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# Local Government Responsibility In Tort In Louisiana

JEFFERSON B. FORDHAM\* AND WILLIAM T. PEGUES\*\*

The American perversion<sup>1</sup> of the old English maxim that the king can do no wrong is a conception of public irresponsibility against which one's moral sense rebels. That government is above the law is a notion that is hardly consistent with the doctrine of supremacy of law which has so long been taken as a basic tenet in our democratic faith. Yet the ancient immunity still obtains in this state in all its vigor; there is no legal responsibility in tort on the part of the state or the agencies of the state government for injury to the person or damage to the property of the individual citizen.<sup>2</sup>

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1. Doubtless the most thorough study of the subject of "governmental responsibility in tort" is to be found in the series of articles under substantially that title, by Professor Borchard, which appeared in (1924-25) 34 Yale L. J. 1, 129, 229 and (1926) 36 Yale L. J. 1. At 36 Yale L. J. 37 Borchard sums the "king can do no wrong" business up as follows:

"The fact is that the unitary character of the sovereign in England, the refusal since Coke's time to see in the king a dual personality, personal and political and the refusal to regard the crown as a corporation, have brought innumerable anomalies in the law governing remedies against the crown. The imputation to the State in England of the infallibility of the personal king, though without warrant in history or logic, can possibly be explained on the evolutionary ground that the king did once dispense justice in person and chose his own servants. Even this shadow of justification for an archaic rule is inapplicable in the United States, where it nevertheless flourishes and finds occasional support. Hardly a modern publicist or student of the subject can now be found, however, who does not agree with Maitland's well-known observations: '. . . it is a wholesome sight to see "the crown" sued and answering for its torts.'"

2. *Orgeron v. Louisiana Power & Light Co.*, 19 La. App. 628, 140 So. 282 (1932), cert. denied May 23, 1932; *Omes v. Department of Conservation of Louisiana*, 187 So. 342 (La. App. 1939); *Lewis v. State*, 200 So. 265 (La. 1941). In the *Omes* case the court made this astounding statement: "That the State of Louisiana or a political subdivision thereof cannot be sued, ex delicto, does not admit of argument." The reference to a political subdivision must have been an inadvertence. A municipality is clearly such, yet, as we shall see, there are many situations in which it may be sued ex delicto.

The courts have uniformly held that provision by statute that a state department or agency shall have all rights, powers and immunities incident to corporations or even that they may sue and be sued, does not amount to legislative consent to actions ex delicto brought by an employee or a third person against such an arm of the state. For recent decisions, see Fouchaux

It is a heartening circumstance that Judge Janvier of the Orleans Court of Appeal recently reexamined the ancient doctrine in the light of modern governmental operations and found it seriously wanting.<sup>3</sup> He recognized that institutionalization of the risk of injuries to the individual arising out of governmental operations was more responsive to the social consciousness of our day. And the fact that his court, not a tribunal of last resort, felt compelled to follow the established rule of immunity in considering the case before it does not despoil his critique of vitality.

In the face of this immunity the injured party is left to such remedies as the law may provide against the individual employee or official at whose hands he sustained the injury. If the case were one where he had been run down by the driver of a highway commission truck he would have the empty satisfaction of knowing he could hold the truckdriver in damages for his negligence; presumably the defendant would lack the requisite financial responsibility to satisfy the judgment. In such a case the legislature, out of the goodness of the hearts of the members, might pass a special law pursuant to Section 35 of Article III of the constitution authorizing the victim to bring an action against the state and duly providing a method of procedure and the effect of such a judgment as might be rendered in the action. Once the victim obtained a judgment in the action, it may be assumed, of course, that the legislature would in good faith appropriate funds for its payment.

This, in brief, is the background of sovereign immunity in the perspective of which we approach the subject of local government responsibility in tort.

In Louisiana, liability in tort can be imposed only where it is expressly or impliedly authorized by the Civil Code or other statutes of the state.<sup>4</sup> The basic general principles of such liability are embodied in codal articles as follows:

“Every act whatever of man that causes damages to another, obliges him by whose fault it happened to repair it. . . .

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v. Board of Com'rs of Port of New Orleans, 186 So. 103 (La. App. 1939), affirmed on other grounds, 193 La. 182, 190 So. 373 (1939), cert. denied 308 U.S. 554, 60 S. Ct. 112, 84 L. Ed. 466 (1939); *Omes v. Department of Conservation of Louisiana*, *supra*.

See generally Freund, *Responsibility of the State in Internal (Municipal) Law* (1934) 9 *Tulane L. Rev.* 1.

3. *Orgeron v. Louisiana Power & Light Co.*, 19 La. App. 628, 140 So. 282 (1932).

4. *Semple v. Buhler*, 6 Mart. (N.S.) 665 (La. 1828); *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937); *Gott v. Scott*, 199 So. 460 (La. App. 1940), cert. and review denied January 6, 1941.

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

"We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody . . . ."<sup>5</sup>

Very early in the history of our jurisprudence the supreme court declared that private corporations, like natural persons, were responsible in tort "for every injurious act on their part, from which the law has not specially exempted them."<sup>6</sup> It is to be noted that the codal articles relating to corporations do not make any distinction with respect to tort liability between a municipal corporation and any other kind of corporate entity, either political or civil,<sup>7</sup> nor is there anything in Article 2315 of the Civil Code, or in its companion articles, which excepts any political corporation from the general provisions making anyone liable for the results of his fault.<sup>8</sup>

Article 660 of the Civil Code, which relates to the servitude due by a lower estate to receive the natural flow of waters from the estate above, declares that the proprietor below may not obstruct the natural flow and the proprietor above may not increase the burden of the servitude. It is not without significance that this article has been applied indiscriminately to private individuals and to local governmental units as proprietors.<sup>9</sup> Article 2315 has been relied upon in awarding damages against a city as a lower proprietor which had obstructed the natural drainage.<sup>10</sup>

In an old case involving the unlawful appropriation of an

5. Arts. 2315, 2316, 2317, La. Civil Code of 1870.

6. *Rabassa v. Orleans Navigation Co.*, 5 La. 461, 464 (1833).

7. Arts. 427-447, La. Civil Code of 1870.

8. Cf. *Orgeron v. Louisiana Power & Light Co.*, 19 La. App. 628, 140 So. 282 (1932). It is significant that in *City of New Orleans v. Christmas*, 17 Fed. 483 (E.D. La., 1883), reversed 131 U. S. 191, 9 S. Ct. 745, 33 L. Ed. 99 (1889), the lower court held that Article 2315 of the Civil Code applied to municipal corporations. The decision was reversed on other grounds by the Supreme Court.

9. *Bowman v. City of New Orleans*, 27 La. Ann. 501 (1875); *Petite Anse Coteau Drainage Dist. v. Youngsville Drainage Dist. of Parish of Lafayette*, 146 La. 161, 83 So. 445 (1919); *Ogden v. Police Jury of East Baton Rouge Parish*, 166 La. 869, 118 So. 65 (1928); *Chandler v. City of Shreveport*, 169 La. 52, 124 So. 143 (1929); *Adams v. Town of Ruston*, 194 La. 403, 193 So. 688 (1940) (The repeated reference in the opinion to Art. 600 of the Civil Code was an inadvertence because the context could relate only to Art. 660). Cf. *Thibodaux v. Town of Thibodaux*, 46 La. Ann. 1528, 16 So. 450 (1894).

10. *Bowman v. City of New Orleans*, 27 La. Ann. (1875).

individual's stone ballast for street purposes a city was held liable in damages under the tort article of the Civil Code of 1825 corresponding to the present Article 2315.<sup>11</sup>

It appears that down to 1854 the Supreme Court of Louisiana, in the negligence cases at least, did not distinguish between a municipality and a private individual as a wrongdoer in applying the basic principles of tort liability.<sup>12</sup> The case of *Stewart v. City of New Orleans*,<sup>13</sup> decided in that year, marked the turning point away from this wholesome rule. Without even mentioning the earlier Louisiana cases, the majority opinion, largely in reliance upon a decision of a lower New York court, embraced the well-known modern doctrine of municipal immunity where the injury arose out of the performance of a *governmental* or *public* as distinguished from a so-called *corporate* or *proprietary* function of the municipality.<sup>14</sup> Of further significance, however, is the fact that only two of the five judges of the Louisiana Supreme Court

11. *Millspaugh v. City of New Orleans*, 20 La. Ann. 323 (1868).

12. *Mayor v. Peyroux*, 6 Mart. (N.S.) 155 (La. 1827); *Lambeth v. The Mayor*, 6 La. 731 (1834); *M'Gary v. The President and Council of the City of Lafayette*, 12 Rob. 688 (La. 1846); 12 Rob. 674 (La. 1846); *McGary v. The City of Lafayette*, 4 La. Ann. 440 (1849); *Johnson v. Municipality No. One*, 5 La. Ann. 100 (1850). Indeed, in one early case punitive damages were awarded against the municipality. *McGary v. The City of Lafayette*, 4 La. Ann. 440, 441 (1849). Cf. *Moore v. The Mayor of Shreveport*, 3 La. 645 (1848).

13. 9 La. Ann. 461 (1854). In this case police officers of the city, acting pursuant to orders to suppress unlawful assemblages of slaves in cabarets, entered a dram shop in which plaintiff's slave was discovered, and, in attempting to capture him, inflicted wounds that proved fatal. An action for the value of the slave was brought against the city, but plaintiff's initial success in the trial court proved abortive, for, on appeal, the supreme court rendered judgment for the city. Other early cases against the municipality which at least smacked of tort involved the sufficiency of allegations in petitions seeking recovery of the value of slaves whose loss was occasioned by the negligence of municipal employees. The issues were decided upon principles governing the bailment relationship rather than upon those relating to tort under the pertinent codal articles. *Chase v. Mayor*, 9 La. 343 (1836); *Clague v. City of New Orleans*, 13 La. Ann. 275 (1858).

14. The distinction has been repudiated in South Carolina and Ohio but the Ohio case has been overruled. *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228, 36 L.R.A.(N.S.) 363 (1911); *Fowler v. City of Cleveland*, 100 Ohio St. 158, 126 N.E. 72, 9 A.L.R. 131 (1919); and *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164, 27 A.L.R. 1497 (1922) (overruling the *Fowler* case). In the *Irvine* case the court put the matter as follows:

"After much consideration of the authorities in this State and elsewhere it seems to us the more logical conclusion that the Courts should not undertake to say that any functions of a municipal corporation are private and not governmental, but on the contrary should hold that municipal corporations are created solely for public and governmental purposes, and that all powers granted to them by the General Assembly under the sanction of the Constitution are to be exercised as public and governmental functions for the benefit of the municipal community. Indeed this view of powers granted is required by the definition of a municipality, for an essential part of the definition is that the charter be granted for the purpose of subordinate self-government." (89 S.C. at 518, 72 S.E. at 230, 36 L.R.A. (N.S.) at 367.)

concurred in the majority opinion. The third judge concurred simply in the conclusion that the municipal government was not liable in the case. Two judges dissented. Thus, the rationalization of the result did not by the *Stewart* case become a part of the jurisprudence of the state because it was not embraced by a majority of the court.

It was not until 1857 that what we take the liberty of calling the governmental versus proprietary doctrine was approved by a majority of the Supreme Court of Louisiana, in *Lewis v. City of New Orleans*,<sup>15</sup> as the governing principle to be applied in determining the tort liability of municipalities.

This qualified doctrine of immunity from tort liability had its basis in the conception of a municipality as an arm of the state government exercising portions of the powers of the sovereign and thus sharing its immunity. The qualification comes about by confining the immunity to what are considered the strictly governmental functions of the municipality; only they reside under the protecting mantle of sovereign immunity. What is striking about this development, so far as Louisiana is concerned, is that whereas in the common law states the distinction between governmental and proprietary functions was seized upon largely as a means of limiting the field of immunity and correspondingly expanding the field of liability, its introduction into Louisiana worked just the other way. In Louisiana the doctrine of immunity had not previously been recognized at all. It affords an interesting instance of borrowing from a foreign legal system which has proved to be retrogressive.

Today the principle of municipal immunity from liability is said by one of the courts of appeal to be predicated upon a public policy of not diverting public funds, dedicated for a specific purpose, to the payment of damages for redress of injuries caused through the negligent performance of the public function.<sup>16</sup> On the other hand, the following language from the opinion in the recent case of *Clinton v. City of West Monroe*<sup>17</sup> harks back to the old basis:

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15. 12 La. Ann. 190 (1857).

16. *Rome v. London & Lancashire Indemnity Co. of America*, 169 So. 132, 136 (La. App. 1936). The payment of a workman's compensation claim from public funds of a parish school board has been held not to violate any constitutional inhibitions against the diversion of public funds for private purposes. *Kroncke v. Caddo Parish School Board*, 183 So. 86 (La. App. 1938), cert. and review denied August 5, 1938. The same view would appear to be as eminently sound in the case of payment of a judgment for damages *ex delicto*.

17. 187 So. 561, 564 (La. App. 1939), cert. and review denied March 6, 1939.

"... when a municipality, the creature of the state exercises powers and functions purely governmental in their nature, it is simply discharging duties which inhere in and are primarily incumbent upon the state. The municipality in such circumstances, acts as the agent of the state, the representative of sovereignty, and is immune from liability for damages caused by its own public agents or servants."

It is an oft-repeated proposition in Louisiana jurisprudence that municipal corporations are dual personalities leading double lives. The notion is that, on the one hand, they perform functions that are of a public or governmental nature and that, on the other hand, they carry on so-called private, proprietary or corporate functions. It is only as Dr. Jekyll that they enjoy sovereign immunity.

It may be profitable to dip into the cases before examining these theories critically.

## I. MUNICIPAL CORPORATIONS

### *Governmental Functions*

The governmental-function immunity has been extended in this state to police activities,<sup>18</sup> to such matters as the operation of an elevator in a municipal criminal court building,<sup>19</sup> to the operation of a free garbage collection service,<sup>20</sup> to the operation and maintenance of public parks,<sup>21</sup> swimming pools,<sup>22</sup> and school sys-

18. *Stewart v. City of New Orleans*, 9 La. Ann. 461 (1854) (unlawful killing by police of slave attempting to escape arrest); *Lewis v. City of New Orleans*, 12 La. Ann. 190 (1857) (neglect of city jail keeper to care for imprisoned slave, resulting in latter's death); *City of New Orleans v. Kerr*, 50 La. Ann. 413, 23 So. 384 (1898) (illegal arrest and imprisonment by police); *Jones v. City of New Orleans*, 143 La. 1073, 79 So. 865 (1918) (unlawful killing of a person attempting to escape arrest, by city policemen assigned to special duty with city's railway system); *Joliff v. City of Shreveport*, 144 La. 62, 80 So. 200 (1918) (unlawful raid on a private establishment by city police while "apparently acting in the discharge of their duties"). See *Martin v. Magee*, 179 La. 913, 919, 155 So. 433, 434 (1934).

19. *Howard v. City of New Orleans*, 159 La. 443, 105 So. 443 (1925).

20. *Manguno v. City of New Orleans*, 155 So. 41 (La. App. 1934), wherein the action arose out of an accident caused by the uncoupling of a trailer attached to a garbage truck being operated by the city's employee within the scope of his employment. The responsibility of a city to a lessor for the care of property used in garbage removal is on a different footing, however. A city has been held liable for damage to such property due to the negligence of its employees. *Interstate Transp. Co. v. City of New Orleans*, 52 La. Ann. 1859, 28 So. 310 (1900).

21. *Godfrey v. City of Shreveport*, 6 La. App. 356 (1927), involving an action seeking damages for injuries caused when a child used a defective slide in a city park; *Loustalot v. New Orleans City Park Improvement Ass'n*, 164 So. 183 (La. App. 1935), involving an attempt to recover damages for injuries caused by a falling pole which was being used in a May Day balloon ascension sponsored by the city park association with admission free.

22. See *Rome v. London & Lancashire Indemnity Co. of America*, 169 So.

tems not operated for pecuniary profit or gain,<sup>23</sup> and to the illegal enforcement of police regulations, as, for instance, an ordinance for the impounding of an automobile improperly parked on a street.<sup>24</sup>

In principle it would seem that the immunity would extend to the activities of a municipal fire department. Nevertheless, liability was imposed, apparently under the doctrine of *respondeat superior*, in a case where a pedestrian was injured when knocked down on the sidewalk by a team of untrained horses hitched to a fire engine.<sup>25</sup> But the supreme court has indicated that it does not consider this decision a precedent on the point.<sup>26</sup>

Under the general rule that a municipal corporation is not liable for the torts of its employees while in the exercise of a so-called governmental function, municipalities in Louisiana are not subjected to liability for personal injuries or death caused by mob action where there is a refusal or neglect of municipal officers to perform their legal duties to maintain order. Thus, where a town marshall refused or failed to protect private property from mob action after the owner's request, which resulted in the owner's death in an attempt to defend it, an exception of no cause of action was sustained as to the marshall and the town

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132, 136 (La. App. 1936), involving the death of a child allegedly caused by the negligent operation of a municipal swimming pool which, it was held, was not operated for profit, a small fee being charged as merely incidental to maintenance.

23. *Floyes v. City of Monroe*, 194 So. 102 (La. App. 1940), involving a situation where a student was injured as a result of falling into a depression in front of a water cut-off box on the campus of a public school operated and maintained by the city.

24. *Roach v. City of Shreveport*, 8 La. App. 339 (1928).

A city ordinance authorized the city commissioner of public works to notify the owner of a burned building to demolish it as a requirement of public safety. The court held that the failure of the commissioner to give notice did not render the city liable because (1) the ordinance did not require notice to be given, and (2) the failure and neglect to give notice was not the proximate cause of the injury as demolition of the building was in progress at the time of the accident and the falling of the cornice resulted from the condition of partial demolition rather than from the fire. The governmental function argument was not mentioned, although it is difficult to think of any case where it would more clearly apply; enforcement of regulations ordained under the police power is plainly governmental business. *Marshall v. Louisiana Rice Milling Co.*, 144 La. 828, 81 So. 331 (1918).

25. *Martin v. Board of Fire Com'rs for City of New Orleans*, 132 La. 188, 61 So. 197 (1913). Cf. *Yule v. City of New Orleans*, 25 La. Ann. 394 (1873), involving an action ex contractu growing out of loss by fire.

26. *Howard v. City of New Orleans*, 159 La. 443, 448, 105 So. 443, 445 (1925). The failure to provide water for fire protection has been shielded by the governmental function label. See *Planters' Oil Mill v. Monroe Waterworks and Light Co.*, 52 La. Ann. 1243, 27 So. 684 (1900). See also *Allen & Currey Mfg. Co., Ltd. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 880 (1904), overruling the *Planters'* case on a separate point.



in reliance on the governmental function notion.<sup>27</sup> Likewise it has been held that an action was not maintainable under Article 2315 of the Civil Code for alleged wrongful death by a member of a mob as a result of the negligence of city police.<sup>28</sup> It has also been held that no action lay against the mayor and councilmen of a city individually for injuries inflicted by a mob where it was not alleged that they were present, aiding and abetting the mob, or that they or either of them inflicted the wounds.<sup>29</sup>

It has been stated that, in the absence of statute, there can be no municipal liability for the destruction of private property by mobs since the duty to preserve order is a governmental one.<sup>30</sup> But in this jurisdiction there has long been a statutory qualification of the immunity doctrine in this type of case. The statute so far breaks down the immunity as to provide for liability by the "different municipal corporations of this state . . . for the damages done to property by mobs or riotous assemblages in their respective limits."<sup>31</sup> The statute has been held inapplicable to parishes.<sup>32</sup> A municipality legally divested of the control and management of its police force has been held liable under the statute.<sup>33</sup>

It is clear from the language of this old statute that it does not apply to personal injuries, and under the decisions on the subject, it will be seen that the usual immunity with respect to police action or inaction is extended to the case where one is injured or killed by a mob. Thus, we have the bizarre situation of municipal immunity where the very life of a citizen is involved, but municipal liability where his hen-house or any other property has been damaged. Surely direct human values should not be so lightly regarded.<sup>34</sup>

27. *Rush v. Town of Farmerville*, 156 La. 857, 101 So. 243 (1924).

28. *Gianforte v. City of New Orleans*, 61 Fed. 64, 24 L.R.A. 592 (E.D. La., 1894); *City of New Orleans v. Abbagnato*, 62 Fed. 240 (C.C.A. 5th, 1894).

29. *Spalding v. Kreider*, 26 La. Ann. 743 (1874).

30. *Gianforte v. City of New Orleans*, 61 Fed. 64, 24 L.R.A. 592 (E.D. La., 1894).

31. La. Rev. Stats. of 1870, § 2453 [Dart's Stats. (1939) § 5369].

32. *Fischer Land & Improvement Co. v. Bordelon*, 52 La. Ann. 429, 27 So. 59 (1899).

33. *Williams v. City of New Orleans*, 23 La. Ann. 507 (1871). Cf. *Street v. City of New Orleans*, 32 La. Ann. 577 (1880). In 1874, citizens had for a brief period wrested the reins of state and city government from a carpetbag regime and had done considerable damage to private property in the process. The court refused to label them a mob or riotous assembly and thus to hold the city of New Orleans liable.

34. As to ascertainment and mitigation of damages under the statute, see *Fortunich v. City of New Orleans*, 14 La. Ann. 115 (1859); *Fink v. City of New Orleans*, 110 La. 84, 34 So. 138 (1903).

*Proprietary or Corporate Functions*

Louisiana adheres to the generally approved corollary doctrine that municipal corporations in the performance of what are determined to be corporate, private or proprietary functions, as distinguished from governmental activities, are liable in tort substantially on the same basis as private parties engaged in like functions or pursuits. Among municipal functions characterized as corporate or proprietary, are the ownership and operation of public utilities. Within this class fall electric systems,<sup>35</sup> natural gas distribution systems<sup>36</sup> and transportation systems.<sup>37</sup>

Without any reference to the governmental versus proprietary test, it has been held that a petition alleging, in brief, that sewage from a municipal sewerage system was forced back by some unknown cause through the sanitary facilities on plaintiff's premises with damaging results, despite clever mechanical gadgets installed by him to cope with the problem, stated a cause of action.<sup>38</sup> The court invoked *res ipsa loquitur*. In another case judgment was recovered for personal injuries resulting from negligence of the New Orleans sewerage and water board in connection with the construction of one of its projects.<sup>39</sup> It does not appear from the report of the case what the nature of the work being done was, that is, whether it related to sewer lines or to

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35. *Bonnin v. Town of Crowley*, 112 La. 1025, 36 So. 842 (1904); *Borrell v. Cumberland Telegraph and Telephone Co.*, 133 La. 630, 63 So. 247 (1913); *Elias v. Mayor and Board of Trustees of City of New Iberia*, 137 La. 691, 69 So. 141 (1915); *Bannister v. City of Monroe*, 4 La. App. 182 (1926); *Hart v. Town of Lake Providence*, 5 La. App. 294 (1927); *Lawn v. City of Monroe*, 8 La. App. 541 (1928); *Oliphant v. Town of Lake Providence*, 193 La. 675, 192 So. 95 (1939). No point has been made in these cases of the purpose for which electricity was being supplied. We think the purpose immaterial but there are cases elsewhere in which the function of providing electricity for municipal buildings or public places, as distinguished from serving private consumers, was deemed immune. See *Borchard*, *supra* note 1, at 34 *Yale L.J.* 253, n. 330.

36. *Phillips v. City of Alexandria*, 11 La. App. 228, 123 So. 510 (1929).

37. *Davis v. New Orleans Public Belt R.R.*, 155 La. 504, 99 So. 419, 31 A.L.R. 1303 (1924); *Solomon v. City of New Orleans*, 156 La. 629, 101 So. 1 (1924); *Mask v. City of Monroe*, 9 La. App. 431, 121 So. 250 (1928), holding city liable for personal injuries and damages to automobile by city-operated bus; *Young v. City of New Orleans*, 14 La. App. 306, 129 So. 247 (1930), applying last clear chance doctrine although not discussing nature of city's function in operating railroad; *Johnson v. City of Monroe*, 164 So. 456 (La. App. 1935).

38. *Urban Land Co. v. City of Shreveport*, 182 La. 978, 162 So. 747 (1935). It should be noted that the court held, in effect, that plaintiff had sufficiently alleged negligence in the operation of the system for it expressed approval of the conventional formula that a municipality is liable for damages arising out of negligent operation of a sewerage system but not for those occasioned by any defect or inadequacy in the plan or construction of the system.

39. *Quayle v. Sewerage and Water Board*, 131 La. 26, 58 So. 1021 (1912).

water mains, for example. Whether a sewerage system is a public utility or not, that the immunity principle should not be applied to its operation seems clear enough.

The power of a city to provide a supply of water has been labeled legislative and governmental in a case where recovery for the amount of a fire loss allegedly due to an inadequate water supply was denied. But there the city did not have a water system of its own; it had contracted with a private company for a water supply and, notwithstanding the broad language used, the court may yet come along and say that a water supply for one purpose, such as fire protection, is governmental, whereas, for another, such as domestic use, it is corporate.<sup>40</sup> We hope not. We think that a municipal water supply for any purpose is public business. We simply do not regard "public business" as synonymous with "irresponsibility."

The pragmatist who frowns upon the immunity rule, no doubt would get unmixed satisfaction from the judicial resort to the factor of operation for a profit as a device by which to make further incursions into the domain of immunity. But it has additional significance; it holds up before the light the flimsy texture of the whole governmental versus proprietary business.

The fruits of the device readily appear. As we have seen, ordinary park operation is deemed governmental, but enter the profit factor, as in the case of operation of a golf course or a swimming pool on a fee basis and, presto, the city has gone into business with at least the attendant risk of tort liability.<sup>41</sup>

### *The Rationale of the Distinction*

If the test of immunity is the character of the function, how

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40. *Planters' Oil Mill v. Monroe Waterworks and Light Co.*, 52 La. Ann. 1243, 27 So. 684 (1900). For discussions of decisions in other states see Borchard, *supra* note 1, at 34 Yale L.J. 254, and 6 McQuillin, *Municipal Corporations*. (Rev. ed. 1937) § 2852.

41. *Rome v. London & Lancashire Indemnity Co. of America*, 156 So. 64 (La. App. 1934), affirmed 181 La. 630, 160 So. 121 (1935), reversing 157 So. 175 (La. App. 1934); *Brooks v. Bass*, 184 So. 222 (La. App. 1938).

To state a cause of action against a municipality it has been said that, in addition to alleging municipal operation of an enterprise and the negligence of its employees which caused injury, facts making out the following essentials of liability must be specifically pleaded: (1) that the defendant is a municipality, (2) that the municipality had authority to do the act, (3) that the agent or employee was exercising a legitimate corporate duty, and (4) that the act was not one in the performance of a governmental function. *West Monroe Mfg. Co. v. Town of West Monroe*, 146 La. 641, 83 So. 881 (1920). But see *Tiller v. City of Monroe*, 5 La. App. 473 (1927), holding it unnecessary to allege that the defendant is a municipal corporation on the theory that the court should take judicial notice of its corporate existence where it was designated by its proper name.

can it be that the profit factor makes any difference? Does it automatically convert the function into semi-private business? It is true that the profit to be derived from a light or water system may be an important matter to a given municipality, but the fact still remains that the prime objective of the system is to supply the people with electricity or water. Any net return is incidental. The legislature, moreover, could require that municipal utilities be operated at cost. From the standpoint of tort liability, that is, the problem of who shall bear the risk of the conduct of such a business or activity, are we to be told that the wiping out of the profit element should also obliterate responsibility on the part of the municipality in tort?

That there is nothing ultimate about the distinction between the governmental and proprietary functions of a municipality is indicated by the fact that a given function may be deemed proprietary for purposes of tort law and governmental for other purposes. Not long before the Supreme Court of the United States broke down completely the notion that the salaries of officials and employees of the state and local governments were immune from federal taxation, that Court used the governmental versus proprietary distinction in determining whether the salary of the chief engineer of the Bureau of Water Supply of New York City was subject to federal income taxation. The Court found that the city was engaged in a governmental function even though it sold water for a profit and proceeded to hold that the ancient doctrine of intergovernmental immunity from taxation applied.<sup>42</sup>

Students of local government are becoming more acutely aware that most of the things that a municipality does may properly be described indiscriminately as public services rendered the community, some of which are financed by tax moneys and some in other ways. The significant fact is that the given activity is engaged in on a public basis as distinguished from private enterprise. We must, of course, have first satisfied ourselves that the field is one that government constitutionally may enter. Today there are legitimate and occupied fields of governmental activity hardly dreamed of a generation ago. So far as local government, at least, is concerned, this expansion is responsive to a popular demand for more and better public services.

When we approach the matter from this angle our perspective

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42. *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352, 57 S. Ct. 495, 81 L. Ed. 691 (1937).

should be clearer; it should be easier to see that an attempt to classify the functions of government according to some *a priori* notion embodying such an assumption as that all functions of government are inherently either governmental or proprietary, for purposes of determining who shall bear the risk of injuries to persons and damage to property arising out of the conduct of such functions, is a highly artificial business. It still remains to be demonstrated just what that highly vulnerable distinction has to do with the basic problem of who should bear the risk of the manifold activities of government so far as responsibility for ordinary civil wrongs is concerned.

### *Street and Sidewalk Cases*

There is one important field of municipal activity in which, for purposes of determining tort liability, the distinction between governmental and proprietary functions has broken down. It is evident that if the distinction means anything, the function of providing and maintaining streets and sidewalks is to be regarded as governmental. It is equally evident, on the other hand, that the risk of municipal dereliction should be borne by the municipality rather than the individual. The public ways are strictly under the control of the public authorities. The individual obviously has no adequate means of self-help. Yet the use of the streets and sidewalks and other public ways is indispensable to the daily conduct of his affairs. For a municipality to have exclusive authority without anything approaching commensurate responsibility in a matter so important to the wellbeing of the members of the public would be monstrous. There is little wonder, then, that the courts of the state have refused to cloak this function with the pallium of sovereign immunity.<sup>43</sup>

In an early case the supreme court expressed doubt that an action could be maintained against a municipality grounded upon

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43. The necessity for this exception to the general rule was stated by the Court of Appeal of the Second Circuit in *Clinton v. City of West Monroe*, 187 So. 561, 564 (La. App. 1939), in the following language:

"But the rule, strict as it is, has in this state at least one exception. A municipality may be held in damages to those injured because of its failure to keep its streets and sidewalks in a reasonably safe condition for travel. If this were not true, persons who desire to use such streets and sidewalks could never safely assume that they are in such condition to warrant travel thereon. If so used, they would have to keep their eyes constantly glued on the surface before them and at night carry a lighted lamp for protection against injury. Holes, pits and excavations in the streets or sidewalks could be left by the agents or servants of the municipality, resulting in death or severe bodily injury to its citizens, with no recourse for damages by anyone, but for the exception to the rule now so well recognized in this state.

...

injuries caused by the negligence of the municipality in obstructing a street in the absence of statutory authority or of jurisprudence sustaining a rule of municipal responsibility. The court was under the impression that in other states where such a cause of action was recognized the improvement in the law was achieved by express statutory provision.<sup>44</sup> This impression was not entirely well founded. In New York, for example, it had previously been held that the City of New York was responsible in damages for injury to abutting property where its failure to keep culverts and storm sewers in good condition and unobstructed resulted in a damaging overflow. There was no express statutory provision for civil liability; there was simply a statute, permissive in terms, authorizing the construction, maintenance, and repair of culverts and sewers. In order to make out a duty to the owner of the abutting property, the court seized upon the well-known rule of interpretation that "may" means "must" where the public interest or the rights of third parties require such an interpretation of the statute.<sup>45</sup>

In some of the earlier cases liability was based upon a charter requirement that the given municipality maintain its streets and sidewalks in good repair. It was assumed, without elucidation, that the governmental duty imposed by charter amounted, in addition, to a civil duty to individuals using the public ways of the municipality. Thus in *O'Niell v. City of New Orleans*,<sup>46</sup> the court was content to refer simply to the duty imposed by charter to keep the streets of the city in repair. But even in this relatively early case the court began to break down the notion that the

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44. *Moore v. the Mayor of Shreveport*, 3 La. Ann. 645 (1848).

45. *Mayor of the City of New York v. Furze*, 3 Hill 612 (N. Y. Sup. Ct. 1842). It should be noted that in 1856 the Court of Appeal of New York shifted to a different theory of civil liability because it thought that the *Furze* case established too broad a principle. It was not prepared to concede that the neglect of a public duty would necessarily entail civil liability to affected private parties. So it worked out the ingenious, but unconvincing, theory that there was an implied undertaking on the part of the municipality to keep public ways in repair which was exacted by the sovereign as a condition upon and in consideration of which corporate capacity and powers were conferred by the sovereign. The implied undertaking would inure to the benefit of any party interested in its performance. *Weet v. Trustees of the Village of Brockport*, 16 N.Y. 161n. (Sup. Ct. 1856). The reasoning of the court in this case was fallacious because there is in point of law no reciprocity of stipulation in the chartering of municipal corporations. Under the prevailing doctrine of legislative supremacy a legislature may create a municipality regardless of local approval or consent; acceptance of a municipal charter is not legally necessary. Nevertheless, this New York theory has been embraced in other jurisdictions. See, for example, *Wilson v. City of Wheeling*, 19 W. Va. 323, 331 (1882).

46. 30 La. Ann. 220, 31 Am. Rep. 221 (1878).

basis for civil liability was the charter duty to repair. The court was at pains to make it clear that the liability of the city was not that of an insurer; that its liability depended upon fault, or, in other words, in the ordinary case upon negligence. This is significant because the statutory duty is unqualified; the statute does not say, for example, that a city must repair its streets only if it knows or should know of the state of disrepair. Theoretically the court might have attached the additional qualification that the municipality must have been given the legal means, by taxation or otherwise, to perform the duty.<sup>47</sup> The qualification would not be important because legal authority and means (as distinguished from actual economic resources) are a commonplace statutory concomitant of the grant of authority with respect to public ways.

While there are several fairly recent cases in which reliance was placed upon a mandatory charter duty to repair, it is quite clear from the cases that the rule of liability obtains today without regard to the existence of such a statutory duty. Thus, in the leading case of *Lemoine v. City of Alexandria*,<sup>48</sup> the rule of responsibility in this type of situation was laid down broadly without reference to any express charter duty.

The duty of a municipality to pedestrians or other travelers upon its sidewalks or streets has been repeatedly stated to be a duty to exercise reasonable care to keep its streets and sidewalks in such condition that travelers who are prudent and ordinarily careful will not be exposed to injury, day or night.<sup>49</sup> Taken at first glance this statement suggests that in order to make out a breach of duty on the part of the defendant a plaintiff must allege and prove, among other things, facts making out the exercise of prudence and ordinary care on his part. But the matter has not been worked out in that way. The Louisiana courts are committed to the proposition that contributory negligence is an affirmative defense.<sup>50</sup> This being the case, the formulation which qualifies the duty of the municipality in terms of the care exercised by the

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47. The point was discussed in *Cline v. Crescent City R.R.*, 41 La. Ann. 1031, 6 So. 851 (1889), but not passed upon since the case went off upon a procedural matter. It is significant that in the leading English case, *Russell v. Men of Devon*, 2 Term R. 667, 100 Eng. Reprint 359 (1788), the defendant was an unincorporated county which had no corporate treasury and, apparently no legal means of raising funds. That was a case in which the injuries were due to a defective bridge. Recovery was denied.

48. 151 La. 562, 92 So. 58 (1922).

49. See, for example, *Goodwyn v. City of Shreveport*, 134 La. 820, 64 So. 782 (1914) and *Suthon v. City of Houma*, 146 So. 515 (La. App. 1933).

50. *Buechner v. City of New Orleans*, 112 La. 599, 36 So. 603 (1904).

traveler has little if any practical significance. In actual administration contributory negligence is a good affirmative defense just as in cases between private parties, but the injured party may make out a prima facie case regardless of the element of contributory negligence.

Beyond what has already been said, generalization grows hazardous. But it would not do to say that the jurisprudence has not packed content into the subject. It is sufficiently clear from the cases that, in order to make out a cause of action, at least the following elements must be present: (1) the condition which caused the injury must have been dangerous or calculated to do injury and (2) the municipality must have had actual notice of the condition or its existence have continued over a period and under such circumstances that in the exercise of due diligence the municipality would have had notice of the situation in time to correct it. A few illustrations from the cases may be helpful.

On the one hand, classification as a dangerous condition has been judicially accorded a protruding metal edging of a sidewalk curbing,<sup>51</sup> a misplaced flagstone crossing over a street culvert,<sup>52</sup> a decayed culvert over a public fire well in a street,<sup>53</sup> an obstruction on a sidewalk in the form of a stepping stone put there by a paving contractor,<sup>54</sup> a wire rope strung above and along the edge of a sidewalk to keep back Mardi Gras crowds,<sup>55</sup> a decayed or missing plank in a wooden bridge across a gutter,<sup>56</sup> an abrupt variation of five inches in the level of a sidewalk in front of two adjoining properties,<sup>57</sup> an open cutoff pipe or box in a sidewalk,<sup>58</sup> a defective shoulder or support on which rested the cover over a street drain,<sup>59</sup> an unbridged and unguarded canal or ditch across a street,<sup>60</sup> a break in a cement sidewalk an inch and a half deep and fourteen or more inches wide,<sup>61</sup> an in-

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51. *Miller v. City of New Orleans*, 152 So. 141 (La. App. 1934); *Parker v. City of New Orleans*, 1 So. (2d) 123 (La. App. 1941).

52. *O'Niell v. City of New Orleans*, 30 La. Ann. 220, 31 Am. Rep. 221 (1878).

53. *Lorenz v. City of New Orleans*, 114 La. 802, 38 So. 566 (1905).

54. *McCormack v. Robin*, 126 La. 594, 52 So. 779 (1910).

55. *Nessen v. City of New Orleans*, 134 La. 455, 64 So. 286 (1914).

56. *Weinhardt v. City of New Orleans*, 125 La. 351, 51 So. 286 (1910); *Smith v. City of New Orleans*, 135 La. 980, 66 So. 319 (1914).

57. *Blume v. City of New Orleans*, 104 La. 345, 29 So. 106 (1900); *Labarre v. City of New Orleans*, 106 La. 458, 30 So. 891 (1901).

58. *Lemoine v. City of Alexandria*, 151 La. 562, 92 So. 58 (1922).

59. *Geismar v. City of Alexandria*, 142 So. 387 (La. App. 1932).

60. *General Securities Co., Inc. v. City of Hammond*, 11 La. App. 306, 123 So. 399 (1929); *Clinton v. City of West Monroe*, 187 So. 561 (La. App. 1939), discussed in Note (1939) 14 *Tulane L. Rev.* 132.

61. *Robinson v. City of Alexandria*, 174 So. 681 (La. App. 1937).



adequately guarded excavation left in a street,<sup>62</sup> and a decayed wooden culvert under a grade crossing.<sup>63</sup> On the other hand, an unpaved street,<sup>64</sup> a sloping variation of one and one-half inches in the level of a paved sidewalk in front of two adjoining properties,<sup>65</sup> an abrupt variation of two or three inches in the level of a paved sidewalk,<sup>66</sup> a manhole cover worn smooth by traffic,<sup>67</sup> a three-inch stopcock pipe protruding a fraction of an inch above the sidewalk,<sup>68</sup> an uneven sidewalk due to soil erosion or other natural causes,<sup>69</sup> and a hole in a cement sidewalk about four inches deep and about a foot square,<sup>70</sup> have been treated as conditions that were not dangerous.

We are not particularly concerned with resolving the apparent inconsistencies in some of the cases cited. Some may constitute mere vagaries in judicial administration but we must remember that each tort case, to a degree unequalled in most branches of the law, is *sui generis*. If this is so, may we not suppose that the cases serve to illustrate the flexibility needed to enable a court to mold its decisions to the more or less inarticulate conceptions of justice so important in the decisions of tort cases. However, we add—quite cautiously, it is true—the observation that one seems to discern a tendency in the recent court of appeals cases to resolve doubts as to whether a given situation involves a dangerous condition in favor of the municipality.

In at least one jurisdiction municipalities and counties have, by statute, been made insurers of the safe condition of the streets, sidewalks and bridges.<sup>71</sup> This drastic standard of responsibility is to be contrasted with the conception of fault on which the Louis-

62. *Allen v. Town of Minden*, 127 La. 403, 53 So. 666 (1910); *Holden v. Toye Brothers Auto and Taxicab Co., Inc.*, 1 La. App. 521 (1925).

63. *Tharpe v. Sibley Lake Bisteneau & Southern Ry.*, 144 So. 274 (La. App. 1932).

64. *Millstead v. City of New Orleans*, 146 So. 492 (La. App. 1933).

65. *Goodwyn v. City of Shreveport*, 134 La. 820, 64 So. 762 (1914).

66. *Brown v. City of New Orleans*, 7 La. App. 611 (1927); *Suthon v. City of Houma*, 146 So. 515 (La. App. 1933); *Loucks v. City of Crowley*, 185 So. 648 (La. App. 1939). In the case of *Carsey v. City of New Orleans*, 181 So. 819 (La. App. 1938), soil erosion had caused an unevenness in a sidewalk resulting in a five and one-half inch elevation of one of the concrete slabs over the next. The court said that this was not such a dangerous condition as to warrant a finding that the city was guilty of negligence in failing to repair it "particularly in view of the fact that it did not have actual knowledge of its existence."

67. *Linxwiler v. City of Shreveport*, 151 So. 81 (La. App. 1933).

68. *Burns v. City of New Orleans*, 155 So. 61 (La. App. 1934).

69. *Jones v. City of Baton Rouge*, 191 So. 734 (La. App. 1939).

70. *Wiltz v. City of New Orleans*, 2 La. App. 444 (1925).

71. See *W. Va. Code Ann. (Michie & Sublett, 1937) § 1588* and *Price, Governmental Liability for Tort in West Virginia (1932) 38 W. Va. L. Q. 101, 110.*

iana jurisprudence is built. The contrast is made conspicuous by the Louisiana rule that a municipality must have had actual notice of the condition which caused the injury or its existence have continued over such a period and under such circumstances that in the exercise of due diligence it would have had notice of the situation in time to correct it. While there is some language in the opinions suggestive of a general requirement that in order to make out a breach of duty by the municipality the dangerous condition must have been of such a character as to make it apparent to one engaged in the exercise of ordinary care,<sup>72</sup> it seems clear that this conception carries entirely too far; there is no reason why a municipality should not be held in the case of a latent defect if it had actual notice in time to do something about the matter. It has been judicially stated, moreover, that the municipality must have had or been chargeable with notice for a sufficient period in advance of the accident to enable it to make the necessary repairs.<sup>73</sup> This statement is entirely too broad because it may take time to effect needed repairs, yet there is no reason why the public should not be safeguarded in the meantime by the use of appropriate barriers, warning signs, and the like.

Broadly speaking, a municipality will not be regarded as having received notice unless an official charged with the responsibility in the matter of street and sidewalk maintenance or a subordinate charged with the responsibility of reporting street and sidewalk defects receives the notice. Thus it is deemed enough if a member of the city council has notice since he has a responsibility in the matter.<sup>74</sup> In a case where the city electrician had been notified of the existence in the edge of a road of the stump of a broken off lamp post, knowledge was imputed to the city.<sup>75</sup> On the other hand, the knowledge of a policeman who was not charged with the duty of reporting conditions of disrepair in sidewalks and streets has been held not to be notice to the municipality.<sup>76</sup>

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72. See *Miller v. City of New Orleans*, 152 So. 141, 142 (La. App. 1934).

73. *Ibid.*

74. *Weinhardt v. City of New Orleans*, 125 La. 351, 51 So. 286 (1910). In *Miller v. City of New Orleans*, 152 So. 141 (La. App. 1934), notice by telephone to an employee in the office of the department having jurisdiction was deemed enough. See also *O'Niell v. City of New Orleans*, 30 La. Ann. 220, 31 Am. Rep. 221 (1878). Query—where the employee gets notice when he is off duty.

75. *Landry v. New Orleans Public Service, Inc.*, 149 So. 136 (La. App. 1933).

76. *Collins v. Lyons*, 9 La. App. 736, 120 So. 418 (1929). Cf. *Wiltz v. City*

Actual notice is not essential where the condition was such that had due care been exercised on the part of the municipality it would have known of the danger in time to remove or guard against it. It is the vogue to refer to this type of situation as one involving constructive or implied notice.<sup>77</sup> It would seem to be a clearer and more direct statement of the matter, however, to depart from the language of notice and simply to declare that in such a situation there may be a breach of duty to the traveler without notice. It is with respect to this type of case that the notion, that the defect must be of a character that our estimable friend, the man of ordinary prudence who is wont to use reasonable care, would readily observe, comes into play. We are talking about civil responsibility based on negligence and it would not harmonize with the idea of fault to hold a municipality in the absence of actual notice where conditions were not such as that competent inspection, for example, would disclose the danger. How long the dangerous condition must have existed to make out negligence on the part of the municipality on this basis is a matter of time and circumstance. In a case where a signpost used to designate parking limits had fallen onto the sidewalk in the heart of the business district in the City of Monroe and had been there in one position or another for a month, the court of appeal was satisfied that the city was negligent in not discovering and remedying the situation.<sup>78</sup> In most of the cases involving this point, however, the period was much longer.<sup>79</sup>

While our courts have not been prepared, in the street and

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of New Orleans, 2 La. App. 444 (1925), in which the court observed that it was the duty of a New Orleans policeman to report defective sidewalks.

77. See *Tharpe v. Sibley Lake Bisteneau & Southern Ry.*, 144 So. 274 (La. App. 1932); *Parker v. City of New Orleans*, 1 So. (2d) 123 (La. App. 1941).

78. *Tiller v. City of Monroe*, 5 La. App. 473 (1927); *Parker v. City of New Orleans*, 1 So. (2d) 123 (La. App. 1941) (involved a period of about two months).

79. *Lorenz v. City of New Orleans*, 114 La. 802, 38 So. 566 (1905) (condition "visibly existed for several months" before accident); *Smith v. City of New Orleans*, 135 La. 980, 66 So. 319 (1914) (hole in gutter crossing had been "visible for months"); *Tharpe v. Sibley Lake Bisteneau & Southern Ry.*, 144 So. 274 (La. App. 1932) (constructive notice of rotten wooden culvert at street and railroad track intersection which had not been inspected for a year or more); *Kernstock v. City of New Orleans*, 147 So. 371 (La. App. 1933) (constructive notice from what an inspection actually made should have disclosed); *Nuss v. City of New Orleans*, 147 So. 374 (La. App. 1933) (same); *Holbrook v. City of Monroe*, 157 So. 566 (La. App. 1934) (constructive notice where defect had existed for "several years"); *Hebert v. City of New Orleans*, 163 So. 425 (La. App. 1935) (constructive notice from what an inspection actually made should have disclosed); *Robinson v. City of Alexandria*, 174 So. 681 (La. App. 1937) (constructive notice where defect in sidewalk existed for "ten years").

sidewalk cases, to lay it down flatly that there is a duty to inspect,<sup>80</sup> it is manifest that a municipality cannot obviate the risk of civil liability in this field of municipal administration short of systematic inspection. The deterring force of the rule of civil responsibility in these cases is inadequate unless it does impel inspection. We fear that it has fallen short of the objective of the law in this respect. Doubtless its virtue as a deterrent is what chiefly recommends a statutory insurer rule.

In connection with this branch of our subject it is interesting to consider the possibility of municipal liability where the given injury arises out of the activity of a municipality in repairing a street. Back in 1910 the supreme court held a municipality responsible in tort where its employees were negligent in failing to provide protection to travelers against excavations by some such device as blocking off such portions of the street as were under repair.<sup>81</sup> Quite similar would be a dangerous condition caused by the leaving of unguarded street repairing equipment in a street overnight.<sup>82</sup> A little further removed would be a situation in which a truck, hauling materials to a point where street repairs were under way, ran down a pedestrian. That sort of case is not unlike the situation in which a street sprinkling machine, designed to be driven on the left side of the street, collided with an automobile in the course of such operation. Liability has been imposed in the street sprinkler case.<sup>83</sup> This happy inroad upon the immunity rule was, unfortunately, not supported by convincing reasoning. The court first put the sprinkling function on a footing with street maintenance, but it would not leave well enough alone. It added:

“Such acts are optional, purely of a municipal or local nature, for the comfort and convenience of its citizens, and are not compulsory for the health, safety or welfare of society in general.”<sup>84</sup>

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80. But there are two court of appeal cases that go far in that direction. See *Holbrook v. City of Monroe*, 157 So. 566 (La. App. 1934); *Robinson v. City of Alexandria*, 174 So. 681 (La. App. 1937).

81. *Allen v. Town of Minden*, 127 La. 403, 53 So. 666 (1910).

82. An exception of no cause or right of action to a petition alleging merely that plaintiff's child had climbed upon an unguarded ditch-digging machine left in the street, which was attractive to children, and fell to the ground sustaining injuries was upheld in *Bordelon v. City of Shreveport*, 5 La. App. 201 (1926). The doctrine of the attractive nuisance cases was deemed inapplicable on the facts alleged.

83. *Ronaldson & Puckett Co. v. City of Baton Rouge*, 3 La. App. 509 (1925).

84. 3 La. App. 509, 510 (1925).

Thus we are told that the function or service is not immune because it is optional, yet in the early street and sidewalk cases liability was based upon a mandatory charter duty to repair! As for the local nature of the activity we have but to point to such matters as the maintenance of a city hall or a fire department to show that it is not determinative of the character of a function for tort purposes.

What is a public way for the safe condition of which a municipality is responsible under the rule of liability? Case materials are meagre. We believe, however, that the simple upshot of the matter is that the rule of civil responsibility would obtain in any case in which injury was caused by a condition in a street or sidewalk which was both a public way<sup>85</sup> and a way subject to the governmental authority of the municipality.<sup>86</sup> Thus, even though there had been a dedication of a way to the public, which, under the law, would be perfected only by formal or informal acceptance on the part of the municipality,<sup>87</sup> acceptance would have to be made out in order to establish governmental responsibility for it as a public way under municipal control, and, short of that, civil responsibility would not be grounded in coeval authority and control.

A subordinate question relates to the physical conditions upon which the rule of liability operates. It clearly covers the traveled portions of streets and sidewalks. But what of the relatively unused portions of the right-of-way of an unpaved street or of the neutral ground between a sidewalk proper and a street? We can cite no Louisiana cases involving the first type of situation but, in principle, it is not evident why the civil duty to keep the street in repair would not cover the entire right-of-way. Doubtless, the circumstances might so far condition the judicial attitude as to render the plaintiff's burden relatively greater.

In *Weil v. City of Alexandria*,<sup>88</sup> employees of the city had excavated a considerable hole in the neutral ground for the purpose, according to the syllabus, of effecting sidewalk repairs. The hole was left unguarded overnight and plaintiff while walking

85. This is an obvious point. It was raised in *Tharpe v. Sibley Lake Bisteneau & Southern Ry.*, 144 So. 274 (La. App. 1932), but the court found on the facts that there had been a sufficient dedication and acceptance of the street in question to render it a public way.

86. As to want of municipal control see *Harrison v. Louisiana Highway Commission*, 191 La. 839, 186 So. 354 (1939).

87. As to statutory dedication, acceptance of which is not required, see *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938).

88. 7 La. App. 387 (1928).

along the sidewalk at night fell into the hole, presumably by casually stepping off the pavement. Plaintiff prevailed. The text of the opinion simply assumed without elaboration that the city owed a pedestrian a duty in the matter. The syllabus clearly states the duty as one to maintain the sidewalk in safe condition.

More recently the Court of Appeal for the First Circuit, in *Aucoin v. City of Baton Rouge*,<sup>89</sup> has, with reference to a much less aggravated state of facts, come to grips with our problem and announced, in substance, that as to a jaywalker the city's duty ended when it provided a safe sidewalk; that it owned such a traveler no particular duty as to the neutral ground. A lady, who stepped into a hole of unstated size in the neutral ground in the course of taking a short-cut across the street at night, was denied recovery. The court made an unconvincing effort to distinguish the *Weil* case. Our quarrel with this case is not so much with the decision as with the implications of the opinion. Certainly one is loathe to concede that the legal conception of a safe sidewalk for present purposes is confined to the physically paved walkway. The problem is one of degree that makes demands upon judicial wisdom in administration but it seems evident to us, by way of illustration, that a perfect pavement with an unguarded six foot drop into a drainage ditch on one side would not constitute a safe sidewalk and that the law should recognize this reality.

A word should be said about the responsibility of the owner of abutting property for the condition of a sidewalk. Quite apart from his position as the owner of abutting property, he, like anyone else, is plainly responsible in damages to one who is injured due to an obstruction or other hazard that he has negligently placed or created on or near a sidewalk.<sup>90</sup> Since the maintenance of the public ways is primarily a governmental responsibility, the "abutter" cannot fairly be held accountable as such unless a responsibility for the condition of the sidewalk has been definitely imposed upon him by statute or municipal ordinance for the benefit of travelers.<sup>91</sup>

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89. 171 So. 412 (La. App. 1936). See also *La Groue v. City of New Orleans*, 114 La. 253, 38 So. 160 (1905).

90. *Clack v. Liggett Drug Co., Inc.*, 164 So. 482 (La. App. 1935). In *Hebert v. Badon*, 187 So. 862 (La. App. 1936), plaintiff's petition was held deficient on an exception of no cause of action because it did not relate the sidewalk defects in question to defendants further than to allege that the defects were in front of their property.

91. *Betz v. Limongi*, 46 La. Ann. 1113, 15 So. 385 (1894); *Aucoin v. City of New Orleans*, 105 La. 271, 29 So. 502 (1901); *McGurk v. City of Shreveport*, 181 So. 553 (La. App. 1939), discussed in Note (1940) 14 *Tulane L. Rev.*

We add, in passing, that civil responsibility for the condition of a street or sidewalk may rest upon a private party who has by contract with a municipality obligated himself to keep a street or other public way in repair,<sup>92</sup> or upon one who has a permit, license or franchise giving him some special privilege in connection with a public way.<sup>93</sup>

The fact that a private party may for one reason or another bear civil responsibility for the condition of a public way does not, however, absolve the municipality; its control over the public ways, in the interest of public safety, continues and along with it civil responsibility as in the ordinary case.<sup>94</sup>

Implicit in what has been said is the notion that municipal responsibility extends only to those using the public ways for travel and purposes incidental to travel. This phase of the subject

466; *Henrichs v. New Orleans Public Service, Inc.*, 192 So. 333 (La. App. 1940). The point won mention, but nothing more, in *Burke v. Tricalli*, 124 La. 774, 50 So. 710 (1909) and *Varnado v. City of Baton Rouge*, 5 La. App. 238 (1926).

92. *Weymouth v. City of New Orleans*, 40 La. Ann. 344, 4 So. 218 (1888).

93. *Ibid.* When a person has by contract with a municipality assumed the obligation of keeping a street or other public place in repair, he may be held liable to one injured because of his failure to perform such obligation.

A person who is injured by reason of a hole next to a loose rail at a railroad grade crossing, the maintenance of railway tracks upon the streets having been approved by the municipality, has an action against the municipality and the railroad company in solido, independently of the company's contractual obligation to keep in repair the streets through which the railroad was built. *Cline v. Crescent City R.R.*, 41 La. Ann. 1031, 6 So. 851 (1889). In such a case the railroad, like anyone else who has caused a dangerous condition in a street, may be held for resulting injury or damage.

Where, in the execution of a private building contract, the contractor laid an iron pipe across an alley forming part of the sidewalk which tripped and injured a pedestrian using due care, the municipality and the contractor were held liable in solido for failure to maintain the sidewalk in a safe condition. *Cole v. Central Contracting Co.*, 5 La. App. 513 (1927). *Stern v. Davies*, 128 La. 182, 54 So. 712 (1911), was a case in which recovery was had against New Orleans and its licensee, the tenant of a building on Canal Street, by an old man who stumbled over strips of wood placed on the sidewalk as a rest for supports to a gallery which extended from the building over the sidewalk. The supports were placed there to make the gallery safe for Mardi Gras parade spectators. On the testimony the method of construction was deemed unsafe to pedestrians and the tenant was liable because he put the obstruction there.

On the ground that a municipal corporation would itself be liable for an injury sustained by reason of its reducing a sidewalk to a dangerous condition, a public utility which was granted permission by a municipality to make excavations in a sidewalk for the purpose of laying electrical conduits, was held liable for injuries resulting from falling into an unguarded excavation. *Rock v. American Constr. Co.*, 120 La. 831, 45 So. 741 (1908). This decision was reached, even though the excavation was made by an independent contractor, on the ground that the presence of such a factor does not insulate one from liability where the contract requires the performance of intrinsically dangerous work, no matter how skillfully performed.

94. See the cases cited in the preceding note and *Tharpe v. Sibley Lake Bisteneau & Southern Ry.*, 144 So. 274 (La. App. 1932). Cf. *La Groue v. City of New Orleans*, 114 La. 253, 38 So. 160 (1905).

has not been developed by adjudication in Louisiana. We believe, however, that this delimitation of the field of liability is patently a rational one with good prospects of receiving judicial approbation.

Judging by the reported cases the entry of a plea of contributory negligence is but a regular step in the orderly development of a tort case against a municipality based on the unsafe condition of a public way. A form of comparative negligence seems to be contemplated by Article 2323 of the Revised Civil Code, at least as to property damage, but the courts have not accepted this view of the matter. Thus a plea of contributory negligence, if sustained, operates as a complete bar to recovery.<sup>95</sup> As applied to the sidewalk and street cases, the doctrine does not mean that a pedestrian must keep his eyes glued upon the surface in front of him; he may properly assume, for example, that a paved sidewalk does not contain holes or obstructions that necessitate constant vigilance.<sup>96</sup> The matter may, of course, be conditioned by the traveler's familiarity with the public way upon which he is traveling and with the other public ways in the neighborhood. Thus, contributory negligence was invoked as a basis for denying recovery in a case where a lady, who had been using a rough, grassgrown sidewalk daily, stepped into a hole in the sidewalk in broad daylight and was injured.<sup>97</sup> In several cases the courts of appeal have sustained pleas of contributory negligence where pedestrians were injured in traveling obviously dangerous routes where safe ones were available.<sup>98</sup> A critical student of the law of torts might insist that this is not a

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95. The cases involving judicial acceptance of the doctrine of contributory negligence are too numerous for citation. It will suffice on that score to refer to the case of *Buechner v. New Orleans*, 112 La. 599, 36 So. 603 (1904) and *Moise v. New Orleans Public Service, Inc.*, 19 La. App. 703, 140 So. 505 (1932). It is interesting to observe that it was in the *Buechner* case that the supreme court adopted the view that contributory negligence is an affirmative defense. The doctrine of comparative negligence is discussed with reference to the Code article in *Inman v. Silver Fleet of Memphis*, 175 So. 436 (La. App. 1937).

96. *Holbrook v. City of Monroe*, 157 So. 566 (La. App. 1934). But see *Ansley v. City of New Orleans*, 168 So. 343 (La. App. 1936) and *Parker v. City of New Orleans*, 1 So. (2d) 123 (La. App. 1941). The pedestrian may not have to look down when he steps from the sidewalk to the street but let him beware when he reaches the opposite curb.

97. *Barnes v. City of New Orleans*, 4 La. App. 503 (1926), cert. and review denied June 30, 1926.

98. *LeCarpentier v. New Orleans Public Service, Inc.*, 13 La. App. 113, 126 So. 248 (1930); *Pepper v. Southern Bell Telephone and Telegraph Co.*, 18 La. App. 257, 137 So. 610 (1931), cert. and review denied January 4, 1932; *Moise v. New Orleans Public Service, Inc.*, 19 La. App. 703, 140 So. 505 (1932).



matter of contributory negligence but one of qualifying the duty of the municipality. In any event, the courts do not press the point so far as to render one chargeable with contributory negligence by reason of the fact that he used a road which, although not perfect, still might, so far as appeared, be safely used in the exercise of ordinary care even though a safer route was available.<sup>99</sup>

### *Concerning Bridges*

For the most part, what has been said as to streets and sidewalks is applicable to the bridge cases. Here, too, the rule of liability does not depend upon a statutory mandate as to bridge maintenance,<sup>100</sup> but is a jurisprudential breakdown of the barrier of immunity.<sup>101</sup> In one respect these cases appear to exact more of the municipality than the street and sidewalk decisions, although the point we have in mind would apply, in principle, to any part of a public way made of perishable materials. We refer to the proposition that the duties of a municipality as to the safety of a wooden bridge may entail competent inspection at proper intervals.<sup>102</sup> In two companion court of appeal cases the injuries complained of occurred when two young men, crossing the footway of a bridge, stopped and leaned on a substantial looking wooden railing, which gave way due to decay and precipitated them into the canal below.<sup>103</sup> The bridge had been super-

99. *Hebert v. City of New Orleans*, 163 So. 425 (La. App. 1935).

100. There have, of course, been cases where a charter duty was relied upon. *Lorenz v. City of New Orleans*, 114 La. 802, 38 So. 566 (1905).

101. *Buechner v. City of New Orleans*, 112 La. 599, 38 So. 603 (1904).

Although the City of New Orleans had failed to provide guard rails or chains to prevent pedestrians from using its bridge while being turned by electricity and to provide an unobstructed view of the approaches for the bridge operators, it was not held liable for the death of a ten year old child who jumped on the bridge while it was in motion and was crushed. *Cusimano v. City of New Orleans*, 123 La. 565, 49 So. 195 (1909). A city was absolved from liability for the death of a five year old child who was drowned by slipping from a bridge into a natural drainage ditch, upon the ground that the city was not negligent in failing to place guard rails at the ends of the bridge as (1) it was in a safe condition to accommodate traffic, and (2) it was not shown that children frequented the bridge. *Foreman v. City of Crowley*, 143 La. 654, 79 So. 210 (1918). A municipality was subjected to liability for injuries caused by its failure to barricade a bridge securely, which resulted in the barricade being rather readily removed by travelers thus leaving the bridge open to passage by the plaintiff, who was hurrying to catch a street car. *Collins v. City of New Orleans*, 3 La. App. 299 (1925).

102. *Smith v. City of New Orleans*, 135 La. 980, 66 So. 319 (1914); *Tharpe v. Sibley Lake Bisteneau & Southern Ry.*, 144 So. 274 (La. App. 1932); *Kernstock v. City of New Orleans*, 147 So. 371 (La. App. 1933); *Nuss v. City of New Orleans*, 147 So. 374 (La. App. 1933).

103. *Kernstock v. City of New Orleans*, 147 So. 371 (La. App. 1933); *Nuss v. City of New Orleans*, 147 So. 374 (La. App. 1933).

ficially inspected two or three months before but the court thought that an adequate inspection would have spotted the rotten state of the railing. On this basis it could be said that the city should have known of the hazard but the court went further; it suggested that in view of the perishable character of the structure there well might be a duty to inspect, a breach of which would involve liability quite apart from actual notice of the unsafe condition or the existence of facts otherwise rendering notice non-essential. The day of wooden bridge structures is passing but we repeat that the notion has wider implications.

Does one who uses a bridge railing as a resting place so far depart from normal bridge uses as to be beyond the protection of the rule of municipal liability? In the last-cited cases a definite negative answer was given to this question. If the normal protection is to be confined to travelers, as we suppose, it would doubtless shelter uses incidental to travel, including resting against a bridge railing. It would not cover other uses, but "what is which" is a problem yet to be dumped into the ample lap of the courts.

#### *Wharves*

There has been no clear judicial expression of the notion that the maintenance and operation of wharves are so far a corporate function as to render a municipality responsible civilly for injuries or damages occasioned by defective municipal wharves.<sup>104</sup> Doubtless that theory was in the back of the judicial mind in an old case in which the city of New Orleans was held liable for the value of a cargo lost by the collapse of a defective wharf at which the cargo was being discharged from a boat. The court seized upon the profit element; by charging and receiving wharfage dues, the city, thought the court, assumed the obligation of providing a safe wharf. In a relatively recent case a town was held responsible for injuries caused by the unsafe condition, known to the town, of the floor of a dance pavilion which formed a part of a public wharf owned and operated by it.<sup>105</sup> The town was required by its charter to keep its wharves in repair but the court did not pin the matter down to a mandatory duty imposed by statute.

#### *The Independent Contractor Element*

The general notion that one is not liable for the wrongful

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104. *Fennimore v. City of New Orleans*, 20 La. Ann. 124 (1868).

105. *Shafer v. Town of Madisonville*, 18 La. App. 146; 136 So. 774 (1931), rehearing denied 18 La. App. 154, 139 So. 733 (1931).

conduct of his independent contractor or of the employees of the latter has been applied to municipalities.<sup>106</sup> The rule was applied in a case where an incorporated board, exercising municipal functions, had retained general supervision over public work, done for it by a contractor, for the purpose of seeing to the performance of the provisions of the contract, but had no control over the selection of employees or their work.<sup>107</sup> In that case the action was one for damages for the alleged wrongful death of an employee of the contractor. Where, however, the municipal agency did exercise control over the selection of the contractor's workmen and over the manner of their work, the label, independent contractor, was brushed aside and liability imposed for the negligence of the contractor's employees.<sup>108</sup> Even where the case involves a true independent contractor situation, the idea that the interposition of an independent contractor does not insulate from liability in the case of characteristically dangerous work would doubtless apply as against a municipality.<sup>109</sup>

#### *Ultra Vires*

A general proposition of particular significance in the proprietary function cases is that even where the activity is admittedly of that character, the municipality will not be responsible in tort if in exercising that function it is acting in excess of its charter powers. In one case, for example, it was sought to recover damages for the death of a wagon driver caused by the alleged neglect of the defendant municipality to place guard rails on a ferry. The city successfully relied on its want of authority to establish and operate the ferry.<sup>110</sup> This same idea would apply in a case where a municipality was supplying water or electricity beyond its corporate limits without authority. Space limitations do not permit thorough analysis of this special branch of the subject. While the immunity has been defended,<sup>111</sup> we find it difficult to swallow. Formalistic arguments based on the want even of substantive power do not convince; technically, a principal

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106. *Todaro v. City of Shreveport*, 187 La. 68, 174 So. 111 (1937); *La Groue v. City of New Orleans*, 114 La. 253, 38 So. 160 (1905).

107. *Lutenbacher v. Mitchell-Borne Constr. Co.*, 136 La. 805, 67 So. 888 (1915).

108. *Quayle v. Sewerage and Water Board*, 131 La. 26, 58 So. 1021 (1912).

109. For a decision not involving a municipality, see *Rock v. American Constr. Co.*, 120 La. 831, 45 So. 741 (1908).

110. *Hoggard v. Mayor of Monroe*, 51 La. Ann. 683, 25 So. 349, 44 L.R.A. 477 (1899). Where the petition showed that the act alleged to be tortious was *ultra vires*, there could be no recovery, *Gaudet v. Parish of Lafourche*, 146 La. 363, 83 So. 653 (1920).

111. See *Gettys, Municipal Liability for Ultra Vires Tortious Acts* (1934) 8 Temple L. Q. 133.

seldom authorizes an agent to commit a wrong but he will not be heard on that score. And, on the policy question of who should bear the risk, does anyone suppose that the hazard to the public treasury is so great as to shift the burden from him upon whom it otherwise should rest?

A distinction is drawn in the cases between want of power and the irregular or improper manner of exercising a conceded power. The cases sustain recovery against a municipality where the action falls in the latter category. For example, liability has been imposed where there was an illegal advertisement and disposal of property lawfully seized for violation of a city ordinance,<sup>112</sup> an illegal seizure of a horse and dray by city officers done within the scope of their employment and ratified by the city,<sup>113</sup> an illegal execution of a judgment in a city's favor by which a railroad depot erected partly on a street and partly on private property was totally demolished upon orders of the mayor, ratified by the city council,<sup>114</sup> an illegal demolition of private buildings on public property pursuant to resolutions of the town council,<sup>115</sup> and an illegal seizure of merchandise and closing of a store by the city marshal in an attempt to collect payment of taxes due by another.<sup>116</sup> Needless to say, the presumption, in such cases, is always in favor of the propriety of the conduct and the good faith of the municipal authorities.<sup>117</sup> It is evident that the character of the municipal function was not controlling in these cases.

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112. *Baumgard v. Mayor*, 9 La. 119, 29 Am. Dec. 437 (1836). It is to be observed that this case was decided prior to the turning point case of *Stewart v. City of New Orleans*, 9 La. Ann. 461 (1854).

113. *Wilde v. City of New Orleans*, 12 La. Ann. 15 (1857).

114. *Pontchartrain R. R. v. City of New Orleans*, 27 La. Ann. 162 (1875).

115. *Faucheux v. Town of St. Martinville*, 124 La. 959, 50 So. 809 (1909).

116. *Engeran v. City of Houma*, 146 So. 712 (La. App. 1933), wherein the court declared that although the function of collecting taxes is governmental, it is transcended when the collector commits a trespass.

Recovery was allowed against the municipality in *McGary v. City of Lafayette*, 12 Rob. 668 (La. 1848) (illegal violation of a court injunction by mayor ratified by city council, whereby a building on private property was demolished in the mistaken belief that it was on public land); *Walling v. Mayor of Shreveport*, 5 La. Ann. 660 (1850) (improper exercise of charter authority to lay out a public road in the city limits in that the required legal procedure was not followed); and in *McLaughlin v. Municipality No. 2*, 5 La. Ann. 504 (1850) (unnecessary prolongation of expropriation proceedings resulting in loss of rents). Cf. *Mallard and Armistead v. the City of Lafayette*, 5 La. Ann. 112 (1850); *Donovan v. City of New Orleans*, 11 La. Ann. 711 (1856).

117. *Reynolds v. Mayor and Trustees of Shreveport*, 13 La. Ann. 426 (1858); *Thibodaux v. Town of Thibodaux*, 46 La. Ann. 1528, 16 So. 450 (1894).

*Lease and Bailment Cases*

The City of New Orleans was treated just like a private party under similar circumstances where it was held liable for the value of a barge, leased for use in connection with the removal of garbage, which was lost by sinking as a result of careless overloading by city employees.<sup>118</sup> This case is rather significant. The governmental function business was not mentioned although garbage removal, as we have seen, has since been labeled governmental. The theory of the decision was simply that the city was liable as a negligent lessee. It would apply to any situation in which the municipality sustained a like relationship, without regard to the nature of the function in which the property, held by it as bailee or lessee, was used.<sup>119</sup>

## II. LOCAL UNITS OTHER THAN MUNICIPALITIES

Parishes,<sup>120</sup> levee districts,<sup>121</sup> and school boards<sup>122</sup> are regarded as governmental agencies of the state, much closer to the bosom of the sovereign than a municipal corporation, and, as such, have been accorded general immunity from tort liability. The prevailing notion is that they are concerned exclusively with performing delegated duties or functions of the sovereign, whereas municipalities are supposed to have their own special knitting in which only the home folks are interested. Thus, a parish enjoys immunity even in the street, road and bridge cases.<sup>123</sup> The suburban dweller's chance of getting judgment for

118. *Interstate Transportation Co. v. City of New Orleans*, 52 La. Ann. 1859, 28 So. 310 (1900). Cf. *Wilkinson v. City of Shreveport*, 165 So. 471 (La. App. 1936).

119. *Chase v. Mayor*, 9 La. 343 (1836); *Clague v. City of New Orleans*, 13 La. Ann. 275 (1858).

120. *Sherman v. Parish of Vermilion*, 51 La. Ann., 830, 25 So. 538 (1899). Accord: *Benton v. Parish of East Carroll*, Gunby's Reports 42 (Second Circuit Court of La., 1885); *Rogers v. Police Jury of East Baton Rouge*, 1 La. App. 648 (1925); *Wise v. Eubanks*, 159 So. 161 (La. App. 1935). Contra: *Houston v. Police Jury of St. Martin Parish*, 3 La. Ann. 566 (1848), where the police jury was subjected to liability under the rule of respondeat superior for injuries sustained as a result of the failure of its employees to open its drawbridge for passage of a boat.

121. *Trumata v. Board of Levee Commissioners of Orleans District*, 3 La. App. 785 (1926). In *Costa v. Illinois Central R. R.*, 137 La. 682, 69 So. 93 (1915), the "attractive nuisance" doctrine was held inapplicable to children injured by striking a levee projection while stealing a ride on a freight train. The court found that neither the railroad nor the district had breached any duty owed the children. The immunity notion was not mentioned.

122. *Horton v. Bienville Parish School Board*, 4 La. App. 123 (1926)

123. *Bridges: King v. Police Jury of St. Landry Parish*, 12 La. Ann. 858 (1857); *Bankins v. Police Jury of Calcasieu Parish*, 116 La. 639, 40 So. 925 (1906); *Gaudet v. Parish of Lafourche*, 146 La. 363, 83 So. 652 (1920); *Smith v. Police Jury of St. Tammany Parish*, 192 La. 214, 187 So. 553 (1939). *Roads:*

injuries due to driving into an unguarded hole in a street may depend entirely on whether the hole is within the city limits or just across the line.

The notion that a parish is on a different level from a municipal corporation because it is more directly a governmental arm of the sovereign must not have been too convincing even in years past when the powers and functions of parishes were so far limited that they could be more aptly described merely as administrative units of the state. Today, a Louisiana parish, to a degree much greater than is commonly true of counties in other states, has extensive powers and performs numerous functions of local government. Whatever validity the distinction might have had in years past, it is enough to say here that it has become largely a sterile formula out of harmony with the existing governmental and legal picture. Surely, the powers and functions and the attendant risk are substantially parallel. The old verbal legerdemain about a parish being a state agency and a municipality not is no longer quicker than the discriminating legal eye. But, beyond all this, if it be conceded that a city should be held responsible in a street case despite the governmental character of the function, are we to suppose that there are degrees of "governmentalness" which make a difference as to tort responsibility? This point applies, of course, to the levee districts and school boards as well. If there is such a distinction it is too subtle for us to grasp.

Drainage districts have been subjected to tort liability in two cases of trespass upon private property.<sup>124</sup> And it has been indicated that road districts may likewise be held to such responsibility.<sup>125</sup>

### III. THE FACTOR OF PUBLIC LIABILITY INSURANCE

For one reason or another—to what extent altruism and to what unfamiliarity with the law we cannot say—many municipi-

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See *Barbee v. Road Dist. No. 1, Claiborne Parish*, 14 La. App. 652, 130 So. 660 (1930); *Wise v. Eubanks*, 159 So. 161 (La. App. 1935).

124. *Canal and Carondelet Navigation Co. v. Commissioners of the First Drainage District of New Orleans*, 26 La. Ann. 740 (1874); *Tagliavore v. Caernarvon Drainage District*, 153 La. 811, 96 So. 665 (1923). These cases do not clearly pin the basis for decision to the notion that drainage districts are not state agencies, as distinguished from parishes, levee districts and school boards.

125. See *Wise v. Eubanks*, 159 So. 161 (La. App. 1935). Cf. *Barbee v. Road Dist. No. 1, Claiborne Parish*, 14 La. App. 652, 130 So. 660 (1930), where the named party defendant was a road district but the opinion was concerned exclusively with the liability *vel non* of the police jury of the parish.

palities and parish police juries have been carrying public liability insurance covering various activities, including some plainly within the governmental function category. This fact, coupled with the statute enabling the injured person or his heirs to sue the insurer under such a policy without joining the assured as a defendant,<sup>126</sup> has been seized upon by way of making further practical constrictions of the field of immunity.

While the supreme court has not ruled on the point,<sup>127</sup> a public liability insurer of a municipal corporation has been held liable in a leading court of appeal decision, where it was admitted that the municipality enjoyed the governmental function immunity and despite the fact that the insurance contract provided for indemnity against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, including death.<sup>128</sup> The same position has been taken where the assured was a parish.<sup>129</sup>

These decisions stem from an earlier supreme court determination that, in a suit by a wife against an insurer upon an automobile indemnity insurance policy of the husband, the plea of coverture was personal to the husband and thus was not available to the insurer.<sup>130</sup> Vigorous efforts have been made to supply them with adequate rational support. It has been said that the question involved is a matter of *defense*, consisting of immunity from tort liability because of the engagement of the assured in the exercise of a governmental function, which *defense* is purely personal to the municipality or its agency and may not be set up by the "surety" under Articles 2098 and 3060 of the Louisiana Civil Code. But the supreme court has declared that no liability in tort can arise out of the performance of governmental functions of a city.<sup>131</sup> It has held that as between the injured party and the

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126. La. Act 253 of 1918, as amended by La. Act 55 of 1930 [Dart's Stats. (1932) § 4248].

127. See, however, the dissenting opinion of Mr. Chief Justice O'Neill in *Rome v. London & Lancashire Indemnity Co. of America*, 181 La. 630, 160 So. 121, 122 (1935).

128. *Rome v. London & Lancashire Indemnity Co. of America*, 156 So. 64 (La. App. 1934), affirmed 181 La. 630, 160 So. 121 (1935); 169 So. 132 (La. App. 1936), overruling *Loustalot v. New Orleans City Park Improvement Association*, 164 So. 183 (La. App. 1935), discussed in (1937) 11 Tulane L. Rev. 326. See *Brooks v. Bass*, 184 So. 222, 224 (La. App. 1938). In the recent case of *Goudeau v. Indemnity Ins. Co. of North America*, 200 So. 493 (La. App. 1941), the court exonerated the municipality's insurer from responsibility in damages because the city was not negligent.

129. *Perrodin v. Thibodeaux*, 191 So. 148 (La. App. 1939).

130. *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935).

131. *Davis v. New Orleans Public Belt R.R.* 155 La. 504, 99 So. 419 (1924).

public corporation the matter is not one of defense; that the onus is on the plaintiff to allege and prove, as essential to his cause of action, that the injury arose from the performance of a proprietary, not a governmental, function.<sup>132</sup> Again, it has been urged that the public policy behind the "defense" is aimed at prevention of the diversion of public funds from the purposes to which they are dedicated and thus does not concern the insurer because no liability is sought to be imposed upon the public. This asserted public policy is open to serious question. Why should not the risk be institutionalized? If it should, would not the financial burden be a proper charge upon the funds devoted to the function out of the performance of which the risk arises? Liability for torts arising from operations is an operating expense to be accounted for as such. It has been urged, in the third place, that to allow a paid insurer to escape liability because the principal is not liable would accomplish a miscarriage of justice where the public body, despite its own non-liability, has deemed it wise to protect the public by insurance. This is aside from the mark because the question depends on the insurer's contract which confines its responsibility to cases where the principal is liable. Finally, it has been said that not to hold the insurer would put him in the position of having received public moneys without consideration and that it is against public policy to allow the insurer to escape liability on that ground. It is not evident what standing the injured person would have to rely on such matters.

These decisions are highly to be commended insofar as they recognize that the injured party should have some redress and are in line with the underlying thesis of this paper that the responsibility of local governmental units should be broadened. But they create a needlessly illogical legal imbroglio. It is not flattering to our jurisprudence that, notwithstanding the enormous expansion of the activities of government and the risks to persons and property that attend them, our courts have to resort to such reasoning to provide a measure of redress to the individual. In Louisiana, as we have seen, the law was more advanced a century ago.<sup>133</sup>

#### IV. NUISANCES

Another special type of case deserving of mention is that involving the maintenance of a nuisance. There appears to be

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132. *West Monroe Mfg. Co. v. Town of West Monroe*, 146 La. 641, 83 So. 881 (1920).

133. See the cases cited *supra* notes 12 and 13.



no case in which a municipality or other local unit has been subjected to civil liability, but there would seem every reason to say that the supreme court would, as to property damage at least, treat a municipality much in the same way that it would an offending private property owner.<sup>134</sup> Were the court to follow the lead of some of our sister states recovery for personal injury would be denied.<sup>135</sup> We leave it to the reader to pass upon the reason and justice of such a distinction. Possibly historical considerations associated with the sanctity of private property lie behind the apparent judicial disposition to hold the governmental unit responsible more freely in the nuisance than the negligence cases.

### V. EXPROPRIATION

Under the constitutional inhibition against the taking or damaging of private property except for public purposes and after just and adequate compensation is paid,<sup>136</sup> an action may be maintained against any local unit of government which proceeds with actual expropriation without first making such compensation.<sup>137</sup> The same principles are applied in actions against agencies or departments of the state government.<sup>138</sup> It has even been

134. Whether substitutional redress would be available was a matter left open in *Gibson v. City of Baton Rouge*, 161 La. 637, 109 So. 339, 47 A.L.R. 1151 (1926), where injunctive relief was denied on a balancing of equities. But the court declared that municipalities are no more privileged to maintain public nuisances than are private parties and made it clear that a nuisance so maintained is wrongful. Cf. *Howe v. City of New Orleans*, 12 La. Ann. 481 (1857).

135. See *Borchard*, supra note 1, at 34 *Yale L. J.* 251, and cases cited. But see 6 *McQuillin*, op. cit. supra note 40, at § 2812, n. 46.

136. La. Const. of 1921, Art. 1, §2.

137. *Lalanne v. Savoy*, 29 La. Ann. 516 (1877); *Manning v. City of Shreveport*, 119 La. 1044, 44 So. 882 (1907); *Foster v. City of New Orleans*, 155 La. 889, 99 So. 686 (1924); *DeMoss v. Police Jury of Bossier Parish*, 167 La. 83, 118 So. 700, 68 A.L.R. 336 (1928), reversing 9 La. App. 215, 120 So. 137 (1928); *Nagle v. Police Jury of Caddo Parish*, 175 La. 704, 144 So. 425 (1932). See *Avery v. Police Jury of Iberville*, 12 La. Ann. 554, 557 (1857). In *Millsbaugh v. City of New Orleans*, 20 La. Ann. 323 (1868), where the city had wrongfully appropriated stone ballast for use in repairing its streets, liability was predicated upon tort under Art. 2294, La. Civil Code of 1825 (Art. 2315, La. Civil Code of 1870). Might not the basis for the decision have been that of expropriation for a public purpose?

138. *Booth v. Louisiana Highway Commission*, 171 La. 1096, 133 So. 169 (1931); *Siebert v. Conservation Commission of Louisiana*, 181 La. 237, 159 So. 375 (1935); *Cope v. Louisiana State Live Stock Sanitary Board*, 176 So. 657 (La. App. 1937); *Pelt v. Louisiana State Live Stock Sanitary Board*, 178 So. 644 (La. App. 1938). If, however, the damages involved are conjectural, purely consequential in nature, or impossible of accurate determination until after the accomplishment of the public purpose of the expropriation, an injunction will not be granted. *Kuhn v. Louisiana Highway Commission*, 174 La. 990, 142 So. 149 (1932). Cf. *Harrison v. Louisiana Highway Commission*, 191 La. 839, 186 So. 354 (1939).

determined that express statutory consent to suit against the state agency or department is not necessary since the constitutional provision is considered "self-executing."<sup>139</sup> Also predicated upon special constitutional limitations<sup>140</sup> and likewise forming a class by themselves are those decisions imposing liability upon levee districts where private property had been used or destroyed in constructing levee works.<sup>141</sup>

#### VI. LIABILITY TO EMPLOYEES

There appears to be little helpful material on this subject apart from the Employers' Liability Act and the cases interpreting it.

There is an old case rather obscure as to the facts, in which police officers were wounded while on duty.<sup>142</sup> They were denied recovery against the city. The court said that the risk was one assumed when they accepted the positions. In a later case damages were recovered for the death of a youth employed at a municipal electric plant who was killed while on the job.<sup>143</sup> The report is barren of reference to the possible immunity of the town. The petition necessarily revealed the "proprietary" character of the function and the town apparently did not set up a claim of immunity. As a general proposition, we see no adequate basis for refusing to impose civil responsibility upon a public employer for the protection of its employees on substantially the same footing as private employers. The application of the Employers' Liability Act to governmental units is statutory confirmation of this view.

Under the Louisiana Employers' Liability Act persons injured while in the service "of any parish, township, incorporated village or city, or other political subdivision, or incorporated public board or commission" in Louisiana "authorized by law to hold property and to sue and be sued, under any appointment or contract of hire, express or implied, oral or written," except an "official" of such governmental units or agencies, are entitled to

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139. *Cope v. Louisiana State Live Stock Sanitary Board*, 176 So. 657 (La. App. 1937); *Pelt v. Louisiana State Live Stock Sanitary Board*, 178 So. 644 (La. App. 1938).

140. La. Const. of 1921, Art. XVI, §6.

141. *Koerber v. Orleans Levee Board*, 51 La. Ann. 523, 25 So. 415 (1899); 52 La. Ann. 2110, 28 So. 318 (1900); *Green v. Board of Com'rs of Lake Borgne Basin Levee District*, 163 La. 117, 111 So. 619 (1927); *McGeehan v. Board of Levee Com'rs*, 165 La. 241, 115 So. 473 (1928). See *DeMoss v. Police Jury of Bossier Parish*, 167 La. 83, 118 So. 700, 68 A.L.R. 336 (1928).

142. *Spalding v. City of Jefferson*, 27 La. Ann. 159 (1875).

143. *Bonnin v. Town of Crowley*, 112 La. 1025, 36 So. 842 (1904).

compensation.<sup>144</sup> The term "political subdivision," as used in the act, has been interpreted to include a parish school board<sup>145</sup> and a road district.<sup>146</sup> It was undoubtedly the statutory intention to cover local governmental units generally. It is evident from this that the act, for its purpose, obliterates the governmental versus proprietary distinction.

Liability under the act is not conditioned upon the activities of the public employer being hazardous in nature.<sup>147</sup> Under certain provisions of the act the principal is rendered liable as if the employee were employed by him where he is undertaking to execute any work which is a part of his business and has contracted with another person for the performance of the work by that person. Significantly, these provisions have been held applicable to public agencies with respect to the performance of work of a hazardous nature which is of a character essential to their business.<sup>148</sup> The court arrived at this conclusion after ruling that the employee of the contractor was not an employee of the public agency within the meaning of the primary provisions of the act.<sup>149</sup>

To be compensable, the injury must have arisen out of and in the course of the complainant's employment.<sup>150</sup> Where the employment is in the service of a municipal carrier by railroad engaged in interstate commerce the liability of the governmental unit is, it has been held, governed exclusively by the Federal Employers' Liability Act.<sup>151</sup> This was true, regardless of whether the municipal function was governmental or proprietary, because the field was one in which federal power was supreme.

Viewed in the perspective of the cases, the exception of officials from the operation of the act renders its application too narrow. The term "official" has been deemed to include a police-

144. La. Act 20 of 1914, §1 [Dart's Stats. (1939) §4391].

145. *Kroncke v. Caddo Parish School Board*, 183 So. 86 (La. App. 1938).

146. *Hicks v. Parish of Union*, 6 La. App. 543 (1927). As to what are political subdivisions of the state, see Note (1939) 1 LOUISIANA LAW REVIEW 626.

147. *Charity Hospital of Louisiana v. Board of School Directors of St. Martin Parish*, 146 So. 487 (La. App. 1933); *Kroncke v. Caddo Parish School Board*, 183 So. 86 (La. App. 1938).

148. *Washington v. Sewerage and Water Board of New Orleans*, 180 So. 199 (La. App. 1938), cert. denied May 30, 1938.

149. For a case in which the claimant himself was held to be an independent contractor and thus within the provision of the act excepting independent contractors from its operation, see *Rodgers v. City of Hammond*, 178 So. 732 (La. App. 1938).

150. *Ford v. City of Alexandria*, 155 So. 48 (La. App. 1934).

151. *Higginbotham v. Public Belt Railroad Commission*, 181 So. 65, 221 (La. App. 1938), affirmed 192 La. 525, 188 So. 395 (1939).

man<sup>152</sup> and a municipal watchman,<sup>153</sup> whose particular responsibilities were regarded as duties of a peace officer. The policeman was considered an appointive "officer" within the meaning of the city charter and that term was deemed synonymous with "official" as used in the act. In the case of the watchman, stress was laid upon the nature of the claimant's duties. These decisions certainly suggest the advisability of an amendment to the statute that would broaden its coverage in the case where a public agency is the employer.<sup>154</sup>

### CONCLUSION

As the reader will have observed, the foregoing pages present a mixture of exposition and critical comment. We have tried to set out the legal material fully and accurately but we have not spared criticism where we thought it was due. We believe that we have made it clear that the law governing the responsibility in tort of local units of government in Louisiana is on anything but a satisfactory basis at the present time.

If a thorough job of rewriting the law on the subject were undertaken it should strike at the theoretical root of all the trouble, namely, the notion of sovereign immunity which places the sovereign above the law and this in a democratic society where government is supposed to be simply the servant of the people, not the master. But as a practical matter we do not have to go this far to put the law on a sounder, more wholesome basis as to local units of government. It is a routine matter for the laws providing for the organization of such units to grant them capacity to sue and be sued. Thus, without the interposition of the legislature, the courts could repudiate the immunity rule and

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152. *Hall v. City of Shreveport*, 157 La. 539, 102 So. 680 (1925).

153. *Coleman v. Maryland Casualty Co.*, 176 So. 143 (La. App. 1937).

154. In the cases of at least two branches of the state service, the National Guard and the State Police, the coverage has been, in terms, greatly extended by the legislature. See La. Act 164 of 1940, §39 [Dart's Stats. (Supp. 1941) § 4505.39] (National Guard); La. Act 94 of 1936, §13 [Dart's Stats. (1939) § 9307.13] (State Police). It remains to be seen, however, whether such statutory extensions provide an effective remedy. Conceding that recovery could be obtained from the workmen's compensation insurer in these instances, are the above provisions and those of the Employers' Liability Act (La. Act 20 of 1914, § 1 [Dart's Stats. (1939) § 4391]) constitutional as applied to the state departments in which these two branches of the state service have been placed? Article III, Section 35, of the Louisiana Constitution of 1921 requires that the legislature shall provide for the method of procedure and the effect of the judgment when it shall authorize suits against the state. *Quære* whether an action could be maintained against either of these state departments in view of the apparent omission of the legislature to comply with these constitutional requirements.

hold the tort articles of the Revised Civil Code applicable to local units of government.

But, despite the vagaries of the governmental versus proprietary distinction, the immunity notion is so strongly entrenched in the jurisprudence of the state that the prospect for judicial repudiation is not too bright.

We would, accordingly, commend the subject as one deserving of prompt legislative consideration and action. The legislature would be in a position to consider such important practical aspects of the matter as how to meet any additional financial burden that would be entailed and how to safeguard the public purse from imposition and fraud. It is our thought, moreover, that it would be practically indispensable to the intelligent formulation of legislative policy with respect to the subject that a careful study first be made of its practical aspects.<sup>155</sup> Once the fruits of such a study were available it could be determined sensibly to what extent the primary rule of liability should be qualified to meet special problems or should be hedged about with procedural and administrative safeguards. The next regular session of the legislature is a year ahead; there is time in the interim for the making of the basic factual study under the aegis of competent authority.

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155. Comparative materials should be consulted. A helpful list of references to legal commentaries on the general subject may be found in Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform* (1934) 20 *A.B.A.J.* 747, 748, n. 1. At the end of that paper Professor Borchard set out a tentative draft of a statute relating to the settlement of tort claims against the state as well as local units.

Statistical studies of the administration of municipal tort liability have been undertaken in geographically representative cities and some of them have been completed. For references to available materials of this sort see Fuller and Casner, *Municipal Tort Liability in Operation* (1941) 54 *Harv. L. Rev.* 437, and the *Symposium on Municipal Tort Liability* (1940) 5 *Legal Notes on Local Government* 351.