Wis. 375, 34 N.W. 2d 126 (1948) noted in 33 MARQ. L. REV. 74 (1949).

¹¹⁵ Not liable: *Aaronson v. New Haven*, 94 Conn. 690, 110 A. 872 (1920). Liable: *Fitzgerald v. Village of Bovey*, 174 Minn. 450, 219 N.W. 774 (1928) (unlighted “dummy policeman.”) Notes, 12 A.L.R. 333, 39 A.L.R. 781.

¹¹⁶ Liable: *Phinney v. City of Seattle*, 34 Wash. 2d 330, 208 P. 2d 879 (1949). And there are more cases holding municipalities liable for negligence in construction and maintenance of traffic “bumpers” *Vicksburg v. Harralson*, 136 Miss. 872, 101 S. 713 (1924); *Titus v. Bloomfield*, 80 Ind. A. 483, 141 N.E. 360 (1923); *Hobart v. Casbon*, 81 Ind. A. 24, 142 N.E. 138 (1924); *Wells v. Kenilworth*, 228 Ill. A. 332 (1923). Cf. *Prewitt v. City of St. Joseph*, 334 Mo. 1228, 70 S.W. 2d 916 (1934).

the fall of poles supporting traffic signals,¹¹⁷ the malfunctioning of traffic signals,¹¹⁸ and the like.

For torts occasioned in alleys¹¹⁹ and on bridges¹²⁰ most jurisdictions apply their rule on street accidents, with the majority recognizing liability. On the liability of a municipality for torts arising out of negligence in street flushing and cleaning the cases are widely split.¹²¹ For negligence in the cutting¹²² and care¹²³ of trees along streets municipal corporations are generally liable.

Municipalities are generally liable for injuries sustained because of defective sidewalks which were known to, or should have been known by, the city.¹²⁴ For falls due to the natural presence

¹¹⁷ *Whalen v. Worcester Electric Light Co.*, 307 Mass. 169, 29 N.E. 2d 763 (1940).

¹¹⁸ Liable: *Johnston v. City of East Moline*, 338 Ill. A. 220, 91 N.E. 2d 401 (1950). Not liable: *Dormney v. City of Montgomery*, 232 Ala. 47, 166 S. 689 (1936) noted in 21 MINN. L. REV. 459 (1937); *Auslander v. City of St. Louis*, 332 Mo. 145, 56 S.W. 2d 778 (1933); *Cleveland v. Town of Lancaster*, 264 N.Y. 568, 191 N.E. 568 (1934); *Vickers v. Camden*, 122 N.J.L. 14, 3 A. 2d 613 (1939). Murray, *Recent Trends in Municipal Tort Liability*, 5 LEGAL NOTES ON LOCAL GOVT, 353, 354 (1940). Notes, 15 VA. L. REV. 595 (1929); 13 TENN. L. REV. 59 (1934); 11 R. MTN. L. REV. 128 (1938); 23 MARQ. L. REV. 216 (1939); 53 A.L.R. 170.

¹¹⁹ Liable: *Pyman v. City of Grand Rapids*, 327 Mich. 543, 42 N.W. 2d 739 (1950); *Town of Geneva v. Mesel*, 106 Ind. A. 632, 21 N.E. 2d 458 (1939); *Baker v. City of Wheeling*, 117 W. Va. 362, 185 S.E. 842 (1936). Note also *Splinter v. City of Nampa*, 70 Idaho 287, 215 P. 2d 999 (1950) holding city liable when it granted permit and city engineer installed tank with explosive gas in alley and explosion destroyed building.

¹²⁰ Liable: *Gathman v. Chicago*, 236 Ill. 9, 86 N.E. 152, 19 L.R.A. (n.s.) 1178 (1908); *Hoppe v. City of Winona*, 113 Minn. 252, 129 N.W. 577 (1911); *Lucas v. Phillips*, 34 Wash. 2d 591, 209 P. 2d 279 (1949). Not liable: *Daly v. New Haven*, 69 Conn. 644, 38 A. 397 (1897); *Coming v. Saginaw*, 116 Mich. 74, 74 N.W. 307, (1898); *Evans v. Sheboygan*, 153 Wis. 287, 141 N.W. 265 (1913).

¹²¹ Liable: *Denver v. Maurer*, 47 Colo. 209, 106 Pac. 875 (1910); *Ostrom v. San Antonio*, 94 Tex. 523, 62 S.W. 909 (1901); *Quill v. Mayor of New York*, 36 App. Div. 476 (1899); *McLeod v. Duluth*, 174 Minn. 184, 218 N.W. 892 (1928); *Griffith v. Butte*, 72 Mont. 552, 234 Pac. 829 (1925); *Roumbos v. Chicago*, 332 Ill. 70, 163 N.E. 361 (1928). Not liable: *Bruhnke v. La Crosse*, 155 Wis. 485, 144 N.W. 1100 (1914); *Savannah v. Jordan*, 142 Ga. 409, 83 S.E. 109 (1914); *Connelly v. Nashville*, 100 Tenn. 262 (1898); *McCrary v. Rome*, 29 Ga. A. 384, 115 S.E. 283 (1923); *Wyatt v. Henderson*, 222 Ky. 292, 300 S.W. 921 (1927). Notes, L.R.A. 1915C 741, 14 A.L.R. 1473, 32 A.L.R. 988, 51 A.L.R. 575, 52 A.L.R. 187, 156 A.L.R. 692.

¹²² *Colorado Springs v. May*, 20 Colo. A. 204, 77 Pac. 1093 (1904); *McGarey v. City of New York*, 89 App. Div. 500 (1903). Contra: *Bouchard v. Auburn*, 133 Me. 439, 179 A. 718 (1935).

¹²³ *Birmingham v. Coe*, 31 Ala. A. 538, 20 S. 2d 110 (1944); *Reule v. Chicago*, 268 Ill. A. 266 (1932); *City of Montgomery v. Quinn*, 246 Ala. 154, 19 S. 2d 529 (1944); *Warren v. City of Tupelo*, 187 Miss. 816, 194 S. 293 (1940). But cf. *Miller v. Detroit*, 156 Mich. 630, 121 N.W. 490 (1909). Note, 14 A.L.R. 2d 186.

¹²⁴ *Loughran v. City of New York*, 298 N.Y. 320, 83 N.E. 2d 136 (1948) noted in 1 Syracuse L. Rev. 141 (1949); *Redmond v. City of Burbank*, 43 Cal. A. 2d 711, 111 P. 2d 375 (1941); *City of Memphis v. McCrady*, 174 Tenn. 162, 124 S.W. 2d 248 (1939). Cf. *Rivard v. Bay City*, 279 Mich. 317, 272 N.W. 690

of ice and snow on sidewalks municipalities are customarily immune,¹²⁵ but if the ice and snow becomes rough or uneven and a pedestrian is injured without his fault the majority of cases today recognize municipal liability, so long as the city knew or should have known of the condition¹²⁶ and had ample time to rectify the condition.¹²⁷ Even here, however, there are contra cases.¹²⁸ When ice has formed from water flowing onto a sidewalk from a permitted eavestrough on a building, the majority of the courts admit municipal liability¹²⁹

Filing of Claim Statutes

In practically all states either by statutory provision or charter requirement a tort claimant against a municipality must file his claim against the city within a relatively short period of time.¹³⁰ These requirements are mandatory and failure to comply will regularly deny recovery.¹³¹ Actual knowledge on the part of city officials is ordinarily held not to dispense with the filing of claim.¹³² Nor can municipal officers waive the statutory or charter

(1937). Notes, 19 VA. L. REV. 748 (1933); 34 GEO. L.J. 522 (1946); 7 MONT. L. REV. 62 (1946); 13 N.C.L. REV. 245 (1935).

¹²⁵ Mayo v. Baraga, 178 Mich. 171, 144 N.W. 517 (1913); Evans v. Concordia, 74 Kan. 70, 85 Pac. 813 (1906); Hopson v. Detroit, 235 Mich. 243, 209 N.W. 161 (1926); Johnson v. Pontiac, 276 Mich. 103, 267 N.W. 795 (1936).

¹²⁶ Templin v. Boone, 127 Iowa 91, 102 N.W. 789 (1905); Smith v. Cloquet, 120 Minn. 50, 139 N.W. 141 (1912); Sayfaus v. Rochester, 113 N.Y.S. 840 (1908); Stanke v. St. Paul, 71 Minn. 51, 73 N.W. 629 (1898); Anderson v. Sioux City, — Iowa — 45 N.W. 2d 845 (1951).

¹²⁷ Chase v. Lowell, 151 Mass. 422, 24 N.E. 212 (1890); Waldron v. Utica, 238 N.Y.S. 401, 228 App. Div. 37 (1930); Swan v. Indiana, 242 Pa. 596, 89 A. 664 (1914); Hawkins v. New York, 66 N.Y.S. 623, 54 App. Div. 253 (1900). Notes, 13 A.L.R. 17, 80 A.L.R. 1151, 97 A.L.R. 14. DeGraff, *Snow and Ice; a discussion of Liability under the Laws of New York*, 21 CORN. L.Q. 436 (1936).

¹²⁸ Jefferson v. Sault Ste. Marie, 166 Mich. 340, 130 N.W. 610 (1911); and see annotations in preceding note.

¹²⁹ Muncie v. Hey, 164 Ind. 570, 74 N.E. 250 (1905); Boyland v. Parkersburg, 78 W. Va. 749, 90 S.E. 347 (1916). *Contra*: Gavett v. Jackson, 109 Mich. 408, 67 N.W. 517 (1896). Note, 97 A.L.R. 14.

¹³⁰ Salm, *Tort Notice of Claims to Municipalities*, 46 DICK. L. REV. 1 (1942); Note, 27 N.C.L. REV. 145 (1948); Note, 3 A.L.R. 2d 711.

¹³¹ City of Birmingham v. Weston, 233 Ala. 563, 172 S. 643, 109 A.L.R. 970 (1937); Douglas v. City of Los Angeles, 5 Cal. 2d 123, 53 P. 2d 353 (1936); McCarthy v. City of Chicago, 312 Ill. A. 268, 38 N.E. 2d 519 (1942); Doyle v. Kammeraad, 310 Mich. 233, 17 N.W. 2d 165 (1945); Doyle v. City of Duluth, 74 Minn. 157, 76 N.W. 1029 (1898); Nevins v. Lexington, 212 N.C. 616, 194 S.E. 293 (1937).

¹³² Hall v. City of Los Angeles, 19 Cal. 2d 198, 120 P. 2d 13 (1942); Harding v. City of Chicago, 290 Ill. A. 598, 7 N.E. 2d 918 (1937); Brewster v. Baker, (T. Civ. A. 1940) 139 S. W. 2d 643.

requirements.¹³³ The general rule requires substantial compliance¹³⁴ but because these claim statutes are often in derogation of the common law they are frequently given a strict construction,¹³⁵ and there is some inclination to ameliorate the requirements of the statute in cases involving the younger minors as well as those physically or mentally incapacitated.¹³⁶ What is necessary in general is that the city be reasonably informed of the time, place and nature of the accident, the character of the injuries, and the amount of damages claimed.¹³⁷

Statutory Changes in Municipal Tort Liability

What is probably the most important single statutory change in municipal tort law is found in the California Public Liability Act of 1923 which provides: "Counties, municipalities and school districts shall be liable for injuries to persons and property on public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county municipality school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, ground, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to

¹³³ *McCall v. City of Birmingham*, 234 Ala. 164, 174 S. 630 (1937); *Hall v. City of Los Angeles*, 19 Cal. 2d 198, 120 P. 2d 13 (1942); *Pender v. Salisbury*, 160 N.C. 363, 76 S.E. 228 (1912); Note, 31 *MINN. L. REV.* 751 (1947); Notes, 82 *A.L.R.* 749; 153 *A.L.R.* 329.

¹³⁴ *Jones v. Savannah*, 52 Ga. A. 537, 184 S.E. 353 (1936); *Koontz v. City of St. Louis*, 230 Mo. A. 128, 89 S.W. 2d 586 (1936); *Duschaine v. City of Everett*, 5 Wash. 2d 181, 105 P. 2d 18, 130 *A.L.R.* 134 (1940); *Peacock v. Greensboro*, 196 N.C. 412, 146 S.E. 3 (1928).

¹³⁵ *Mayor of City of Buford v. Light*, 65 Ga. A. 99, 15 S.E. 2d 459 (1941); *Sherfey v. City of Brazil*, 213 Ind. 493, 13 N.E. 2d 568 (1938).

¹³⁶ *Costello v. City of Aurora*, 295 Ill. A. 510, 15 N.E. 2d 38 (1938); *Briggs v. Village of Peekskill*, 19 N.Y.S. 2d 11, 259 App. Div. 819 (1940); *Adonmino v. Village of Mt. Morris*, 12 N.Y.S. 2d 658, 171 Misc. 383 (1939); *Foster v. Charlotte*, 206 N.C. 528, 74 S.E. 412 (1934). However, it has been said that the weight of authority holds non-compliance unexcused because of injury or insanity. Notes, 31 *A.L.R.* 619, 59 *A.L.R.* 411, 109 *A.L.R.* 975. See also Note, 17 *CORN. L.Q.* 867 (1932); and Note, 36 *MICH. L. REV.* 502 (1938).

¹³⁷ *Maise v. City of Gadsden*, 232 Ala. 82, 166 S. 795 (1936); *City of Indianapolis v. Evans*, 216 Ind. 555, 24 N.E. 2d 776 (1940); *Harder v. City of Minneapolis*, 40 Minn. 446, 42 N.W. 350 (1889); *Hampton v. City of Duluth*, 140 Minn. 303, 168 N.W. 20 (1918). Note, 27 *N.C.L. Rev.* 145, 149 (1948).

protect the public against such dangerous or defective condition."¹³⁸ This has been followed by a number of other "safe place" statutes the effect of which is almost as great as the California Act.¹³⁹ And many states have passed statutes making municipal corporations liable for defective construction of city streets and sidewalks.¹⁴⁰ Municipal liability has frequently been further expanded by statutes making municipalities liable for the negligent operation of city-owned vehicles,¹⁴¹ as well as by more limited statutes imposing liability upon municipal corporations for negligence in the operation of carriers of school children.¹⁴²

There are numerous state statutes making municipalities and counties liable for personal and property damage of mobs within their boundaries.¹⁴³ Typical is the Kansas statute which provides that "all incorporated cities and towns shall be liable for all damages that may accrue in consequence of the action of mobs within their corporate limits, whether such damage shall be the destruction of property or injury to life or limb." ¹⁴⁴ Further less frequent examples of statutory expansion of municipal tort

¹³⁸ Cal. Stat. 1923, p. 675; Cal. Genl. Laws (Deering 1937), act 5619.

¹³⁹ e.g. Wis. Stat. 1933, ss. 101.01, 101.06, applied in *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922 (1940). Annotation, 114 A.L.R. 428.

¹⁴⁰ e.g. Mass. Laws Ann. (1932), c. 84, ss. 1, 15; West Virginia Code 1887, sec. 53, ch. 43, applied in *Chapman v. Milton*, 31 W. Va. 384, 7 S.E. 22 (1888); 25 A.J., Highways, sec. 349, n. 16.

¹⁴¹ New York Highway Law, sec. 282G, applied in *Miller v. New York*, 257 N.Y.S. 33, 235 App. Div. 259 (1932); New York Gen. Mun. Law, sec. 50-b, sec. 205; Ohio Code (1936), sec. 3714-1, California Civil Code (Deering 1931), sec. 1714¼; Illinois Laws (1931), p. 618; Wisconsin Laws (1929) c. 77, applied in *Schumacher v. Milwaukee*, 209 Wis. 43, 243 N.W. 756 (1932); *MICH. C.L.* (1948), sec. 691.141. Note, *Municipal Liability for Motor Vehicle Torts*, 10 *TEMPLE L.Q.* 75 (1935). Notes, 4 A.L.R. 361, 61 A.L.R. 866, 88 A.L.R. 174, 89 A.L.R. 394, 112 A.L.R. 416, 114 A.L.R. 428.

¹⁴² Conn. Laws (1927), c. 209; Washington Remington Rev. Stat., ss. 950, 951, applied in *Briscoe v. School District*, 32 Wash. 2d 353, 201 P. 2d 697 (1949); Oregon Laws Supp. (1921-1927) s. 4.

¹⁴³ Illinois Smith-Hurd Stats, c. 38, ss. 512-7, applied in *Anderson v. Chicago*, 313 Ill. A. 616, 40 N.E. 2d 601 (1942); New Jersey Stat. Ann. ss. 2:63-1, 2:152-1, applied in *Hailey v. City of Newark*, 22 N.J. Misc. 139, 36 A. 2d 210 (1944); New York Gen. Mun. Law, sec. 71, applied in *Finkelstein v. City of New York*, 47 N.Y.S. 2d 156, 182 Misc. 271 (1944); Rhode Island Gen. Laws (1923), c. 396, s. 10, applied in *Goldman v. Quinn*, 60 R.I. 335, 198 A. 549 (1938); Wis. Stat. (1933), ss. 66.07(1,4), applied in *Northern Assn. Co. v. City of Milwaukee*, 227 Wis. 124, 277 N.W. 149 (1938). Note, *Communal Liability for Mob Violence*, 49 *Harv. L. Rev.* 1362 (1936); Note, *Liability of the Municipality for Mob Violence* 6 *Ford. L. Rev.* 270 (1937) (both citing additional statutes). Notes, 13 A.L.R. 751, 23 A.L.R. 297, 44 A.L.R. 1137, 52 A.L.R. 562.

¹⁴⁴ Kansas Gen. Stat. (1935) sec. 12-201, applied in *Maus v. City of Salina*, 154 Kan. 38, 114 P. 2d 808 (1941).

liability can be noted in most states.¹⁴⁵ Only in statutory immunization of liability for torts at municipal airports is there any discernible development contra.¹⁴⁶

Comment

Although an appreciation of the present judicial position requires utilization or at least recognition of the "governmental-proprietary" dichotomy it is concededly unserviceable as a guide to decision and it is suspected that it is a trap to mechanical adjudication. It has been suggested that it be discarded and municipalities held liable for all torts.¹⁴⁷ This extreme position seems unwise. To hold a municipal corporation liable for the so-called legislative torts would so effectively stifle legislative initiative in an area where individual injury is very meager and is to this author quite unsound social engineering. Contrariwise, it has been held that municipalities should be immune from all tort liability in the absence of legislative mandate to the contrary.¹⁴⁸ It is easy to comprehend the view of a court that so decides as well as the analogous judicial determination of non-liability in particular tort situations. The shifting of risk and loss from the individual to the group is one of the greatest problems in any socio-political structure and it is understandable that in a democracy especially the judiciary should consider this a responsibility of the legislature with its far superior facilities for discovering societal needs and weighing social forces.

¹⁴⁵ Kansas Gen. Stat. (1935) sec. 21-2155 making city liable for injuries by intoxicated persons. At least six states make municipalities liable for damages inflicted by animals. Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, 110 (1932). Illinois by statute imposes liability for acts of firemen. Ill. Stat. Ann. (Smith-Hurd 1934) c. 70, sec. 9, applied in *Bryan v. City of Chicago*, 371 Ill. 64, 20 N.E. 2d 37 (1939). MacDonald, *The Administration of a Tort Liability Law in New York*, 9 L.&C.P. 262 (1942). And see Borchart, *Proposed State and Local Statutes Imposing Public Liability in Tort*, 9 L.C.P. 282 (1942).

¹⁴⁶ Alabama Laws (1931), No. 136, sec. 5; Iowa Laws (1929), ch. 138, sec. 9; North Dakota Laws (1931), ch. 92, sec. 2; South Carolina Acts (1929), No. 562, ss. 1, 2; Texas Laws (1929 Reg. Sess.) ch. 281, sec. 1, Wis. Laws (1929), ch. 464, sec. 1.

¹⁴⁷ Borchart, *Government Liability in Tort*, 34 Yale L.J. 1, 129, 229 (1924), 36 Yale L.J. 759, 1039 (1926); Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1935); Harno, *Tort Liability of Municipal Corporations*, 4 Ill. L.Q. 28 (1921); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437 (1941); *Kaufman v. Tallahassee*, 84 Fla. 634, 94 S. 697 (1922); *Fowler v. City of Cleveland*, 100 Oh. St. 158, 126 N.E. 72 (1919).

¹⁴⁸ *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911).

Thus the task of attaching municipal tort liability is for the legislature,¹⁴⁹ assuming — and this is almost unquestioned¹⁵⁰ — that the ethical code of our culture demands compensation by the group for individual damage at the hands of the state. There is little likelihood that states will make cities of all sizes completely liable for municipal torts. There is a far greater probability that the desirability of adopting the aforementioned safe place, street and sidewalk, vehicle, and mob liability statutes can be impressed upon the legislatures of more states. Model statutes have been prepared after much study by Professor Borchard from the experiences with individual present enactments¹⁵¹ and they deserve careful consideration and adoption.

There are instances in which municipalities have indirectly absorbed the loss from torts by their employees by reimbursing the latter for judgments against them,¹⁵² but this is discretionary and unsatisfactory. And there are other instances in which municipalities have voluntarily assumed a direct liability¹⁵³ but they are so rare as to be insignificant.

Statutes imposing further municipal tort liability may point the way but the social objective may often fail when juries of tax payers too readily find contributory negligence or assumption of risk, and there seems to be such an inclination when the defendant municipality is a small community. Further consideration must be given to this problem as admittedly sizable tort judgments will

¹⁴⁹ Smith, *Municipal Tort Liability*, 48 Mich. L. Rev. 41, 47 (1949); Tooke, *The Extension of Municipal Liability in Tort*, 19 Va. L. Rev. 97, 108 (1932); Lloyd, *Municipal Tort Liability in New York — a Legislative Challenge*, 23 N.Y.U. L.Q. Rev. 278 (1948); *Scibilia v. Philadelphia*, 279 Pa. 549, 560, 124 A. 273, 277 (1924); *McGraw v. Rural H.S. Dist.*, 120 Kan. 413, 414, 243 Pac. 1038 (1926); *Erickson v. West Salem*, 205 Wis. 107, 236 N.W. 579 (1931).

¹⁵⁰ "To adhere to the ancient rule in the presence of existing relations would seem to involve the obvious contradiction that the state, which is formed to protect society, is under no obligation, when acting for itself, to protect an individual member of society." *Fowler v. City of Cleveland*, 100 Oh. St. 158, 166, 126 N.E. 72, 75 (1919). See also: Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 461 (1941); Repko, *American Legal Commentary on Doctrines of Municipal Tort Liability*, 9 L.C.P. 214, 233 (1942); Borchard, *op. cit.* note 147. Smith, *op. cit.* note 149.

¹⁵¹ Borchard, *op. cit.* note 145.

¹⁵² So authorized by Minnesota Laws (1929) ch. 81, sec. 1. Peterson, *Government Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 854 (1942); Massachusetts Laws Ann. (Supp. 1940), c. 41, sec. 100A. *Hixon v. Sharon*, 190 Mass. 347, 76 N.E. 909 (1916); *Sherman v. Carr*, 8 R.I. 431 (1867); *State v. St. Louis*, 174 Mo. 125, 73 S.W. 623 (1903). Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437, 451 (1941).

¹⁵³ *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933); Comment, *Municipal Responsibility for the Torts of Policemen*, 42 Yale L.J. 241 (1932).

be disastrous to the less populated municipality¹⁵⁴ Beyond statutory increase in tort liability further consideration must be given to the idea of pooling the risks of small cities and villages or shifting municipal loss to the state upon payment of a nominal sum per person or assessed valuation. This seems to offer the most socially desirable means of doing justice to the injured individual while protecting the integrity of the smaller community.

¹⁵⁴ A valuable study is by Warp, *Tort Liability Problems of Small Municipalities*, 9 L.&C.P. 363 (1943).