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## The Court, The Legislature, and Governmental Tort Liability in Michigan

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# THE COURT, THE LEGISLATURE, AND GOVERNMENTAL TORT LIABILITY IN MICHIGAN

Luke K. Cooperrider\*

## I. THE ERA OF CAMPBELL AND COOLEY

### A. *The Original Image of the Problem: Nonfeasance and Mere Neglect, Misfeasance and Trespass, Independent Public Officers, and Legislative Decisions*

IN 1961, when Justice Edwards of the Michigan supreme court said, "From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan,"<sup>1</sup> he went on to say that he was eliminating from the law of Michigan "an ancient rule inherited from the days of absolute monarchy,"<sup>2</sup> a "whim of long-dead kings."<sup>3</sup> Justice Carr, dissenting, agreed that the doctrine in question "came to us as a part of the common law,"<sup>4</sup> for which reason he thought it was protected by the reception clause of the Constitution of 1850<sup>5</sup> from the overruling action of the court. If the learned justices had looked more closely, they would have discovered that their statements were not historically accurate. The doctrine of "governmental immunity," as it has been known in recent years—that is, the rule that governmental entities are immune from tort liability for the acts of their employees whenever the injury-causing activity is "governmental" in nature or involves the performance of a "governmental function"—is not, so far as the law of Michigan is concerned, "ancient." It did not exist in 1850 and therefore can scarcely "have come to us as part of the common law" or by inheritance from monarchs, absolute or otherwise. Rather it was imported into the law of Michigan in the first two decades of the twentieth century by a generation of judges and lawyers who found it easier to read about the law in Judge Dillon's treatise on municipal corporations than to track down their own legal heritage. The instruments

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\* Professor of Law, University of Michigan. B.S. 1940, Harvard University; J.D. 1948, University of Michigan; Editorial Board, Vol. 46, *Michigan Law Review*.—Ed.

1. *Williams v. City of Detroit*, 364 Mich. 231, 250, 111 N.W.2d 1, 20 (1961).

2. *Williams v. City of Detroit*, 364 Mich. 231, 250, 111 N.W.2d 1, 20 (1961).

3. *Williams v. City of Detroit*, 364 Mich. 231, 258, 111 N.W.2d 1, 28 (1961).

4. *Williams v. City of Detroit*, 364 Mich. 231, 240, 111 N.W.2d 1, 5 (1961).

5. MICH. CONST. sched. § 1 (1850): "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."

with which the justices of the Michigan supreme court in its salad days operated upon problems of municipal tort liability were products of their own environment and experience, bore little resemblance to the blunt instrument of later years—"governmental function"—and had almost nothing to do with the divine right of kings.

In the early days, the Savoyard Creek, a minor watercourse meandering through the area that is now downtown Detroit, was used by the householders along its banks as a place to dispose of refuse, until it became so noisome that the city fathers, in 1836, walled it in, covered it over, and created the first underground sewer in that city. It was known as the "Grand Sewer," and its success was such as to convince a doubting citizenry of the merits of underground drainage; however, for many years yet there was no general system. Private parties built their own sewers in their own ways, many lots had no drainage, and for many others the drainage available was most imperfect. A system did not begin to emerge until a new city charter in 1857 gave a board of sewer commissioners control over all sewers, public and private.<sup>6</sup>

In that same year the supreme court, in *Dermont v. Mayor of Detroit*,<sup>7</sup> entertained the first case involving a claim against the city arising out of its management of such matters. During a heavy rainfall in 1853 the Grand Sewer backed up into the cellar of Dermont's store. Dermont claimed the damage was caused by the city, which had introduced too many tributaries into the main trunk and had connected the Woodward Avenue sewer, at the very corner where his store was located, at right angles instead of on a curve; all of this was done after he had, with the city's consent and at the cost of an annual fee, connected his private drain to the sewer.<sup>8</sup> The court rejected his claim, resting its decision upon the proposition that the city had no obligation to furnish private drainage to individual property owners.<sup>9</sup> It was conceded that the city would be liable if plaintiff's damage had happened "directly" in consequence of defendant's want of prudence or skill in the *construction* of the sewer, or if the water had flowed up through the manholes and flooded his cellar. But it was asserted that his damage had, in fact, resulted from his connection of his private drain to the sewer for his own convenience, and that the rule in such case was no different from what it would be if a private individual

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6. S. FARMER, *THE HISTORY OF DETROIT AND MICHIGAN* 60-61 (2d ed. 1889).

7. 4 Mich. 435 (1857).

8. 4 Mich. at 436.

9. 4 Mich. at 442.

had dug a drain and permitted his neighbor to tie into it.<sup>10</sup> The annual fee paid by plaintiff did not alter these conclusions, for it was viewed as payment for a license only, and not as the consideration for an obligation, express or implied, to furnish sufficient drainage for the premises connected to the sewer.<sup>11</sup>

Since Dermont's assertions appear sufficient to support a claim of misfeasance, the factual image from which the decision proceeds, *i.e.*, that the claim was based on nonfeasance, a "failure to provide sufficient drainage," seems questionable. Nevertheless, the decision did rest on an application of tort doctrine not peculiar to the liabilities of governments. The opinion did contain, however, the statement of a position, applicable particularly to governmental defendants, which echoed down through subsequent cases:

The powers granted to Municipal Corporations for the laying out and making of highways, and for opening and grading streets, and the construction of sewers, involve the exercise of discretion on the part of the municipal authorities, and should be employed for the benefit of the public at large, and not for the private convenience or advantage of individuals; nor are the officers of a Municipal Corporation justified in the exercise of those powers, except in reference to the public demands.<sup>12</sup>

It was thought that to recognize liability in this case would "impose upon the city the obligation to furnish private drainage for individuals; and the question presented to its officers would not be, what the public exigencies demanded in reference to its capacity, but how they might best discharge its legal obligations to individuals."<sup>13</sup>

Another landmark in the area of municipal liability was established by the court at the same term when, in *Commissioners of Highways v. Martin*,<sup>14</sup> it rejected a claim for damage arising from the non-repair of a bridge. Judge Douglass, the reporter responsible for the publication of the first volumes of Michigan supreme court reports, asserted in his opinion that the court was unaware of any previous attempt in Michigan to assert such a liability. While he carefully noted the state of authorities in England and the historical origins of duties in regard to maintenance of highways and bridges there reposed in local units of government, he focused primarily upon indigenous conditions and upon American authorities, which, in the

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10. 4 Mich. at 443.

11. 4 Mich. at 444.

12. 4 Mich. at 442.

13. 4 Mich. at 443.

14. 4 Mich. 557 (1857).

absence of statute, he found to be almost unanimously contrary to the claim.<sup>15</sup>

Unlike the situation in Russell's pursuit of the Men of Devon,<sup>16</sup> Martin's problem was not the absence of a suable entity, for under Michigan statutes the inhabitants of each organized township constituted a body corporate that could sue and be sued, hold and dispose of property, and enter into contracts.<sup>17</sup> His difficulty, as the judges viewed the scene in Michigan, was that the corporate township had, not just no liability, but no duty at all, even of an operational character, in respect to the maintenance of bridges. The reason they saw the situation in this light had little to do with the immunity of sovereigns, but much to do with the way in which such matters had been handled on the frontier.

At that time the inhabitants of a Michigan township assembled each year in an annual meeting to elect certain officers and transact such other business as required their action.<sup>18</sup> One of the officers elected at the meeting was a highway commissioner. Since his term of office was three years, each township had three such commissioners, who together constituted the Board of Highway Commissioners.<sup>19</sup> In addition, an overseer of highways was elected for each road district that had been set aside within the township.<sup>20</sup> The highway commissioners were, by statute, directly burdened with responsibility for the care and superintendence of highways and bridges within the township, and with the duty to see that they were kept in repair.<sup>21</sup>

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15. 4 Mich. at 562.

16. *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788). *Russell*, which is generally identified as the basis for common law doctrine concerned with the liability or immunity of municipal corporations, was an action for damages arising from an un-repaired bridge. It was the county's duty to repair the bridge, but the county was not a corporate entity, and a demurrer was interposed by two of the inhabitants of the county for themselves and the other inhabitants. The judges concluded that no action could be maintained without statutory authorization because of the difficulties that would be created with regard to the collection of the award and the identification of the inhabitants bound to contribute to it, there being no corporate fund out of which it might be paid. This reasoning was imported into American doctrine via dicta in *Riddle v. Proprietors of the Locks & Canals*, 7 Mass. 169 (1810), and the decision in *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812), wherein the court assumed it was applicable to a claim against a town, though the town apparently was possessed of a corporate identity, and stated the proposition that quasi-corporations (*i.e.*, towns and counties) "created by the legislature for purposes of publick policy are subject by the common law to an indictment for the neglect of duties enjoined on them: but are not liable to an action for such neglect, unless the action be given by statute." 9 Mass. at 250. See generally W. PROSSER, *TORTS* 977 (4th ed. 1971), and sources cited therein at 978 n.80.

17. MICH. REV. STAT. ch. 16, § 2 (1846).

18. MICH. REV. STAT. ch. 16, §§ 8, 12 (1846).

19. MICH. REV. STAT. ch. 16, § 12 (1846).

20. MICH. REV. STAT. ch. 16, § 10 (1846).

21. MICH. REV. STAT. ch. 22, § 1 (1846).

Their "department" for this purpose consisted of the overseers, themselves elected representatives of the inhabitants, upon each of whom, within his own district, fell the explicit duty "to repair and keep in order the highways."<sup>22</sup> The commissioners and the overseers were subject to indictment and fine for refusal or neglect to perform the duties imposed upon them by law,<sup>23</sup> and the commissioners were required to prosecute an overseer against whom a complaint was filed, with security for costs, by any resident.<sup>24</sup>

While the duties of the commissioners were explicit, as were their risks of office, their resources were limited. Although the township board was authorized, at the behest of the highway commissioners, to *request* of the annual township meeting an appropriation for the improvement of highways and bridges,<sup>25</sup> the amount of that appropriation was expressly limited to 250 dollars, and the principal resource for the maintenance and improvement of the highway system was the labor of the township inhabitants, who were conscripted through an assessment system administered by the highway commissioners. Each male inhabitant between the ages of twenty-one and fifty was annually assessed one day of labor on the highways, and the remaining labor required for the maintenance program was assessed against all property owners in proportion to the value of their assessed property, not in excess of one day of labor per one hundred dollars valuation.<sup>26</sup> It was the duty of the overseer, who was assessed along with the rest, to notify persons when to come to work and to supervise their labors when they appeared.<sup>27</sup>

This mobilization of the inhabitants for the repair and construction of highways had been in effect in Michigan from early territorial days. The same basic system is found in a statute promulgated in 1805 by the governor and judges of the Michigan territory, coupled with the declaration, essential to their power to legislate, that it was "adopted from the laws of one of the original States, to wit, the State of New York, as far as necessary and suitable to the circumstances of the territory of Michigan."<sup>28</sup> It was this system the judges had in

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22. MICH. REV. STAT. ch. 22, § 5 (1846).

23. MICH. REV. STAT. ch. 16, §§ 85-86, ch. 22, § 13 (1846).

24. MICH. REV. STAT. ch. 22, § 14 (1846).

25. MICH. REV. STAT. ch. 22, § 4 (1846).

26. MICH. REV. STAT. ch. 23, § 5 (1846). The labor could be commuted in cash at the election of the person assessed, MICH. REV. STAT. ch. 24, § 3 (1846), or he could hire a substitute to work out his obligation. MICH. REV. STAT. ch. 24, § 6 (1846).

27. MICH. REV. STAT. ch. 22, § 5 (1846).

28. Act of Sept. 18, 1805, 1 MICH. TERR. LAWS 75, 79 (1871). Numerous revisions appeared thereafter, e.g., one adopted in 1819 that was then attributed to "the laws of three of the original states; to wit, the states of New-York, Pennsylvania, and Ohio." Act of Dec. 30, 1819, 1 MICH. TERR. LAWS 449, 461 (1871). The final territorial version

mind when they considered Martin's claim against the Niles commissioners.

His action was brought, not against the township as such, but against the commissioners of highways as a "quasi corporation" under a procedural chapter (chapter 119) of the Revised Statutes that authorized the commissioners, and other similar public boards, to sue in the name of their office on contracts made by them or their predecessors, or to enforce any legal duty, or to recover damages for injuries to their official property or rights.<sup>29</sup> They were made subject to suit in the same fashion, and it was provided that if judgment were recovered in such an action, payment thereof was to be made by the township treasurer *after* the amount had been levied and collected from the taxpayers like other township charges.<sup>30</sup> There was no specification, however, of the kinds of claims that could be asserted against the board. The judges thought that the township as such could not be held liable for the nonperformance by the commissioners of a duty that was imposed directly upon them, since in the performance of such duties they were neither responsible to nor controlled by the township. Moreover, the judges could not bring themselves to believe that the procedural provisions of chapter 119 were intended to create such a liability, which, by virtue of the collection machinery that the law provided, would ultimately come to rest on the inhabitants of the township.<sup>31</sup> Their conclusion was that those provisions authorized a suit only for *acts done* by the commissioners or on contracts made by them within the scope of their authority and did not extend to claims for damages caused by an alleged *neglect* of official duty. The opinion added without explication that, "if liable at all, [the commissioners] are liable individually, and not officially, as a *quasi* Corporation."<sup>32</sup>

These conclusions were perhaps not inevitable, but neither were they unreasonable. They were *not* the product of a mindless obeisance to *Russell v. Men of Devon*,<sup>33</sup> although they were influenced by the

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was adopted by the Legislative Council in 1833. Act of April 17, 1833, 3 MICH. TERR. LAWS 1049 (1874). It was then reiterated in MICH. REV. STAT. pt. 1, tit. IV, ch. 1 (township organization) & tit. VI, ch. 1 (highways) (1838).

29. MICH. REV. STAT. ch. 119 (1846).

30. MICH. REV. STAT. ch. 119, § 7 (1846).

31. 4 Mich. at 563-64.

32. 4 Mich. at 564.

33. For critiques of American decisions following *Russell v. Men of Devon*, discussed in note 16 *supra*, see Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250, 264 (1937); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 41-45 (1924).

weight of American authority, which had in turn been influenced by that decision. If one is inclined to speculate about unexpressed premises, it may be that the judges saw the problem of imperfect rural highways as one of the common perils of the times, which the community dealt with as best it could through the efforts of its members, and that their sense of justice did not strongly suggest that the community be required to assume the costs of individual misfortunes arising from a risk to which all were exposed.

A few years later, in *City of Detroit v. Corey*,<sup>34</sup> the city was again before the court, this time as a result of an injury suffered by one Corey, who drove his wagon into a Grand River Street excavation that had been made and left unprotected by a contractor who was building a sewer for the city. The court rejected the city's "independent contractor" defense and held it liable. The court argued that, although the city streets were public highways, the sewers were the city's private property, and the people of the state at large had no interest in them.<sup>35</sup> The grant of power to the city to locate sewers in its streets was therefore a grant for private purposes, and the donee of such a power, whether it be a corporation or an individual, took it subject to the conditions that it shall be so executed as not unnecessarily to interfere with the rights of the public and that all proper measures be taken to guard against accidents to persons lawfully using the highway. Such an obligation is binding upon the donee personally and cannot be divested by delegating the execution of the power to another.<sup>36</sup>

The first case to imply a possible public liability for *nonrepair* of public facilities was *Dewey v. City of Detroit*.<sup>37</sup> Plaintiff had tripped on a loose plank in a city sidewalk. The trial judge told the jury that the city would be liable only if it had had notice of the defect and that notice might be inferred if the defect were open and notorious, or of long standing and of such character that it would naturally arrest the attention of persons passing by. Plaintiff's counsel argued that this condition was too restrictive, but Justice Campbell could find no fault with the charge. He did not deny the implication that liability would arise from a failure to repair after notice. He answered the plaintiff's claim of more extensive responsibility by pointing to the fact that sidewalk repairs were required by the city charter to be made under the supervision of street commissioners, that there were

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34. 9 Mich. 165 (1861).

35. 9 Mich. at 184.

36. 9 Mich. at 184-85.

37. 15 Mich. 307 (1867).



only two commissioners for the entire city, and that, as a practical matter, the commissioners could not be expected to be aware of defects that were not apparent to every ordinary observer, since the walks in a city the size of Detroit covered "many scores, and probably several hundreds of miles."<sup>38</sup> He thought that the "minute daily inspection which is possible and necessary on a line of railroad, where a small break may endanger hundreds of lives, would be absurd and impracticable in relation to sidewalks."<sup>39</sup> Although it might be argued that the city could have decided to appoint more commissioners, that decision, he was firmly convinced, was legislative in character and not subject to judicial review; nor could it be made the basis of a complaint against the city.<sup>40</sup>

Thus, in these early decisions the court had held that road and bridge maintenance in rural areas was, under Michigan statutes, the personal responsibility of certain elected officials, and not that of any public entity, so injuries arising from the lack of repair of such facilities were not a source of community liability, and further, that the charter of the city of Detroit did not impose upon the city any obligation to provide adequate drainage for its inhabitants, so the city had no liability to private parties for failure of the drainage system to conduct surface water away rapidly enough to avoid flooding. On the other hand, the court had held that the city *was* liable to a private party harmed by the negligence of the city's contractor in opening an excavation in a public street without taking the necessary precautions to prevent accidents to users of the public way and had voiced dicta to the effect that a city would be liable for harm caused by construction operations in building a sewer, or by a sewer that, because of insufficient capacity, overflowed and cast water upon private premises. In another early case, *Pennoyer v. City of Saginaw*,<sup>41</sup> wherein plaintiff complained of ditches that cast surface water upon his premises, the court had also stated that a city would be liable for the continuance of a nuisance that it had created.

The evolving demarcation corresponded generally to the boundary between misfeasance and nonfeasance, with two jogs, one on each side of the line. The court had disclaimed power to interfere, under the warrant of an action for damages, with decisions that it viewed as within the legislative or discretionary powers entrusted to other branches of government. This idea was advanced as part of the argu-

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38. 15 Mich. at 313.

39. 15 Mich. at 313.

40. 15 Mich. at 313.

41. 8 Mich. 534 (1860).

ment in *Dermont* and in *Dewey* that the decisions as to *how much* drainage and *how many* street commissioners should be provided by the city were not subject to judicial review. But in *Larkin v. County of Saginaw*<sup>42</sup> the idea was also applied to bar a claim for damages allegedly caused to a steamboat by the county's action in building, across the Tittibawassee River, a bridge that the claimant asserted constituted an unlawful obstruction to navigation.<sup>43</sup> On the other side of the misfeasance-nonfeasance line was the tacit assumption in *Dewey* that the city might be liable for an injury resulting from failure to repair a notoriously long-standing defect in the public ways. The latter deviation was not long-lived, however.

At a time when street paving was a sometime thing, crossing the street in Detroit in inclement weather was a formidable experience. According to one account:

The condition of all the streets up to 1835, and of most of them to about 1850, was such as to preclude all unnecessary use. Especially in the spring and fall, the fine black soil, saturated with water, and in places mixed with clay, made the roads almost impassable. Children living not two blocks away were carried to school on horseback, and horses were kept hitched in front of stores or offices to enable their owners to cross the streets, the animals literally wading from side to side.<sup>44</sup>

In 1847, the city fathers took action to ameliorate the problem, providing by ordinance for the establishment by the city of crosswalks of wooden planks laid on cross ties and for their funding by assessment.<sup>45</sup> In the winter of 1868, Hannah Blackeby stepped into a hole in a crosswalk over Michigan Avenue, tripped, and fell, breaking her arm in two places. Her evidence, in an action against the city, tended to show that the walk had been "notoriously out of repair" for several months prior to the accident. Chief Justice Campbell, in *City of*

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42. 11 Mich. 88 (1862).

43. The argument was peculiar. Chief Justice Martin's opinion was as follows:

The board of supervisors of Saginaw county is clothed with legislative as well as executive power; and while the county may be liable for its acts in the exercise of the executive, it can not for its exercise of legislative power. The determination that it was necessary to build a bridge across the Tittibawassee river, and the whole action of the board in relation thereto, were legislative, and whether any portion was usurpation or not, no action can be maintained against the county for any consequences resulting therefrom. What would be a nuisance if erected by an individual, is not such when erected by authority of law and by the public, so as to confer a right of private action against the public therefor; and the same principle I think controls in this case that would had the bridge been built by authority of the Legislature.

11 Mich. at 91.

44. S. FARMER, *supra* note 6, at 928.

45. *Id.* at 931.

*Detroit v. Blackeby*,<sup>46</sup> brushed aside any implications to be found in his dictum in *Dewey* as not required by that decision and posed for decision the question "whether the city of Detroit is liable to a private action by an injured party, for neglect to keep a cross-walk in repair."<sup>47</sup> There was no statute imposing such an obligation, and in view of the uniform opinion that, in the absence of statute, governmental units such as towns, townships, and counties had no such liability as to highways generally,<sup>48</sup> there was, in his mind, a strong presumption against liability where cities were concerned. Mrs. Blackeby's counsel argued that a duty owed by the city to his client arose from the control, by law exclusive of others including state and county, that the city exercised over its streets; he cited a line of outside decisions that distinguished in this respect between towns and counties, on the one hand, and incorporated cities and villages, on the other.<sup>49</sup> The pivotal decision was that of Judge Selden in the New York case of *Weet v. Trustees of the Village of Brockport*,<sup>50</sup> wherein he reviewed a number of English and American decisions and concluded that although, in the absence of statute, towns and counties were not subject to liability for failure to repair the public ways, with incorporated municipalities it was otherwise.

The heart of the matter was the difficulty that courts of the time experienced in identifying a vehicle for tort liability—a "duty"—when the plaintiff's complaint was that he had suffered injury because the defendant did not do something he ought to have done, and the "ought" was not derived from contract or any other special duty-creating relationship between the parties. Public officials owed to the public at large a duty to perform in a proper way the functions entrusted to them, and their nonfeasances were sanctioned by indictment. But, with the exception of certain officials who, like sheriffs, acted or were bound to act at the behest and in the interest of individuals from whom they also received a special compensation, what was the source of any duty owed by the official to the individual citizen? And if there was none, then why would there be any difference

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46. 21 Mich. 84 (1870).

47. 21 Mich. at 105.

48. 21 Mich. at 107.

49. 21 Mich. at 88.

50. The opinion of Judge Selden in this supreme court case was reported in a footnote to the court of appeals decision in *Conrad v. Trustees of the Village of Ithaca*, 16 N.Y. 158, 161-73 n.\* (1857), where it was stated by Chief Justice Denio that the Selden opinion had been adopted by the court of appeals as a correct exposition of the principles governing such cases in the course of the court's decision to reverse the supreme court's decision in *Hickock v. Trustees of the Village of Plattsburgh*, 15 Barb. 427 (N.Y. Sup. Ct. 1853). See 16 N.Y. at 160-61 & 161 n.\*.

in so far as the obligations of public corporations were concerned? Judge Selden found his answer to the latter question in a theory, spun from English cases, that the special grant of governmental powers to a municipal corporation, normally made at the request of the incorporators, constituted consideration for an implied obligation on the corporation's part to perform its duties in a proper way and that this implied obligation was for the benefit of individuals injured by nonperformance, as well as for the benefit of the public at large.<sup>51</sup>

But Justice Campbell would have none of this. The distinction between towns and counties, on the one hand, and cities, on the other, he thought irrational:

It is competent for the Legislature to give towns and countries powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this because the good government of the people is supposed to require it. It would be contrary to every principle of fairness to give special privileges to any part of the people and deny them to others; and such is not the purpose of city charters. In England the burgesses of boroughs and cities had very important and valuable privileges of an exclusive nature, and not common to all the people of the realm. The charters were grants of privilege and not mere government agencies. Their free customs and liberties were put by the great charter under the same immunity with private freeholds. But in this State, and in this country generally, they are not placed beyond legislative control. The Dartmouth College case, which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere, which holds that either offices or municipal charters generally involve any rights of property whatever.<sup>52</sup>

In sum, his view was "that simply as municipal corporations . . . no public bodies can be made responsible for official neglect involving no active misfeasance"<sup>53</sup> and that "it will require legislative action to create any liability to private suit for non-repair of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative

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51. 16 N.Y. at 161 n.\*, 170-71.

52. 21 Mich. at 116-17. This was not the first evidence of Justice Campbell's disapproval of the argument derived from *Weet*. He had dissented on similar grounds in *City of Detroit v. Corey*, discussed in the text accompanying notes 34-36 *supra*, because it seemed to him that the condition attached by the court to the city's exercise of its charter power to open excavations in the public way for the implantation of sewers was the product of some notion of implied contract between city and state in regard to the manner of its use. *See* 9 Mich. at 187-92.

53. 21 Mich. at 116.

questions of importance and some nicety. They cannot be solved in courts."<sup>54</sup>

Justice Cooley, in dissent, was of a different opinion. To him it was unquestionably sound policy "that a municipal corporation which is vested with full control of the public streets within its limits, and chargeable with the duty of keeping them in repair, and which also possesses by law the means of repair, should be held liable to an individual who has suffered injury by a failure to perform this duty."<sup>55</sup> Being of this view, he was not disposed to buck the strong trend of opinion in accord with Judge Selden's view for no better reason than the questions that might be raised against the logic by which it was derived.<sup>56</sup>

Two years later the court's position was brought into bolder relief by its decision in *Sheldon v. Village of Kalamazoo*.<sup>57</sup> The village trustees, having concluded that a number of property owners were maintaining fences within the boundaries of the street along Olmstead Road, ordered the village marshal, in default of prior action by the owners, to remove the offending structures. In response to that directive, the marshal removed Sheldon's fence, and Sheldon sued the village, claiming that the fence was in fact on his property. The trial judge refused to hear Sheldon's evidence on the ground that the trustees had acted on their own responsibility as public officers and that the village was therefore not responsible for any resulting damage.<sup>58</sup> This position was firmly rejected by Justice Campbell for a unanimous court. He asserted that, although some local officers are corporate agents and others are not, a public corporation is as much a legal person as is a private corporation, and if an unlawful act is brought home to the corporation itself, there is no reason why it

54. 21 Mich. at 117.

55. 21 Mich. at 117.

56. But when, ten years later, the question was raised again by a litigant who hoped to benefit from a change in the court's membership, it was Justice Cooley who rebuked him:

The case of Blackeby was very fully and carefully considered, and there can be no ground for supposing that either of the judges participating therein has since changed the opinion then deliberately formed and expressed. The case was decided on the concurring opinions of a majority of the court, and the decision is authoritative. There has been a change in the court since that time, but it would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court, thereby encouraging speculation as to the probable effect of such changes upon principles previously declared and enforced in decided cases. Nothing is more important than that the law should be settled; and when a principle has once been authoritatively laid down by the court of last resort, it should be regarded as finally settled.

*McCutcheon v. Common Council*, 43 Mich. 483, 486, 5 N.W. 668, 668-69 (1880).

57. 24 Mich. 383 (1872).

58. 24 Mich. at 384.

should not be answerable. On this point, he stated, there was no disagreement at all.

The only disagreement is concerning corporate responsibility in cases of alleged neglect of duty, and concerning the bounds of what may be termed their legislative discretion, as distinguished from their other action. To hold that positive wrongs must in all cases be considered as purely individual and not corporate acts, would be a novelty in jurisprudence. Although not subject like corporations to the jurisdiction of courts, it has always been understood that even states and nations may be held responsible for the wrongs of their authorized agents, and the whole system of public law rests on this assumption. The idea, therefore, that a corporate body has a discretionary power to do wrong and not suffer for it, is not in harmony with any safe principle. There may be certain cases where there is, of necessity, a final discretion; but there can be no absolute discretionary power over private persons or property. They are assured by the law of the land against any improper interference, and no public authority exists which can authorize their immunity to be taken away.<sup>59</sup>

The act complained of by Sheldon was a trespass, directly commanded by the village fathers themselves. Worse yet, it was in effect a forcible taking of private lands for public use and therefore in no way analogous to cases involving claims for incidental inconveniences arising out of grade changes or other public improvements where a wide latitude for legislative decision-making must be allowed. Under the circumstances presented by plaintiff's complaint, neither the "non-agency" argument nor the "legislative discretion" argument was applicable, and it was not a case of "mere neglect of public duty." Consequently, there was no reason why the village should escape responsibility for the act of its officers carried out in their corporate capacity.<sup>60</sup>

During the remaining years in which the court enjoyed the counsel of either Justice Campbell or Justice Cooley,<sup>61</sup> the reason most commonly asserted by the court for a conclusion that a municipal corporation was not subject to liability (where the case did not involve mere nonfeasance and the court was persuaded that the action in question was the action of the municipal corporation and not that of an independent officer or agency) was that the particular action

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59. 24 Mich. at 385-86.

60. See also *Rogers v. Randall*, 29 Mich. 41 (1874) (similar reasoning applied to removal of sidewalk from plaintiff's premises without his consent); *Jordan v. Thorp*, 142 Mich. 515, 105 N.W. 1113 (1905).

61. Justice Cooley was defeated for re-election in 1885; Justice Campbell died in 1890.

reflected a decision within the legislative or political discretion of the policy-making organ of the unit. It is clear that both of these justices harbored strong convictions that judges and juries had no business second-guessing operational decisions made by the elected representatives of the people. Thus, in *City of Pontiac v. Carter*<sup>62</sup> it was held that the city had no liability to a property owner for damages allegedly suffered by reason of a change in the grade of the street on which his premises were located. While the facts are not set forth in the opinion, the case was described in *Ashley v. City of Port Huron*<sup>63</sup> as involving no intrusion upon plaintiff's premises, but only a claim that the value of his property was adversely affected because he had built by reference to the earlier grade. It was a case of first impression in Michigan. Justice Cooley cited what he described as an overwhelming weight of authority contrary to plaintiff's claim, which he saw as analogous to a claim for loss arising from the removal of a public market or public hall from the vicinity of plaintiff's land, or from the bringing of a prison into its vicinity.<sup>64</sup> He also cited *Larkin v. County of Saginaw*<sup>65</sup> for the proposition that "no action would lie against a municipal corporation or body for an injury resulting from a lawful exercise of its legislative authority," a principle that he thought was applicable here.<sup>66</sup>

In *Henkel v. City of Detroit*<sup>67</sup> plaintiff complained that the city was unlawfully interfering with his property rights by allowing traffic to accumulate around a public market to such an extent as to block access to his adjoining business premises. He sought an injunction. Justice Cooley, again, held that plaintiff could not complain about the establishment of the market even though it inconvenienced him, for the establishment of the market was a legislative act and "[a]n act of legislation can never be counted on as a legal wrong, however injurious it may prove to be to private interests."<sup>68</sup> He did, however, review the facts of the case to determine whether the city's implementation of its legislative decision had been in any way wrongful; he concluded that the wrong, if any, must arise from the city's failure to establish and enforce due regulations to protect and preserve the

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62. 32 Mich. 164 (1875).

63. 35 Mich. 296, 297-98 (1877).

64. 32 Mich. at 171-72.

65. See note 43 and text accompanying notes 42-43 *supra*.

66. 32 Mich. at 169.

67. 49 Mich. 249, 13 N.W. 611 (1882).

68. 49 Mich. at 258, 13 N.W. at 615.

right of passage, "[b]ut this would be a failure in duty of a political nature and could give no right of action."<sup>69</sup>

In *Burford v. City of Grand Rapids*<sup>70</sup> plaintiff complained of the city council's action in setting aside Fountain Street as a street on which coasting would be permitted. He asserted that the large numbers of people who gathered there for that purpose constituted a public nuisance and that he had suffered special injury when his horse, which he was driving on the street, was hit by a bob occupied by several men and boys. Justice Cooley held that the complaint failed to state a cause of action, for the permission granted by council was again the exercise of a legislative power conferred upon the city to control the use of its streets, and "legislative power, whether held by the law-making authority of the State, or by municipal bodies, is in its nature governmental and discretionary."<sup>71</sup> To plaintiff's claim that the council had, in effect, licensed a nuisance, he replied that coasting on a public highway is not necessarily a nuisance, and, this being so,

[t]he case presented then, would seem to be this: The common council, having full control of the streets, has licensed the use of a particular street in a particular way differing from the ordinary use. In doing so it must be supposed to have determined that the use in that way will not interrupt or interfere with such customary use of it for passage or travel as the public may have occasion for. The decision to this effect is made in the exercise of its discretionary and governmental authority over a subject confided by the state to its judgment, and is presumptively correct. But, whether correct or not, no appeal from the judgment to court and jury has been provided for, and therefore none can be had.<sup>72</sup>

In *Hines v. City of Charlotte*<sup>73</sup> the court held that the plaintiff had no cause of action against the city for a fire loss that he attributed to the city's failure to enforce its ordinance prohibiting the erection of wooden structures within certain areas, and in *Amperse v. City of Kalamazoo*<sup>74</sup> it held that the city had no liability for the city council's wrongful refusal to approve a bond offered by the plaintiff so that he could engage in the sale of liquor. Both cases were treated as instances

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69. 49 Mich. at 261, 13 N.W. at 616.

70. 53 Mich. 98, 18 N.W. 571 (1884).

71. 53 Mich. at 100, 18 N.W. at 571.

72. 53 Mich. at 105, 18 N.W. at 574.

73. 72 Mich. 278, 40 N.W. 333 (1888).

74. 75 Mich. 228, 42 N.W. 821 (1889).



of mere nonfeasance, although in the latter case the council had passed a resolution affirmatively disapproving the bond.

In sum, it was decided in these cases that the city was not required to compensate a property owner for the prejudicial effect that a change of street grade would have upon the value of his property, nor for the inconvenience he suffered from the traffic near his place of business generated by the operation of a public market nearby, nor for a fire loss that would not have occurred if the ordinance pertaining to the use of wooden buildings had been enforced; nor was it required to compensate a user of the highway for harm suffered at the hands of another person using the highway in a manner permitted by the city, nor to compensate a citizen who claimed that the city council arbitrarily refused to take action in his favor that he was entitled to have taken.

The most dubious decisions during this era were *City of Detroit v. Beckman*<sup>75</sup> and *City of Lansing v. Toolan*,<sup>76</sup> both products of the questionable decision in *Larkin v. County of Saginaw*.<sup>77</sup> The "legislative discretion" argument was used in these cases to exempt the municipal corporation from liability for personal injuries allegedly caused by defects in the design or plan of public works. In *Beckman* it was alleged that decedent's wagon had run off the end of a culvert and overturned and that the city was negligent in causing so short a culvert to be constructed. Justice Cooley's reaction was that, when the complaint is that the plan of a public work is so defective as to render it dangerous when completed, the fault found is with legislative action, for the determination to construct a public work and the prescribing of the plan for it are matters of legislation.<sup>78</sup> In *Toolan* the plaintiff claimed that he had fallen into a ditch that had been cut by authority of the city and negligently left unprotected. It appeared that a contractor employed by the city to make improvements on a bridge had cut the ditch to protect his work from a flow of water after a heavy rain, that he had covered the ditch with a plank to a width of sixteen feet, and that the city thereafter allowed the ditch to remain as a permanent drain and paid the contractor for it. Plaintiff relied upon acceptance and ratification to bring responsibility home to the city. Despite the analogy of *City of Detroit v. Corey*,<sup>79</sup> Justice Cooley thought that the case was controlled by *Beckman*. In planning

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75. 34 Mich. 125 (1876).

76. 37 Mich. 152 (1887).

77. See note 43 and text accompanying notes 42-43 *supra*.

78. 34 Mich. at 126.

79. See text accompanying notes 34-36 *supra*.

a public work, he said, a municipal corporation must determine for itself to what extent it will guard against possible accidents, and courts and juries are not to say it shall be punished in damages for failing to give the public more complete protection. The public has a right to require of the city that due care shall be observed in the construction of the work after the plans are fixed, and in its management thereafter, but negligence is not to be predicated of the plan itself.<sup>80</sup>

Contemporary with these two decisions, on the other hand, was *Ashley v. City of Port Huron*,<sup>81</sup> wherein plaintiff claimed that injury to his premises was caused by the cutting of a sewer, the "necessary result" of which was to collect and throw large quantities of water on his premises where water would not otherwise have flowed. While the trial judge thought that the "legislative discretion" argument precluded recovery, the supreme court was of contrary opinion. According to Justice Cooley, it was clear from the authorities that municipal corporations have no exemption from responsibility where the injury is directly caused by a corporate act in the nature of a trespass: "If the corporation sends people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result."<sup>82</sup> The principle was the same as in *Pennoyer v. City of Saginaw*,<sup>83</sup> where the city became liable by creating a nuisance that caused injury to an individual.

A distinction seems thus to have been drawn between a *design feature* of a public work that *necessarily results* in an invasion of plaintiff's property interest and a design feature that merely *creates a risk* of personal injury and property damage. Liability could be predicated of the former, but not of the latter. The trespass-appropriation image in the former situation made the difference.

*Ashley* thereafter furnished the rationale by which persons with complaints against the municipality's handling of sewers and drains could frequently avoid the nonfeasance difficulty created by *Dermont*. In *Defer v. City of Detroit*<sup>84</sup> the facts alleged by plaintiff were not unlike those which *Dermont* had asserted. The claim was that the city had rebuilt the junction between the sewers in Franklin and

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80. 37 Mich. at 154.

81. 35 Mich. 296 (1887).

82. 35 Mich. at 301.

83. See text accompanying note 41 *supra*.

84. 67 Mich. 346, 34 N.W. 680 (1887).

Riopelle Streets in such a way as to raise the grade of that junction above the level of the Franklin Street sewer, so that the sewer ran backward and flooded plaintiff's basement. The city argued that the case was controlled by the proposition that a municipal corporation is not liable for an injury resulting from the exercise of legislative power, but the court cited *Ashley* as evidence that this is not universally true.<sup>85</sup> When the plan adopted must necessarily cause injury to private property equivalent to some appropriation of the enjoyment thereof, the court said, liability arises. Only when fault is found with the wisdom or sufficiency of the measure, or its adaptability to carry out the purpose intended, is liability precluded.<sup>86</sup> In this instance, the allegation that the grade of the sewer had been changed in such a way as to cause water to flood the plaintiff's premises was a charge of misfeasance for which there would be liability.<sup>87</sup> At the same term, in *Rice v. City of Flint*,<sup>88</sup> a claim was sustained against the city for raising the grade of Saginaw Street without taking care to provide for the surface water that, because of the change, was cast upon the plaintiff's premises. Whereas in the past the street had carried the water away, its flow was now dammed up so that the gutters discharged in front of plaintiff's buildings. The court said that "[f]or a direct act which causes water to flow upon the premises of another to his injury a municipality is responsible."<sup>89</sup>

#### B. *The Legislature Enters the Scene: Of Defects in the Public Ways*

Meanwhile, back at the Capitol, the legislature was not content with the outcome of Martin's action against the Niles highway commissioners.<sup>90</sup> Four years after his case was decided, the following statute was enacted:

That any person or persons sustaining bodily injury upon any of the public highways in this State, by reason of neglect to keep in repair any bridge or culvert, by any township or corporation whose duty it is to keep such bridge or culvert in repair, such township or corporation shall be liable to, and shall pay to the person or persons so in-

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85. 67 Mich. at 349, 34 N.W. at 682.

86. 67 Mich. at 349, 34 N.W. at 682.

87. 67 Mich. at 350, 34 N.W. at 682-83.

88. 67 Mich. 401, 34 N.W. 719 (1887).

89. 67 Mich. at 403, 34 N.W. at 719. *Accord*, *Seaman v. City of Marshall*, 116 Mich. 327, 74 N.W. 484 (1898); *Morley v. Village of Buchanan*, 124 Mich. 128, 82 N.W. 802 (1900); *McAskill v. Township of Hancock*, 129 Mich. 74, 88 N.W. 78 (1901) (refused to distinguish between "quasi-corporations," such as townships and counties, and incorporated towns and cities).

90. See text accompanying notes 14-32 *supra*.

jured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.<sup>91</sup>

In section 2 of the act similar provisions were made for injuries to horses and other animals and for injuries to vehicles and other property.<sup>92</sup> A collection procedure was provided, which involved certification of the judgment to the township clerk, who was directed to collect the amount of the judgment by normal procedures of taxation.<sup>93</sup>

But the draftsmen had not read the court's opinion in *Martin* with sufficient care, and the statute failed its first test in an action against a township. In *Township of Leoni v. Taylor*,<sup>94</sup> wherein plaintiff sought compensation for injuries to his horses arising from a defective bridge, the court read the statute, saw that it, by its terms, imposed liability only upon a township or corporation "whose duty it is to keep such bridge or culvert in repair," recalled that the *Martin* case had established that bridge and highway repair is *not* the duty of the township, and decided that the plain meaning of the statute required a decision that the township, not having acquired a repair duty, still had no liability. "The courts are not at liberty," said Justice Graves, "in order to effectuate what they may suppose to have been the intention of the Legislature, to put a construction upon the enactment not supported by the words, though the consequences should be to defeat the object of the act,"<sup>95</sup> and his brothers, Campbell, Christiancy, and Cooley, concurred.

The wheels ground slowly, but the legislature's eventual reaction to this decision was the enactment in 1879 of Public Act No. 244.<sup>96</sup> This time the terrain had been more carefully reconnoitered, and an effort was made to interdict all escape routes. The initial section of the statute was as follows:

That any person or persons sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, crosswalks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city, or corporation whose corporate authority extends over such public highway, street, bridge, crosswalk or culvert, and whose duty it is to keep the same in good

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91. Act of March 15, 1861, No. 197, § 1, [1861] Mich. Acts 407.

92. Act of March 15, 1861, No. 197, § 2, [1861] Mich. Acts 408.

93. Act of March 15, 1861, No. 197, § 2, [1861] Mich. Acts 408.

94. 20 Mich. 148 (1870).

95. 20 Mich. at 155.

96. Act of May 29, 1879, No. 244, [1879] Mich. Pub. Acts 223.

repair, such township, village, city, or corporation shall be liable to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.<sup>97</sup>

As in the earlier statute, a second section provided the same responsibility for injury to animals and other property,<sup>98</sup> and in section 3 a procedure was provided for collection of the judgment.<sup>99</sup> In section 4 it was explicitly made "the duty of townships, villages, cities, or corporations to keep in good repair, so that they shall be safe and convenient for public travel at all times, all public highways, streets, bridges, crosswalks, and culverts that are within their jurisdiction and under their care and control, and which are open to public travel."<sup>100</sup> Moreover, the public entities upon which the duty was imposed were authorized to levy additional taxes, up to five mills, for repair purposes if other means of financing provided by law proved insufficient;<sup>101</sup> it was further stipulated that "highway commissioners, street commissioners, and all other officers having special charge of highways, streets, bridges, crosswalks, or culverts, and the care or repairs thereof, are hereby made and declared to be officers of the township, village, city, or corporation wherein they are elected or appointed, and shall be subject to the general direction of such township, village, city, or corporate authorities, in the discharge of their several duties."<sup>102</sup> All actions brought under the statute were subject to the proviso that "it must be shown that such township, village, city, or corporation has had reasonable time and opportunity after such highway, street, crosswalk or culvert became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein."<sup>103</sup>

One hardy defense attorney argued thereafter that the 1879 statute was still ineffective to impose liability upon a township, because the repair duty continued to rest upon the highway commissioners as individuals and their office was created by the constitution, which did not subject them to the general direction of the township authorities as the statute proposed to do.<sup>104</sup> Justice Cooley, however, tendered the court's surrender. He conceded that the legislature's intent in

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97. Act of May 29, 1879, No. 244, § 1, [1879] Mich. Pub. Acts 223.

98. Act of May 29, 1879, No. 244, § 2, [1879] Mich. Pub. Acts 223.

99. Act of May 29, 1879, No. 244, § 3, [1879] Mich. Pub. Acts 224.

100. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.

101. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.

102. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 224.

103. Act of May 29, 1879, No. 244, § 4, [1879] Mich. Pub. Acts 223, 224.

104. *Burnham v. Township of Byron*, 46 Mich. 555, 9 N.W. 851 (1881).

1861 may have been to change the rule of *Commissioners of Highways v. Martin* and asserted that no doubt as to the existence of that intent could remain after 1879. Wherever the operational duty was located, section 4 of the statute had the effect of imputing neglect of duty on the part of the commissioners "to the corporation by whose people they are chosen and within whose limits they exercise their authority,"<sup>105</sup> and there could be no question of the legislature's power to make the municipalities liable, regardless of where the duty was located.

On the same day, in *City of Grand Rapids v. Wyman*,<sup>106</sup> Justice Cooley held that the legislature had also succeeded in overriding *Detroit v. Blackeby*<sup>107</sup> and that the statutory liability was now applicable to cities as well as to the other units named in the statute. The city attorney had argued that the city still had only two street commissioners, who could scarcely be expected to discover and correct promptly all the defects that might develop in the city ways. But that argument was no longer viable: "The statute having imposed the duty of repair and the liability for neglect, the city at its peril must do whatever is needful to protect itself against actions for injury."<sup>108</sup> It was quickly established, however, that the duty imposed was only one of reasonable care; the municipalities did not have an insurer's liability.<sup>109</sup>

In the 1879 version the coverage of the statute, which in 1861 had been limited to bridges and culverts, was expanded to include highways, streets, and crosswalks. The very first case to reach the supreme court thereafter was a claim for injury caused by a defective public sidewalk. In *City of Detroit v. Putnam*<sup>110</sup> the court examined the statute, noted that sidewalks had not been mentioned, and concluded that they were not covered. Correction of this omission was attempted in 1885 in a statute that added sidewalks to the list.<sup>111</sup> But the lawmakers slipped again. That statute contained, in addition to the side-

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105. *Burnham v. Township of Byron*, 46 Mich. 555, 558, 9 N.W. 851, 852 (1881).

106. 46 Mich. 516, 9 N.W. 833 (1881).

107. See text accompanying notes 46-56 *supra*.

108. 46 Mich. at 517, 9 N.W. at 834.

109. *Fulton Iron & Engine Works v. Township of Kimball*, 52 Mich. 146, 17 N.W. 733 (1883); *Township of Medina v. Perkins*, 48 Mich. 67, 11 N.W. 810 (1882). Both cases arose from the failures of bridges under heavy loads, apparently steam tractors. In the latter case the court said that lack of reasonable care could be found in a failure to discover the defect in the bridge, but that the jury should take into account all the circumstances, including the size of the governmental unit involved and the degree of engineering knowledge to be expected of the township officers. 48 Mich. at 72, 11 N.W. at 811-12.

110. 45 Mich. 263, 7 N.W. 815 (1881).

111. Act of June 17, 1885, No. 214, [1885] Mich. Pub. Acts 289.

walk provision, a section abolishing common law liability for injuries of the type covered by the statute<sup>112</sup> and another setting dollar limits on sidewalk claims, on a sliding scale from 300 dollars, when the population of the defendant municipality was less than 500, to 1,800 dollars, for a population of more than 2,000.<sup>113</sup> Unfortunately, these provisions had not been described in the title of the act, which was, for that reason, promptly held unconstitutional,<sup>114</sup> and the whole thing had to be done over.<sup>115</sup>

The court did not receive this derogation of the common law with open arms. While Justices Cooley and Campbell were still present, the new statutory liability developed at a conservative pace. In *Keyes v. Village of Marcellus*<sup>116</sup> the village was held to have no liability where plaintiff departed from the traveled portion of a road in the dark and fell into a hole that some youngsters had excavated within the right of way. Nor was the city liable, in *Williams v. City of Grand Rapids*,<sup>117</sup> to a plaintiff who fell at a point where a city sidewalk came to the margin of an intersecting street, when it appeared that no crosswalk had ever been constructed at that crossing. While the statute required the city to keep crosswalks in repair, it imposed no obligation to build one where none existed. How many crosswalks should be built, and in what locations, was wholly a question of need, within the discretion of the common council, and not to be reviewed by any court.<sup>118</sup>

In *Davis v. Mayor, Recorder & Alderman*,<sup>119</sup> when plaintiff ran into a stone that marked the end of a drain running under the street, it was error not to give the jury an instruction based on the "no liability for negligence in the plan or for legislative decisions" notion.

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112. Act of June 17, 1885, No. 214, § 6, [1885] Mich. Pub. Acts 291.

113. Act of June 17, 1885, No. 214, § 6, [1885] Mich. Pub. Acts 291.

114. *Church v. City of Detroit*, 64 Mich. 571, 31 N.W. 447 (1887). The court noted that the provision abrogating a common law liability that the court had held did not exist was included in the act because the federal courts had held otherwise. As a result a nonresident might recover where a resident could not. In the interest of uniformity, the statute was designed to create a purely statutory liability. Since the 1885 enactment purported to be only an amendment of existing law and contained no repealer, its demise left the 1879 statute in effect.

115. Act of June 28, 1887, No. 264, [1887] Mich. Pub. Acts 345. This statute reiterated the provisions of the 1879 statute, adding liability for sidewalks and the section abrogating common law liability, but, prudently it would seem, omitting the dollar limits on sidewalk claims that had been included in the 1885 version. It repealed, and therefore superseded, the 1879 statute. It was codified in 3 MICH. GEN. STAT. §§ 1446c-h (A. Howell ed. 1890).

116. 50 Mich. 439, 15 N.W. 542 (1883).

117. 59 Mich. 51, 26 N.W. 279 (1886).

118. 59 Mich. at 55, 26 N.W. at 281.

119. 61 Mich. 530, 28 N.W. 526 (1886).

Focusing upon the duty to keep the ways "in repair," rather than upon the following clause requiring them to be kept "in a condition reasonably safe and fit for travel," the court, in *McKellar v. City of Detroit*,<sup>120</sup> held that the city was not liable for failing to remove snow and ice from a crosswalk. A trial judge's opinion that *Beckman*<sup>121</sup> and *Toolan*<sup>122</sup> were abrogated by the 1879 statute was brusquely corrected by Justice Campbell in *Shippy v. Village of Au Sable*.<sup>123</sup> Pointing to *Williams* and *Davis*, he deprived a plaintiff of a verdict based on a claim that the step-off from a sidewalk to a crosswalk was too precipitous. Again, he was much concerned about the chaos that would result if plans for public works were subjected to review by juries: "If it can be referred to a jury to determine on the propriety of such action, there will be as many views as there are juries, and it can never be definitely known when a municipality is safe."<sup>124</sup>

Justice Campbell was also most reluctant to recognize a liability on the part of the municipality for injury resulting from conditions created by third persons.<sup>125</sup> In *McArthur v. City of Saginaw*<sup>126</sup> he wrote that a lumber pile within the limits of the right-of-way but outside its traveled portion was not a "defect" the failure to eliminate which would represent a neglect of "repair." At most, it represented a failure by the city to enforce its police regulations, and "the Legislature," he averred, "seldom imposes responsibility to individuals for that kind of municipal negligence or misconduct."<sup>127</sup>

But in 1889 a turning point was reached. Justice Campbell, on a single decision day, found himself in solitary dissent in *Southwell v. City of Detroit*,<sup>128</sup> which, in effect, reaffirmed the outcome of *City of Detroit v. Corey*,<sup>129</sup> and also in *Joslyn v. City of Detroit*,<sup>130</sup> which, without expressly overruling them, cut the ground from under his

120. 57 Mich. 158, 23 N.W. 621 (1885).

121. See text accompanying notes 75 & 78 *supra*.

122. See text accompanying notes 76 & 79-80 *supra*.

123. 65 Mich. 494, 32 N.W. 741 (1887).

124. 65 Mich. at 501, 32 N.W. at 744.

125. See, e.g., *Agnew v. City of Corunna*, 55 Mich. 428, 21 N.W. 873 (1885); *McArthur v. City of Saginaw*, 58 Mich. 357, 25 N.W. 313 (1885); *Joslyn v. City of Detroit*, 74 Mich. 458, 42 N.W. 50 (1889) (dissenting opinion).

126. 58 Mich. 357, 25 N.W. 313 (1885).

127. 58 Mich. at 362, 25 N.W. at 315. By this statement he was putting the case in the same category as *Henkel v. City of Detroit*, discussed in text accompanying notes 67-69 *supra*; *Burford v. City of Grand Rapids*, discussed in text accompanying notes 70-72 *supra*; and *Hines v. City of Charlotte*, discussed in text accompanying note 73 *supra*.

128. 74 Mich. 438, 42 N.W. 118 (1889).

129. See text accompanying notes 34-36 *supra*.

130. 74 Mich. 458, 42 N.W. 50 (1889).



decisions in *McArthur* and in *Agnew v. City of Corunna*.<sup>131</sup> Mrs. Joslyn's buggy upset when its wheels ran up on a pile of sand in the traveled part of a street that she was traversing after dark. The sandpile had been placed there by a contractor who was building a house for an abutting owner; it had been there for more than a month and was unmarked by lights or other warnings at the time of the accident. Justice Campbell sturdily contended that the city's only statutory duty was to keep the streets in repair, that the sandpile did not constitute a condition of disrepair, that the city had no responsibility for foreign articles placed on the street by others, and that the court could not, consistently with its own precedents, sustain the claim.<sup>132</sup> But Chief Justice Sherwood was of a different mind: "It was the object of the Legislature in the passage of this statute to avoid the decisions of this Court, by which, before the passage of the act, the law by construction was made to relieve the municipality from all liability of this kind, and we think the statute should be so construed as to effect the object intended by the Legislature."<sup>133</sup> The duty imposed by the statute was not just a duty to repair; rather, the statute made the city liable for accidents that occurred by reason of its neglect to keep its streets in a condition reasonably safe and fit for travel: "The duty resting upon the city to make safe its streets . . . is entirely independent of the police power. It requires everything to be done by the city necessary to make travel upon its streets reasonably safe."<sup>134</sup> And, again over Justice Campbell's dissent, the same reasoning was relied upon in *Malloy v. Township of Walker*<sup>135</sup> to sustain an action against the township based upon a claim of negligence in failing to provide railings along a steep embankment, the defense having argued that this was at most a claim of negligence in the design of the road:

This statute cannot be given a construction that would relieve a township or other municipality, upon which a burden is cast to keep its highways in repair and reasonably safe for travel, from liability by saying that it had adopted a method of construction, and had built according to the plan. A municipality cannot construct a dangerous and unsafe road,—one not safe and convenient for public travel,—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith. . . .

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131. 55 Mich. 428, 21 N.W. 873 (1885).

132. See 74 Mich. at 461-65, 42 N.W. at 51-52.

133. 74 Mich. at 460, 42 N.W. at 50.

134. 74 Mich. at 461, 42 N.W. at 51. See also *Lombar v. Village of East Tawas*, 86 Mich. 14, 48 N.W. 947 (1891); *Sebert v. City of Alpena*, 78 Mich. 165, 43 N.W. 1098 (1889).

135. 77 Mich. 448, 43 N.W. 1012 (1889).

The statute is imperative to make a road reasonably safe, and whether it is in that condition of safety and fit for travel must be a question for the jury, under proper circumstances.<sup>136</sup>

C. *Deflection of Responsibility Through State Intervention:  
Independent Agencies; State and Local Functions*

During the nineteenth century local political units in Michigan frequently did not stand alone as agencies of government or of public service within their geographical boundaries. The state government was in close touch with local affairs, and when, in particular communities, particular problems proved intractable or new departures were needed, the legislature frequently devised ad hoc solutions. One common solution was to entrust the problem to a commission, specially created and empowered, which, although it might draw its financial support in whole or in part from the local political unit, operated more or less independently of the local legislative body.

By mid-century it had become apparent that Detroit had outgrown its town marshal system for enforcing the law and keeping the peace, and it was generally agreed that the time had come to create an urban police force; but all efforts of local authorities to respond to the need foundered on the issue of cost.<sup>137</sup> At last, in 1865, the state legislature took charge and, overriding the protest of the local establishment, enacted a special statute that established "a police government for the city of Detroit."<sup>138</sup> The statute created a commission that was entrusted with the police function within the city and empowered to prepare an annual budget, the funds for which were required to be provided by the city council. The original commissioners were named in the act, and the governor was empowered to fill vacancies by appointment. In *People ex rel. Drake v. Mahaney*,<sup>139</sup> the supreme court quickly sustained the constitutionality of the act against a challenge, "based on general principles," that it was bad because it imposed upon the people of Detroit the obligation to tax themselves to pay the expenses of a board in whose appointment they had no voice and over whose conduct they had no control.

Fire protection became an issue at about the same time. Prior to 1860 the city depended upon the protection provided by volunteer fire companies utilizing man-powered equipment. But the interest and élan that had sustained these companies was fading, and the

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136. 77 Mich. at 462, 43 N.W. at 1016.

137. S. FARMER, *supra* note 6, at 240.

138. Act of Feb. 28, 1865, No. 78, [1865] Mich. Acts 99.

139. 13 Mich. 481 (1865).

process of converting to steam fire engines in the care of companies composed of paid officers and firemen was begun. In 1867, the legislature created a fire commission to administer the new steam fire department, designated its original membership and provided for the filling of vacancies by appointment of the common council.<sup>140</sup>

A few years later the legislature attempted to deal in a similar fashion with still another subject matter; it adopted an act "to establish a board of public works in and for the city of Detroit"<sup>141</sup> to supersede the existing boards of sewer commissioners and water commissioners and assume control of the city's streets, parks, and other public grounds. Again, the initial members of the board were designated in the act, and it was this feature that evoked, in *People ex rel. Le Roy v. Hurlbut*,<sup>142</sup> a subsequent quo warranto proceeding, a chorus, unusual in its time, of opinions from each of the four members of the supreme court. Since the court had raised no objection to the similar feature in the police commission act, its opposite reaction to the board of public works act required explanation. The basis for the attack upon the provision was a clause in the state constitution that provided that "[j]udicial officers of cities and villages shall be elected and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct."<sup>143</sup> Chief Justice Campbell construed that requirement as applicable only to *municipal* officers and therefore saw the question to be whether "the police commissioners are essentially city officers in the same sense that the board of works are city officers."<sup>144</sup> His answer to that question was negative:

The preservation of the peace has always been regarded, both in England and America, as one of the most important prerogatives of the state. It is not the peace of the city or county, but the peace of the king or state that is violated by crimes and disorders. . . .

The general purposes of the police act were such as appertain directly to the suppression of crime and the administration of justice. There is, therefore, no constitutional reason for holding it to be other than a regulation of matters pertaining to the general policy of the state, and subject to state management.<sup>145</sup>

On the other hand:

There is no dispute concerning the character of the public works

140. Act of March 26, 1867, No. 453, [1867] Mich. Acts 931.

141. Act of April 18, 1871, No. 494, [1871] Mich. Loc. & Pers. Acts 273.

142. 24 Mich. 44 (1871).

143. MICH. CONSR. art. XV, § 14 (1850).

144. 24 Mich. at 79.

145. 24 Mich. at 83-84.

act. Its purposes are directly and evidently local and municipal. And the main point to be decided is, whether the legislature of the state can, without the concurrence of the city of Detroit, select the local officers of the city.<sup>146</sup>

He then proceeded to forge a theory of implied constitutional right to local self-government that produced a negative answer to that last question.<sup>147</sup> In this, he was strongly supported by his brother Cooley, who said, "The state may mould local institutions according to its views of policy or expediency; but local government is a matter of absolute right; and the state cannot take it away."<sup>148</sup>

Thus was stated, in cases concerned with the proper allocation of certain decision-making powers between the state government and the local community, and *not* with the question of community liability for the tortious acts of public officials, a portentous distinction between functions performed by local officials as agents of state policy and functions that relate instead to the "private" or parochial concerns of the local community. In the time of Cooley and Campbell the reason for the distinction was remembered, and it did not bloom out into the "governmental-proprietary" cliché of later days. There were, however, some cases that edged in that direction.

When the city of Detroit decided to build and operate the Detroit

146. 24 Mich. at 84.

147. 24 Mich. at 89-90.

148. 24 Mich. at 108. Justice Cooley emphasized even more sharply the distinction between state and local functions:

For those classes of officers whose duties are general,—such as the judges, the officers of the militia, the superintendents of police, of quarantine, and of ports, by whatever name called,—provision has, to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us, the officers in question involve the custody, care, management, and control of the pavements, sewers, water-works and public buildings of the city, and the duties are purely local. . . . The municipality, as an agent of government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. . . . In *Detroit v. Corey* . . . Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside or public people of the state at large had no concern. . . . Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of a two-fold character; the one public as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens . . . .

24 Mich. at 103-05.

The other cases cited in the argument, in addition to *Corey*, had nothing to do with municipal liability, but related instead to the protection of municipal property rights against state intrusion. These ideas were further elaborated by Justice Cooley in *People ex rel. Board of Park Comms. v. Common Council*, 28 Mich. 228 (1873) (legislature not able to confer upon a special commission the power to obligate a municipal corporation to provide funds for the acquisition of a park).

House of Correction, the legislature provided by statute for its establishment and for the confinement of convicted persons therein.<sup>149</sup> The administration of the prison was, by this statute, put under the control of a board of inspectors, three of whom were appointed by the city council; the mayor and the chairman of the state board of prison inspectors were made *ex officio* members. Some years later an action was brought against the city of Detroit by a person who had been confined in the prison for a period of time; he asserted that he had suffered injury from being required by the prison officers to take a cold bath under improper conditions and by subsequent exposure in a cold cell. The supreme court, in *City of Detroit v. Laughna*,<sup>150</sup> reversed a judgment favorable to the plaintiff on the ground that the city had no control over the management of affairs within the prison, since the prison had been entrusted to a board that served as an agency of the state rather than as an agency of the city:

The whole subject of personal liberty is one of general state concern, and imprisonment in all its incidents has always been regulated by statute. The law of 1861, adopting the house of correction as a public prison, has provided for a state representative on the governing board, and has provided expressly, and has not left to the action of the common council to determine, under whose control its regulation shall be placed.

It is impossible under such a law to regard the city of Detroit either as custodian of the prison or as jailer and guardian of the prisoners. The officers are not city agents, and the city has nothing to do with their responsibility.<sup>151</sup>

It was a limited holding: not that the correctional officers were, *by reason of their function*, state rather than municipal agents, but that they were so by reason of the way in which the legislature had organized this particular activity.

In 1889, in *Coots v. City of Detroit*,<sup>152</sup> the court affirmed a judgment against the city of Detroit in favor of a fireman who was injured when the wheel of the engine being driven to a fire struck a street defect and threw him against the machinery. Two of the majority justices rejected the city's assumption of risk and fellow servant defenses on the ground that they were not applicable to a claim based on breach of the city's statutory street repair obligation,<sup>153</sup> but the third, Justice Champlin, argued that they were inapplicable *because*

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149. Act of March 15, 1861, No. 164, [1861] Mich. Acts 262.

150. 34 Mich. 402 (1876).

151. 34 Mich. at 404-05.

152. 75 Mich. 628, 43 N.W. 17 (1889).

153. 75 Mich. at 636, 43 N.W. at 20.

members of the fire department were not servants or agents of the city.<sup>154</sup> Justice Campbell, in dissent, was persuaded that the judgment should not stand and desired to rest his decision in part on the fellow servant doctrine, an approach that was somewhat difficult in view of the independent status of the fire department.<sup>155</sup> That difficulty did not prove insuperable, but the significance of the opinion lies in the difference that was revealed between his perception of the municipal situation and that of Justice Champlin. The latter had asserted that firemen, *as such*, were "public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents."<sup>156</sup> For this proposition he cited and quoted outside cases and asserted that it was also the well-settled law in Michigan. For the latter assertion he cited no authorities, and in fact there were none. Justice Campbell made no such dogmatic assertion. His perception was that the *Detroit* fire department was a public instrumentality that the legislature had seen fit to remove from the direct control of the city and place under a commission governed by law and not subject, in the immediate government of the force, to the will of the city legislature:

Although in a certain sense it is sometimes called a city agency, yet its members are in no proper sense city agents, in the usual meaning of agency. Their duties are not powers delegated by the city, but powers conferred by the law of the State. They relate to matters which public policy requires should be placed in the list of municipal affairs, and which are often put entirely within the control of the governing body of the city. But they are of such importance that the immediate control has been thought proper to be removed from the other city authorities.<sup>157</sup>

In *Laughna* the plaintiff failed to hold the *city* responsible for the acts of officials who acted, as the court viewed it, independent of city control. In *O'Leary v. Board of Fire & Water Commissioners*<sup>158</sup> the plaintiff was equally unsuccessful in an effort to bring liability home, not to the city, but to just such an independent board that provided services to a local community. While the city of Marquette was yet a village the legislature created for it a board of water commissioners,

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154. 75 Mich. at 637, 43 N.W. at 20-21.

155. 75 Mich. at 647, 43 N.W. at 23-24.

156. 75 Mich. at 637-38, 43 N.W. at 21.

157. 75 Mich. at 646, 43 N.W. at 23-24.

158. 79 Mich. 281, 44 N.W. 608 (1890).

the members of which were appointed by the common council of the municipality and empowered to issue bonds, purchase lands, construct a water system, provide fire protection, and levy water rates upon consumers.<sup>159</sup> O'Leary fell into a ditch that had been dug for the laying of water pipes and sued the board, whose servants had dug it. While the statute did not expressly declare the board to be a corporation, Justice Campbell agreed that it was a corporation to all intents and purposes,<sup>160</sup> although it was not a municipal corporation because its members did not directly represent the local constituency and it had not been favored with general governmental authority.<sup>161</sup> If it had been a municipal corporation, it might have become liable if it had caused injury by neglect in the process of construction of a work that was its private property or if its action had been directly injurious to private property.<sup>162</sup> But Justice Campbell could not believe that the legislature, having created the board to perform a particular service for the people of Marquette and having failed to provide it with access to funds from which a judgment might properly be paid, had intended that it should be liable for the tortious acts of its servants:

It is for the Legislature to determine how far, if at all, a body whose negligence, if it is so called, is imputed, and in no sense actual, shall be made subject to suit for the misconduct of its employes. There are many cases where such liability does not exist, except against the immediate individual wrong-doer. The person injured is not harmed any more where there are several persons liable than where there is only one. Imputed negligence is purely a question of public policy, and subject to legislative regulation.<sup>163</sup>

#### D. *Reprise: The Law in 1890*

Thus ended Justice Campbell's association with these questions. Two months later he died. As he and his brothers viewed the terrain, it would seem that they saw the city as an instrumentality of government, which, largely for convenience in the performance of certain

159. Act of March 2, 1869, No. 243, [1869] Mich. Acts 104.

160. 79 Mich. at 283-84, 44 N.W. at 609.

161. 79 Mich. at 284, 44 N.W. at 609.

162. 79 Mich. at 285, 44 N.W. at 609, *citing* *City of Detroit v. Corey*, discussed in text accompanying notes 34-36 *supra*; *Pennoyer v. City of Saginaw*, discussed in text accompanying note 41 *supra*; *Ashley v. City of Port Huron*, discussed in text accompanying notes 81-82 *supra*; *Defer v. City of Detroit*, discussed in text accompanying notes 84-87 *supra*.

163. 79 Mich. at 286-87, 44 N.W. at 610. Why O'Leary sued the board and not the city does not appear. The court noted that "[w]hether the corporation in charge of the public ways is liable is not before us." 79 Mich. at 282, 44 N.W. at 609.

service functions for its inhabitants, was also incorporated, but which did not stand alone in either capacity. Some of the local functions of central government and some of the service functions of the local community were entrusted by the constitution and the legislature to particular officers or public bodies. Some of these were locally elected or appointed, and some were designated from Lansing, but all of them operated to some extent on their own responsibility or at least independent of control by the corporate municipality. Where this was so, the court saw no reason why the cities should bear legal responsibility for their acts. Hence the city of Detroit was not liable for the acts of the prison officers at the Detroit House of Correction,<sup>164</sup> nor was the township of Niles liable for the neglect of duty by the local highway commissioners.<sup>165</sup>

Moreover, the court did not consider the doctrine of *respondeat superior* to be part of the law of nature. Whether a public board or corporation was subject to "imputed" responsibility for the deficient conduct of persons who were unquestionably its servants was a question of policy, and if the legislature had established a board to accomplish a given end and had conferred upon it powers and resources for the attainment of that end only and no other, this action was likely to be seen as evidence that the legislature did not intend the corporate entity to be vicariously liable to tort claimants, who had, after all, recourse against the primary actors.

On the other hand, this principle would not protect from liability a public entity, whether municipal corporation or special agency, which, by its *corporate* act, *i.e.*, by the decision of its responsible officers, took action that directly injured, by trespass or nuisance, the property interest of an individual. In such a case, the liability was primary, not imputed, and there was, moreover, an element of appropriation of private interests involved.

General principles of affirmative obligation in tort had not yet been completely worked out, and a conservative approach in this context was reinforced by a concern that the decision-making powers of public bodies not be clogged by apprehensions of private liability. It was difficult for the court to see why a private individual should have a money claim against a public entity because it had failed or refused to provide services or to enforce its police regulations, or which had made some other decision that was of incidental disadvantage to him. Such municipal decisions frequently involved no mis-

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164. See text accompanying notes 150-51 *supra*.

165. See text accompanying notes 14-32 *supra*.



feasance and were "legislative," "discretionary," or "political" in nature. Freedom to make decisions concerning the nature and extent of public services (absent nuisance or trespass, of course), without being required to pay compensation to those disadvantaged by them or being subject to second-guessing by judges and juries, was essential to political governance and a necessary implication of the division of function between the political and judicial aspects of government. There was a questionable extension of this principle of judicial restraint to situations that seemed to involve misfeasance, where it became an immunity from liability for injuries caused by deficiencies of public works attributable to plan or design decisions unless such defect constituted an unsafe condition of the public ways.

Finally, the legislature had, in regard to the maintenance of public ways, specifically overridden the court's refusal to recognize affirmative tort duties and created a special statutory rule that evolved into a principle of liability not only for negligent failure to repair, but, more broadly, for negligent failure to keep the highways in a reasonably safe condition for travel.

The cases that would test the liability of the municipality for injuries caused by defective or dangerous premises and by the affirmative tortious acts (other than those resulting in trespass) of municipal employees had not arisen. There were occasional dicta that the corporation would be liable for negligent "ministerial" acts, and there were, in some cases, implications that, when a municipal corporation was sought to be held liable for negligent misfeasances of its servants or agents, it might make a difference that the employees were engaged in work related to the corporation's "private property" (*e.g.*, in the construction of sewers rather than streets).<sup>166</sup> Also, Justice Campbell did say in *O'Leary*, in most general terms, that a municipal corporation may be liable in such cases and in cases where it causes direct

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166. See also *Rowland v. Superintendents of the Poor*, 49 Mich. 553, 14 N.W. 494 (1883), in which the superintendents of the poor, under statutory authorization, operated a poor farm. Plaintiff claimed that the superintendents borrowed a boar from him for use on their farm, negligently exposed it to swine infected with hog cholera, returned it to him in a diseased state, and thus caused his entire herd to become infected. The court upheld his claim, stating that "municipal corporations in the care and management of their property, like an individual, are in duty bound to produce no injury to others. In clearing up the poor-farm the superintendents could not, nor could those in their employ, with impunity, negligently set fires, or carelessly permit them to extend to and destroy the property of their neighbors, nor could they permit the farm stock to trespass upon the lands of adjoining proprietors and claim exemption from all liability therefor." 49 Mich. at 560-61, 14 N.W. at 495, citing *Ashley v. City of Port Huron*, discussed in text accompanying notes 81-82 *supra*; T. COOLEY, TORTS 619-20 (1879). All this was said after the court emphasized that the complaint was against the defendants as owners and managers of the farm property, authorized to make it productive and to sell and dispose of the produce.

injury to a property interest, but that "it is not usually liable in other cases."<sup>167</sup> But there had been, as yet, no assertion of immunity from liability derived from the governmental nature of the activity or function, as distinguished from the legislative character of the particular decision, on which the claim was predicated. Hindsight reveals that that egg had been laid, but it did not hatch until the nineties.

## II. THE ASCENDANCY OF THE "GOVERNMENTAL FUNCTION" DEFENSE

### A. *Evolution of the Defense*

In January 1890, the common council of Detroit authorized the construction of a public market building. Before the year was out the structure had been designed and built, and had collapsed on Adolphus Barron during a fifty mile-per-hour wind because the iron columns that supported it had not been anchored to the foundation. Citing *Larkin*,<sup>168</sup> *Beckman*,<sup>169</sup> and *Toolan*,<sup>170</sup> the city sought to escape liability by arguing that the absence of anchoring fixtures had been a design decision, made first by the city engineer and adopted by the council when it approved the plans, and that therefore Barron's action was an attempt to derive liability from a legislative decision. The court replied, in *Barron v. City of Detroit*,<sup>171</sup> that, while this contention would be correct "if the city had been acting purely in a matter of public concern, in its governmental capacity or character,"<sup>172</sup> it was not applicable to the instant case because the city had had no imperative duty to provide a market building and in choosing to do so had assumed the same responsibility as would a private corporation or individual, whether the negligence occurred at the construction or at the planning stage.<sup>173</sup>

The decision was progressive, for it would have been unfortunate to deny compensation to Barron because the mistake was in the engineering of the structure rather than in its construction, but the reverse implication of *nonliability* if the building had been dedicated to a "public" or "governmental," rather than to a "private" or "proprietary" use put Michigan law in a new track. The court explained its position by quoting, from Judge Dillon's treatise on municipal

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167. 79 Mich. at 235, 44 N.W. at 609.

168. See text accompanying notes 42-43 *supra*.

169. See text accompanying notes 75 & 78 *supra*.

170. See text accompanying notes 76 & 79-80 *supra*.

171. 94 Mich. 601, 54 N.W. 273 (1893).

172. 94 Mich. at 604, 54 N.W. at 274.

173. 94 Mich. at 606, 54 N.W. at 275.

corporations, its exposition of the dual character of municipal corporations—"governmental or public" versus "private or proprietary"—and by pointing to earlier Michigan cases that distinguished between *state and local functions* as evidence that the distinction had been accepted by the Michigan court.<sup>174</sup>

The following year, in *Webster v. County of Hillsdale*,<sup>175</sup> the court denied to Daniel Webster his claim against the county for injury to his health arising from the unhealthful conditions of the jail where he had been confined for 207 days, awaiting trial on a charge of which he was acquitted. The court thought it could not recognize liability in such a case without overruling *Blackeby*,<sup>176</sup> for if there were no common law liability for defects in public highways there could be none for defects in public buildings. The *Blackeby* court might have thought the distinction between failure to repair a crosswalk and forcible incarceration in a pest-hole to be not without significance, but reliance was now on Dillon's generalization that "counties are under no liability in respect of torts, except as imposed by statute," which was explained on the ground that counties are involuntary political divisions of the state.<sup>177</sup> The court gratuitously added the comment that "the same rule appears to apply to municipal corporations when acting under general laws of the state, and not under special charters which they voluntarily assume, or for private gain."<sup>178</sup>

In *Ostrander v. City of Lansing*<sup>179</sup> the city sought to defend a claim brought by a city employee who was injured in a cave-in while he was digging a trench for a sewer; the city argued that the injury occurred while the city "was in the exercise of a governmental function, instead of a private municipal enterprise."<sup>180</sup> This plea was foredoomed by *City of Detroit v. Corey*,<sup>181</sup> which had referred to sewers as the "private property" of the city, though only for the purpose of emphasizing the rights of "the public" (meaning all the people of the *state*) in the safety of the *highways*. The court cited that case and threw in the additional comment that "as to the sewers con-

174. 94 Mich. at 604-06, 54 N.W. at 274-75, citing 2 J. DILLON, MUNICIPAL CORPORATIONS § 66 (4th ed. 1890); *People ex rel. Le Roy v. Hurlbut*, discussed in notes 142-48 *supra* and accompanying text.

175. 99 Mich. 259, 58 N.W. 317 (1894).

176. See text accompanying notes 46-56 *supra*.

177. 99 Mich. at 260, 58 N.W. at 317, citing 2 J. DILLON, MUNICIPAL CORPORATIONS § 963 (4th ed. 1890).

178. 99 Mich. at 260, 58 N.W. at 317.

179. 111 Mich. 693, 70 N.W. 332 (1897).

180. 111 Mich. at 695, 70 N.W. at 333.

181. See text accompanying notes 34-36 *supra*.

structed under the charter by the city of Lansing, they may also be a source of revenue,"<sup>182</sup> thus introducing the notion that pecuniary gain from the activity in question was an important factor.

In *Gilboy v. City of Detroit*<sup>183</sup> the city was held to have no liability for a loss to a boarding house proprietor arising from the alleged negligence of the city board of health in permitting a person exposed to smallpox to go at large and contaminate plaintiff's premises. The explanation for the ruling was that "such boards and officers are not acting for private, but for public, purposes. They represent the entire State, through the municipality, a political subdivision of the State; and municipalities, in the absence of express statutes fixing liability, are not liable for the negligence of such officers and boards."<sup>184</sup> The absence of municipal responsibility for the actions of certain officers and boards, which in the past had been attributed to the fact that those officers and boards operated under statutory authorization independent of municipal control, was thus re-explained as a consequence of the fact that the *functions* performed by a board of health have an a priori identification with statewide, rather than local, objectives.

In *Corning v. City of Saginaw*<sup>185</sup> plaintiff's claim against the city for damage to his barge caused by the failure of a bridge tender to open the draw promptly in response to a signal, which failure allegedly resulted from negligent maintenance of the bridge, was rejected on the ground that it was settled law in Michigan that legislative action is required to create any liability in private suit for nonrepair of public ways. The court added that "it does not appear that the city derives any benefit from the bridge. It is maintained for the public good by the city in its governmental or public character, and not in its proprietary or private character, and the city is therefore not liable in this action . . . 1 Dill.Mun.Corp. (4th ed.) Sec. 66."<sup>186</sup>

Most surprising was the decision in *Murray v. Village of Grass Lake*.<sup>187</sup> The claim was that the village council, on the recommendation of the village board of health, had caused action to be taken that raised the level of the lake two feet above the level that had been maintained for twenty years, thus flooding and rendering useless land

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182. 111 Mich. at 695, 70 N.W. at 333.

183. 115 Mich. 121, 73 N.W. 128 (1897).

184. 115 Mich. at 122, 73 N.W. at 128.

185. 116 Mich. 74, 74 N.W. 307 (1898).

186. 116 Mich. at 79, 74 N.W. at 309, *citing* 1 J. DILLON, MUNICIPAL CORPORATIONS § 66 (4th ed. 1890).

187. 125 Mich. 2, 83 N.W. 995 (1900).

that had long been used for pasture and meadow. The act under which the village was incorporated authorized the council to exercise the powers conferred by statute on boards of health and further authorized the council to appoint a board of health.<sup>188</sup> Noting that the council's action had doubtless been taken under the authority of these provisions, the court said:

The fact that the wrong was committed by the officers of the village does not fix the responsibility upon the municipality if the wrongful act was done under authority of a general statute in the attempt to perform a public service not distinctively local or corporate. 2 Dill. Mun.Corp. (4th ed.) sec. 974. It is apparently the established rule that local health officers, acting under a general statute of the State conferring their powers, are not performing corporate functions, but are representatives of the State, and that the municipality is not liable for the acts of such boards, either of misfeasance or nonfeasance.<sup>189</sup>

Finally, after ten years of such nibbling at the immunity bait, giving more attention to external cases and their synthesis by Judge Dillon than to its own tradition, in 1902 the court opened wide and swallowed the whole thing. In *Nicholson v. City of Detroit*<sup>190</sup> the plaintiff's decedent had been a carpenter employed by the city in the construction of a new hospital at the site of an existing hospital for contagious disease. The old building and the grounds were alleged to have been infected with smallpox germs, and the claim was for death from smallpox allegedly contracted as a consequence of the city's negligence in exposing the decedent to this contamination.<sup>191</sup> The court referred to statutes that imposed upon the city a duty to take measures for the protection of the public health through a board of health, that required it to provide a place of reception for persons afflicted by smallpox, and that authorized it to build permanent hospitals, and then asserted, "It is the well-settled rule that the State is not liable to private persons who suffer injuries through the negligence of its officers; and the rule extends to townships and cities, while in the performance of State functions, imposed upon them by law."<sup>192</sup> The argument against this position that evoked the most extensive rebuttal from the court had been many times implied: that in its capacity as property owner a governmental unit has the same duties and liabilities as any other property owner, and that the city's duties to its employee in this case arose out of its ownership of the

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188. 1 MICH. COMP. LAWS § 2821 (1897).

189. 125 Mich. at 5, 83 N.W. at 966.

190. 129 Mich. 246, 88 N.W. 695 (1902).

191. 129 Mich. at 247, 88 N.W. at 696.

192. 129 Mich. at 248, 88 N.W. at 696.

property and its contractual relations with him. The court's reply was that the property was owned in this instance for governmental purposes, not for the "private purposes of the municipality" or "for purposes in which the state has no interest."<sup>193</sup> *Murray v. Village of Grass Lake* was cited and quoted for the governmental nature of the powers exercised by health officers, and the court reiterated that such officers, though chosen by the city, "do not represent the city, but the State."<sup>194</sup> In providing a hospital under the statutory duty and authority, the city was acting as a governmental agency, just as it did when "providing a police force for the preservation of the peace, or a fire department, and prescribing regulations for the same."<sup>195</sup> Justice Campbell's suggestion in *O'Leary* that the application to a public body of the *respondeat superior* principle is a question of public policy was repeated,<sup>196</sup> and it was argued that such application was contraindicated because public officers are the representatives of the injured person as well as of the other taxpayers who must pay for his judgment and that the selection of prudent officers is as much his duty as theirs.<sup>197</sup> Moreover,

[t]he rule of public liability in such cases offers such opportunities and inducements for abuse that there is some ground for doubting the expediency of relieving individuals at public expense in any such case; and as has been said, it is only in cases where the legislature has authorized it that the obligation can be enforced against the public, instead of the individual to whose misconduct the injury is due, and who should, in justice, be primarily liable in all cases.<sup>198</sup>

While in the minds of Justices Campbell and Cooley there was a *presumption* against liability of the municipal corporation for the *nonperformance* by local officers of duties imposed upon them by statute, this statement seems to place the whole question of vicarious liability for *any* negligence of municipal servants engaged in "governmental functions" peculiarly within the area of legislative decision. The court summed up its position in the following sweeping terms:

The true theory is that the township or city represents the State in causing these things to be done, and, like the State, it enjoys immunity from responsibility in case of injury to individuals, leaving

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193. 129 Mich. at 250, 88 N.W. at 697.

194. 129 Mich. at 254, 88 N.W. at 698.

195. 129 Mich. at 254, 88 N.W. at 698.

196. 129 Mich. at 250, 88 N.W. at 697, *citing* *O'Leary v. Board of Fire & Water Comms.*, discussed in text accompanying notes 158-63 *supra*.

197. 129 Mich. at 249-50, 88 N.W. at 696-97.

198. 129 Mich. at 250, 88 N.W. at 696.

liability for such injuries to rest upon the persons whose misconduct or negligence is the immediate cause of the damage. The township and city must always act through officers. If it builds or repairs a road, constructs a bridge, collects a State or county tax, erects a town house, provides for the poor or the infirm, preserves the public peace, or provides a smallpox hospital, it must do it through persons selected for the purpose; and whether the law broadly directs that it shall do these things, or shall select officers whose duties are prescribed by law, its obligation is the same. The State relieves itself from the burden of multitudinous detail by delegating to and imposing upon aliquot parts of the body politic the power, and perhaps the duty, of doing for the State what it would otherwise have to supervise for itself. These powers are frequently legislative as well as ministerial. In this sense the township or city is a political agency, and the persons selected to perform the details whereby the result is accomplished are no more agents of the city or township, and no less the agents of the State, than as though the legislature had been more definite in prescribing the duties of the officers, and merely left their selection to the municipality. In imparting a portion of its powers, the State also imparts its own immunity.<sup>199</sup>

Substantially contemporaneous with *Nicholson* was the court's decision in *Attorney General ex rel. Kies v. Lowrey*,<sup>200</sup> in which the opinion, as in *Nicholson*, was written by Chief Justice Hooker. It was a quo warranto proceeding that questioned, on the ground that it violated the "home rule" principle, the constitutional validity of a statute incorporating a new school district to take over the area previously occupied by a number of other districts.<sup>201</sup> Excluding "municipal corporations proper" from the discussion as not involved in the case, the court stated that "quasi corporations," including such units as counties, townships, school districts, and highway districts, were quite different, for they performed functions "for and about the business and policies of the State, which has imposed upon them the responsibility and expense of maintaining highways, schools, drains, bridges, etc.," and were therefore completely subject to the power of the legislature except to the extent of any limitations imposed upon that power by the constitution:<sup>202</sup> "The school district is a State agency."<sup>203</sup>

It was a strange time for the emergence in Michigan of this strong image of the local presence of a central sovereign. Only five years after *Nicholson* and *Lowrey* a constitutional convention was to pro-

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199. 129 at 258-59, 88 N.W. at 700.

200. 131 Mich. 639, 92 N.W. 289 (1902), *affd.*, 199 U.S. 233 (1905).

201. See *People ex rel. Le Roy v. Hurlbut*, discussed in notes 142-48 *supra*.

202. 131 Mich. at 643-44, 92 N.W. at 290.

203. 131 Mich. at 644, 92 N.W. at 290.

pose, on the basis of a consensus so broad that the matter was scarcely debated, the most advanced constitutional home-rule provisions in the land;<sup>204</sup> they required the legislature to provide by general law for the incorporation of cities and villages and confer upon the electors of cities and villages the power and authority to frame, adopt, and amend their own charters; to pass ordinances relating to all municipal concerns; to acquire, own, and maintain parks, boulevards, cemeteries, hospitals, almshouses, and all works that involve the public health or safety; and, subject to certain limitations, to acquire and operate public utilities. Under the implementing legislation each city charter was required to provide for the election or appointment of such officers as were deemed necessary, and for the public peace and health, and for the safety of persons and property, and was allowed to provide for the establishment of any department deemed necessary for the general welfare of the city.<sup>205</sup>

Thus, the special charters and other ad hoc legislative creations in the local government field, which were responsible for the nineteenth-century court's perception that many local officers were agents of the state rather than of the city, became obsolete at the same time that the twentieth-century court began to see *almost everything* done by local units as done in the name of the state.

Nevertheless, the die had been cast. *Nicholson* and *Lowrey* combined, in *Whitehead v. Board of Education*,<sup>206</sup> to produce a holding that a painter injured in the employ of the board of education, allegedly as a consequence of the negligence of the board's agents in providing for his use a defective and unsafe scaffold, had no cause of action. Applying the *Lowrey* decision, the court said that "the learned trial judge was correct in saying that 'the affairs of the board of education are as purely a State function as those of the board of health,' and that this case could not be distinguished in principle from the case of *Nicholson v. City of Detroit*."<sup>207</sup> An attempt was later made, by the plaintiff in *Daniels v. Board of Education*,<sup>208</sup> to escape the "quasi-corporation" rubric by setting up the fact that the defendant board had been incorporated by a special act of the legislature and was not simply operating under the general laws applicable to all alike, but the court's reply was that the powers exercised by

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204. MICH. CONST. art. VIII, §§ 20-29 (1908). See generally Fairlie, *The Michigan Constitutional Convention*, 6 MICH. L. REV. 533, 541 (1908).

205. Act of June 2, 1909, No. 279, §§ 3-4, [1909] Mich. Pub. Acts 497.

206. 139 Mich. 490, 102 N.W. 1028 (1905).

207. 139 Mich. at 494, 102 N.W. at 1029.

208. 191 Mich. 339, 158 N.W. 23 (1916).



the board were still solely of a governmental nature. The distinction between "quasi-corporations" and "municipal corporations proper" was, therefore, not the significant distinction, since "[t]ouching their immunity from liability in the exercise of strictly governmental functions, the authorities are as a rule applicable to either."<sup>209</sup> The claim in this case was for negligence in building, maintaining, and using for school purposes, a building that contained a stairwell with a railing of inadequate height, over which the eight-year-old plaintiff had fallen to his injury.

The actions of firemen in flushing a fire hydrant, allegedly the cause of injury to plaintiff, whose horse was frightened, were held to be governmental in *Brink v. City of Grand Rapids*.<sup>210</sup> The court, advertent to the fact that there was no evidence that the particular hydrant had ever been used for any purpose other than fire protection, said: "The city had no pecuniary interest in establishing or maintaining this hydrant. It received no compensation for its use. It was maintained entirely by taxation upon the entire city, and its use was for the sole benefit of the city. It was constructed, maintained, and used in a governmental capacity."<sup>211</sup> Justice Ostrander, concurring, thought the question of the city's pecuniary interest in the hydrant was not the material factor. The city's *water* system was unitary, though used for miscellaneous purposes, but there was no liability in this case because the firemen were acting, pursuant to *their* duties as members of the fire department, as "independent public officers."<sup>212</sup>

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209. 191 Mich. at 347, 158 N.W. at 26.

210. 144 Mich. 472, 108 N.W. 430 (1906).

211. 144 Mich. at 475, 108 N.W. at 431.

212. 144 Mich. at 475-76, 108 N.W. at 431. *Cone v. City of Detroit*, 191 Mich. 198, 157 N.W. 417 (1916), is another example of the problem presented by a mixture of functions. Plaintiff's decedent was killed, while standing in the entranceway to a store, when a firetruck, making a run, struck a hole in the street, went out of control, and ran him down. The city relied on *Brink* as a defense, but the court permitted liability to rest upon the city's breach of the highway statute. It commented, however, that the question whether liability under the statute could extend to a person not on the highway at the time of injury had not been discussed by counsel and would not, therefore, be considered. 191 Mich. at 200, 157 N.W. at 417-18. The notion of nonliability on the part of the municipality for the acts of certain public officers who were regarded, in respect to duties imposed upon them by general statute, as independent agents rather than as municipal servants, did not die out completely. In *Bodewig v. City of Port Huron*, 141 Mich. 564, 104 N.W. 769 (1905), a claim against the city, referred to as a trespass claim, that the city health officer obtained possession of plaintiff's house by trick and used it as a place for reception of smallpox cases, was held not maintainable, under the principle of *Murray v. Village of Grass Lake*, discussed in notes 187-89 *supra*, since it was not claimed that the city authorized or ratified the "trespass," and the city was not responsible for the acts of the health officer because he was independent of city control. In *Hoek v. Township of Allendale*, 161 Mich. 571, 126 N.W. 987 (1910), it was held that the township was not liable for a trespassory act of the highway com-

But two years later, in *Davidson v. Hine*,<sup>213</sup> the court held unconstitutional, as contrary to the home-rule principle, a statute that created a bureau of public safety for Bay City, included within the jurisdiction of that bureau not only the police but also the fire department, and provided for appointment of the governing officials by the governor. The court thought that fire protection, as distinguished from police protection, was a *local*, rather than a state function, indistinguishable in that respect from sewers and water: All were "agenc[ies] of local government maintained for the benefit of the local community."<sup>214</sup> A board of health would also be different, since neglect of duty on its part might produce an epidemic that would affect the rest of the state, while fire was a problem only for the local inhabitants.<sup>215</sup> *Brink*, the court said, was not inconsistent with this conclusion, since it did not rest upon the proposition that the fire department was a *state* agency, but on no more extensive a principle than that a municipality is not liable for injuries negligently caused by members of the fire department engaged in work pertaining exclusively to the extinguishment of fires because *when so occupied they are engaged in the performance of "a local governmental duty."*<sup>216</sup>

And so the mutation was complete. The end product was a strange mixture of uprooted and reshaped conceptions. The home-rule principle had originally required that a distinction be made between local functions of *state* government, which could constitutionally be placed under the control of state appointees, and functions that were *inherently local*, carried on for the benefit of the local inhabitants and not for the benefit of the state at large, which must be left to the control of officers locally appointed or elected. The police function was of the former character,<sup>217</sup> while the public

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missioner, or for such an act ordered by him, since, in the performance of his highway repair duties, he did not act as the agent of the township. The fact that the highway statute, ever since 1879, had explicitly provided that "highway commissioners . . . are hereby made and declared to be the officers of the township . . . wherein they are elected . . . and shall be subject to the general direction of such township . . . in the discharge of their several duties," see text accompanying 102 *supra*, was apparently overlooked. And as late as 1940, a claim against a county for flooding, allegedly caused by the drain commissioner's action in accelerating the drainage above plaintiff's premises without doing the same below, was rejected on the ground that the commissioner was acting on his own in the performance of duties imposed by statute on him rather than on the county, and that the county had no control over his actions. *Maffei v. Berrien County*, 293 Mich. 92, 291 N.W. 234 (1940).

213. 151 Mich. 294, 115 N.W. 246 (1908).

214. 151 Mich. at 299, 115 N.W. at 248.

215. 151 Mich. at 301, 115 N.W. at 248.

216. 151 Mich. at 301-03, 115 N.W. at 249.

217. See *People ex rel. Drake v. Mahaney*, discussed in text accompanying note 139 *supra*.

works function was of the latter.<sup>218</sup> The prison function was also a state function, and when a local prison was placed under the administration of a board, one member of which was a state official, not only was the home-rule principle not offended, but the municipal corporation was not responsible for the acts of the board's servants.<sup>219</sup>

At a second stage, the health officer function was identified as a state function. Originally the classification was made because the function was located in a board of health created pursuant to statutory requirement. But then it was decided that, whether the function was committed to a special board or was performed by a municipal corporation through its own officers and servants, the municipal corporation was not liable for the nonfeasance or misfeasance of such officers because this was a state function and the duties were imposed by general statute.<sup>220</sup> In performing such statutory duties the corporation itself acted as an agency of state government, and its nonliability was an extension of the state's immunity from liability for the negligence of its officers.<sup>221</sup> "Quasi-corporations," which perform, for the state, functions that are imposed upon them by law without their consent, are fully subject to state power and do not fall within the home-rule principle. The board of education is such an agency.<sup>222</sup> Therefore, since it performs *only* state functions, it has no liability for the negligence of any of its officers and employees.<sup>223</sup> Since the same principle is applicable to municipal corporations when they are engaged in strictly governmental functions, the immunity is derived from the nature of the function rather than from the nature of the corporate organization of the entity in question.<sup>224</sup> Moreover, it extends to premises and equipment devoted to a governmental purpose.<sup>225</sup>

Finally, firemen engaged in fire protection activities are perform-

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218. See *People ex rel. Le Roy v. Hurlbut*, discussed in text accompanying notes 142-48 *supra*.

219. See *City of Detroit v. Laughna*, discussed in text accompanying notes 150-51 *supra*.

220. See *Gilboy v. City of Detroit*, discussed in text accompanying notes 183-84 *supra*; *Murray v. Village of Grass Lake*, discussed in text accompanying notes 187-89 *supra*; *Nicholson v. City of Detroit*, discussed in text accompanying notes 190-99 *supra*.

221. See *Nicholson v. City of Detroit*, discussed in text accompanying notes 190-99 *supra*.

222. See *Attorney General, ex rel. Kies v. Lowrey*, discussed in text accompanying notes 200-03 *supra*.

223. See *Whitehead v. Board of Educ.*, discussed in text accompanying notes 206-07 *supra*.

224. See *Daniels v. Board of Educ.*, discussed in text accompanying notes 208-09 *supra*.

225. See cases cited in notes 221, 223 & 224 *supra*.

ing a governmental activity, and the municipal corporation is therefore not responsible for their negligent acts.<sup>226</sup> But fire protection is not a "state" function; rather, it is, insofar as the home-rule principle is concerned, a "local" function, as are sewers, water, parks, and streets. The exemption of the municipal corporation from liability for the negligent acts of employees engaged in such activities is therefore related solely to the "governmental nature" of the activity and is not dependent on a conclusion that the state has an overriding interest in the performance of the function. And, for the purpose of determining whether a given activity is "governmental in nature," the principal clue that emerges is the fact that it is carried on for the benefit of the general public, without pecuniary return and supported by general taxation.

### B. "Governmental" Versus "Proprietary"

The case of the market building that fell on Barron<sup>227</sup> was perhaps the first instance of liability engendered by the "proprietary" nature of the activity, though at that time the term referred to the fact that in providing a market the city was doing its own thing, rather than acting under a state-imposed duty. The sewer trench that Ostrander<sup>228</sup> was digging when he was injured was a "private municipal enterprise" rather than a thing done "in the exercise of a governmental function," in part because sewers had at an early time been used as an example of an enterprise carried on by the municipal corporation in its own "private" interest, rather than in the interest of the entire public, and in further part because, as the court suggested, under the applicable charter the sewer might become a source of revenue to the city. The fact that the fire hydrant in *Brink*<sup>229</sup> produced no revenue was considered by all but one of the judges to be important to the conclusion that the firemen who flushed it were not engaged in a proprietary activity. In *Hodgins v. Bay City*<sup>230</sup> a telephone lineman was electrocuted when he came in contact with a wire that had become charged as a result of broken insulation on a city-owned power line strung on the same poles. The city had two lines on the pole, one supplying DC current for street lighting and the other, AC current for home lighting. It was decided that the claim was good because

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226. See *Brink v. City of Grand Rapids*, discussed in text accompanying notes 210-12 *supra*.

227. See text accompanying notes 168-74 *supra*.

228. See text accompanying notes 179-82 *supra*.

229. See text accompanying notes 210-12 *supra*.

230. 156 Mich. 687, 121 N.W. 274 (1909).

the decedent had been electrocuted by the AC line; it was asserted, *obiter*, that the result would have been different if the injury had been caused by the DC line, since street lighting was a governmental function.<sup>231</sup>

It was "conceded" in *Borski v. City of Wakefield*<sup>232</sup> that a city bus line was a proprietary enterprise, and in *Foss v. City of Lansing*<sup>233</sup> the claim of a plaintiff who was hit by a garbage truck was validated by the argument that if garbage disposal is a governmental activity, the city was nevertheless liable because it was making an "incidental profit" by recouping its costs, in part, from a user fee and from the sale of its garbage-fed hogs. It was expressly asserted in *Foss* that in Michigan, *if the city is engaged in governmental work with an incidental profit, it has the same liability as a private corporation.*<sup>234</sup>

On the other hand, *Kilts v. Board of Supervisors*<sup>235</sup> held that the county board of supervisors, when operating a poor farm, was engaged in a governmental activity and was therefore not liable for the death of a workman employed by a contractor doing work on a water tower when the platform upon which the workman was standing collapsed because it was insufficiently supported. And, in *Heino v. City of Grand Rapids*,<sup>236</sup> a city park system and swimming pool, provided by the city through a park board, supported by taxation, and open to the public without charge, was held to be a governmental activity. The court noted the home-rule cases that held that parks are a local rather than a state function, but said they were not in point. *Brink*<sup>237</sup> and *Davidson*<sup>238</sup> were evidence that a particular activity might be "governmental" for some purposes and "private" for others.<sup>239</sup>

Road and street construction and maintenance activities, whether performed by the city or by the county road commission, were repeatedly held to be governmental,<sup>240</sup> thus creating the paradox of

231. 156 Mich. at 692, 121 N.W. at 276-77.

232. 239 Mich. 656, 215 N.W. 19 (1927).

233. 237 Mich. 633, 212 N.W. 952 (1927).

234. 237 Mich. at 636-37, 212 N.W. at 953.

235. 162 Mich. 646, 127 N.W. 821 (1910).

236. 202 Mich. 363, 168 N.W. 512 (1918).

237. See text accompanying notes 210-12 *supra*.

238. See text accompanying notes 213-16 *supra*.

239. 202 Mich. at 374-75, 168 N.W. at 516.

240. *Alberts v. City of Muskegon*, 146 Mich. 210, 109 N.W. 262 (1906); *Gunther v. Board of County Road Comms.*, 225 Mich. 619, 196 N.W. 386 (1923); *Longstreet v. County of Mecosta*, 228 Mich. 542, 200 N.W. 248 (1924); *Wrighton v. City of Highland Park*, 236 Mich. 279, 210 N.W. 250 (1926); *In re Moross v. Hillsdale County*, 242 Mich. 277,

liability for *nonfeasance* under the highway statute, and *immunity* from liability for *misfeasance* in doing the work required by the statute. For instance, in *Longstreet v. County of Mecosta*,<sup>241</sup> where the plaintiff's car went off the end of an unfinished bridge that allegedly had not been provided with warning lights or barriers, the board of road commissioners, which was doing the construction work on the bridge, was exempted from liability by the governmental nature of its activities, while the county itself, to which the highway liability provisions originally applicable to townships and cities had been extended in 1909,<sup>242</sup> was held liable for having failed in its statutory duty to keep the highway safe for use.

In these cases the proposition asserted in *Foss*, that an "incidental profit" realized in the course of a governmental activity engenders tort responsibility with respect to that activity, began to cause trouble, since county boards of road commissioners did much of their highway construction and maintenance work under contracts with the state highway commissioner that provided for payments to the board in connection with the work done. For example, the contract in *Gunther v. Board of County Road Commissioners*<sup>243</sup> provided for a sharing of expense pursuant to which the state commissioner ultimately paid to the board seventy-five per cent of the total cost of the work done. In *Johnson v. Board of County Road Commissioners*<sup>244</sup> it was alleged that the contract called for payment to the county board, over and above its expenses, of a percentage fee for overhead and supervision. In neither case did the payment result in liability, but in *Johnson* this result was explained by a statement that the burden of proof was on the plaintiff to show that the payment would result in a profit to the board and the burden had not been met.<sup>245</sup> While this explanation can be used to reconcile the outcomes of *Johnson* and *Foss*, the conflict between the two was not resolved.

In *Matthews v. City of Detroit*<sup>246</sup> plaintiff sustained injuries while alighting from the miniature railway at the Detroit zoo. The zoo was a public park, open free of charge, and therefore "governmental," but a small fee was charged for a ride on the train, and that particular

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218 N.W. 683, *cert. denied*, 278 U.S. 635 (1928); *Johnson v. Board of County Road Comms.*, 253 Mich. 465, 235 N.W. 221 (1931); *Russo v. City of Grand Rapids*, 255 Mich. 474, 238 N.W. 273 (1931).

241. 228 Mich. 542, 200 N.W. 248 (1924).

242. *See* Act of June 2, 1909, No. 283, ch. IV, § 21, [1909] Mich. Pub. Acts 573.

243. 225 Mich. 619, 196 N.W. 386 (1923).

244. 253 Mich. 465, 235 N.W. 221 (1931).

245. 253 Mich. at 470, 235 N.W. at 223.

246. 291 Mich. 161, 289 N.W. 115 (1939).

operation produced a small profit that contributed to the support of the zoo, which was otherwise mainly supported by taxation. Plaintiff cited the "incidental profit" argument from *Foss*, while the city relied on *Johnson* and particularly on a statement therein that did conflict with *Foss*, that "municipal corporations and other governmental agencies when performing a purely governmental function do *not* lose their immunity from liability for its negligent performance merely because they derive an income therefrom, provided the income is only incidental to the main purpose of so functioning and aimed at covering the cost of the undertaking."<sup>247</sup> Plaintiff's judgment survived an even split on the court, and the opinion for affirmance suggested that *Foss* and *Johnson* could be distinguished from each other on the ground that "the maintenance of roads is *peculiarly* a governmental function."<sup>248</sup>

The problem became more pressing in cases involving another activity, which had a strong "governmental" aura. As in the case of municipal corporations proper, entities primarily engaged in education sometimes become involved in activities with "proprietary" overtones. For instance, a question arose in *Robinson v. Washtenaw Circuit Judge*,<sup>249</sup> as to whether The University of Michigan was liable for the alleged malpractice of a physician on the staff of the University Hospital. Plaintiff contended that "The Regents of the University of Michigan" was by law a body corporate and as such was liable, like other corporations, for the torts of its agents. The argument and the decision did not clearly separate the "charitable immunity" defense from that based on "governmental immunity," but the court took notice of the provisions of the constitution relating to The University of Michigan and its governance and decided that

[w]ith such provisions in our Constitution it seems clear that the general supervision of the University, and direction and control of all expenditures from its funds is a governmental activity, and the board of regents a state agency to carry out the will of the people, as expressed in the Constitution they adopted, in regard to the educational institution committed to its care and supervision.<sup>250</sup>

Moreover, the hospital was a charitable institution, and in the long run the court thought denial of liability could safely be rested on either ground.<sup>251</sup>

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247. 291 Mich. at 165-66, 289 N.W. at 117, quoting 253 Mich. at 471, 235 N.W. at 223 (emphasis added).

248. 291 Mich. at 166, 289 N.W. at 117 (emphasis added). Presumably garbage collection and distribution is a more doubtful case.

249. 228 Mich. 225, 199 N.W. 618 (1924).

250. 228 Mich. at 228, 199 N.W. at 619.

251. 228 Mich. at 230, 199 N.W. at 619-20.

In *Daszkiewicz v. Detroit Board of Education*,<sup>252</sup> the board, operating as board of control for Wayne University, was held to be free of liability for the death of a medical student caused by the failure of the door catch on an elevator shaft, despite the fact that the expenses of operation of the school were partially recouped from tuition fees. The court said that a board of education or school district cannot be held liable for injuries caused by the negligence of its employees "because they, in furthering the purposes of education, are in the exercise of a public or governmental function";<sup>253</sup> the court thus seemed to leave little room for "proprietary" activities to be identified. Nevertheless, the court, citing *Johnson* and not mentioning *Foss*, went on to observe that since the tuition fees covered only about thirty per cent of the costs of the school and were therefore "only incidental" to the main purpose they did not deprive the board of its immunity.<sup>254</sup>

Interscholastic athletics put governmentalism to a sterner test. In *Watson v. School District*,<sup>255</sup> after a football game at the high school stadium plaintiff's decedent fell into an excavated traffic ramp, allegedly unlighted and insufficiently protected, in the school parking lot. It was argued that in conducting the athletic contest and charging admission for it the school was engaged in a commercial activity, rather than in one that was strictly governmental. The court split down the middle again and by so doing allowed a judgment n.o.v. for the defendant to stand. The opinion for reversal relied largely on *Foss* and reasoned that even if the activity were governmental, there was nevertheless an incidental profit to justify imposing liability.<sup>256</sup> The contrary opinion emphasized the school's obligation to include a physical education program in its curriculum, relied on *Daszkiewicz*, and argued that if *Foss* really stood for the proposition that a governmental function coupled with an incidental profit is a source of liability, to that extent it should be overruled.<sup>257</sup>

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252. 301 Mich. 212, 3 N.W.2d 71 (1942).

253. 301 Mich. at 221, 3 N.W.2d at 75.

254. 301 Mich. at 222, 3 N.W.2d at 75, citing 253 Mich. at 471, 235 N.W. at 223. See also *Martinson v. City of Alpena*, 328 Mich. 595, 44 N.W.2d 148 (1950), arising from a similar accident in a city-owned hospital. The court analyzed the hospital's financing to demonstrate that it was not a profit-making enterprise and that it served the entire region, not just the residents of the city. The test for governmental immunity was said to be whether the activity was carried on for the common good, without special corporate benefit or profit. 328 Mich. at 598, 44 N.W.2d at 149. Neither the tuition fees charged by the city medical school, nor charges made by the hospital for operating expenses made it a proprietary activity, since the hospital operated for the purpose of promoting the general public health. 328 Mich. at 598-99, 44 N.W.2d at 149.

255. 324 Mich. 1, 36 N.W.2d 195 (1949).

256. 324 Mich. at 6-8, 36 N.W.2d at 197-98.

257. 324 Mich. at 11-13, 36 N.W.2d at 199-200.



The same issue was posed in *Richards v. Birmingham School District*<sup>258</sup> by injuries arising from the collapse of the bleachers at a high school football game. Three of the justices, relying on *Daszkiewicz* and *Watson*, thought that there was no claim;<sup>259</sup> two others concurred with the outcome on irrelevant grounds without mentioning this issue.<sup>260</sup> Justice Edwards, joined by Justice Talbot Smith, strongly criticized the immunity doctrine<sup>261</sup> but in the end argued that the activity in the particular case should be classified as "proprietary."<sup>262</sup> Justice Carr explained *Foss* away by suggesting that the city in that case might be regarded as having been engaged in *two* activities—garbage collection and removal (governmental) and the operation of a piggery for profit (proprietary)—and reinforced that explanation by reference to *Matthews*, with its governmental park and its proprietary railway.<sup>263</sup> (He did not explain why the operation of the truck was to be identified with the proprietary piggery rather than with the governmental collection function; perhaps the classification was made because the truck was returning from the piggery when the accident occurred?) Justice Edwards thought that Justice Carr's approach was a step backward and that the court should take every opportunity to whittle the defense away; he implied that *Foss* had offered one such opportunity. Much of the confusion in the cases, he suggested, came from the assumption that the terms "governmental" and "proprietary" are mutually exclusive. All things done by a municipal corporation are in a sense governmental, but some are more closely related than others to things more normal to private enterprise than to governmental units. The conduct of the football game by the school was governmental enough, but there was no reason why the admission charge, plus other circumstances—such as the fact that the game was held on a national holiday, that it was open to the public, and that the collapsing bleachers had been rented from a supplier in order to increase seating capacity and thus enhance the pecuniary return—should not be taken into account in concluding that the school was sufficiently involved in a proprietary activity to require it to surrender the defense.<sup>264</sup> He also recognized that if his opinion should prevail, it would, for the first time in

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258. 348 Mich. 490, 83 N.W.2d 643 (1957).

259. 348 Mich. at 507-10, 83 N.W.2d at 652-53 (Dethmers, C.J., Kelly & Carr, JJ.).

260. See 348 Mich. at 512-14, 83 N.W.2d at 654-55 (Black & Sharpe, JJ.).

261. See 348 Mich. at 514-20, 83 N.W.2d at 655-59.

262. 348 Mich. at 523-24, 83 N.W.2d at 660.

263. 348 Mich. at 505-06, 83 N.W.2d at 651.

264. 348 Mich. at 521, 83 N.W.2d at 659.

Michigan, specifically apply the proprietary limitation to an immunity defense asserted by a school district, though he thought there were sufficient implications in earlier cases to make this result justifiable.<sup>265</sup> His opinion was an open invitation for a frontal attack upon the immunity defense, since he relied on the "proprietary function" argument only because the more general question had not been adequately briefed and argued. In the following year, in *Penix v. City of St. Johns*,<sup>266</sup> Justice Edwards again voiced his discontent with the basic rule (with the concurrence, this time, of four other justices) but went along with its application in the particular case—arising from the collapse of bleachers at a public park—for the reason that, unlike *Richards*, the case offered no basis for a proprietary-function argument.

On its face this was a conservative record in the use of the proprietary-function idea. Cases in which the supreme court explicitly held a particular activity to be within the proprietary category were few. As the problem was worked out, a pecuniary return of some sort from the activity appeared to be a necessary, but not a sufficient, condition to its characterization as proprietary. The activity was deemed governmental *unless* such a return was shown, but if it *was* shown, the situation remained ambiguous because the court frequently used the word "profit" without settling whether it meant a net pecuniary gain to the unit or merely the realization of some income from the activity. The implication in *Johnson*<sup>267</sup> was that the percentage fee did not make the road contract proprietary because there was no proof that it made the activity profitable to the county. There was specific reference in *Daszkiewicz*<sup>268</sup> and in *Martinson*<sup>269</sup> to the fact that the fees and charges collected by the medical schools and the hospital only partially made up the costs of these enterprises, and the prevailing opinion in *Watson*<sup>270</sup> made a point of the fact that the school's athletic program as a whole was conducted at a loss; all of this would suggest that an operation actually for profit was required. On the other hand, the comment in *Ostrander*<sup>271</sup> was that the sewer might become a *source of revenue*, and in *Brink*,<sup>272</sup> that the

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265. 348 Mich. at 522, 83 N.W.2d at 659.

266. 354 Mich. 259, 92 N.W.2d 332 (1958).

267. See text accompanying notes 244-45 *supra*.

268. See text accompanying notes 252-54 *supra*.

269. See note 254 *supra*.

270. See text accompanying notes 255-57 *supra*.

271. See text accompanying notes 179-82 *supra*.

272. See text accompanying notes 210-12 *supra*.

fire hydrant never had been. The bus line in *Borski*<sup>273</sup> and the commercial power line in *Hodgins*<sup>274</sup> were assumed to be proprietary without attention to whether they were "profitable" activities, and it appears that the proceeds of the piggery in *Foss*<sup>275</sup> only partially recouped the costs of the operation. In *Matthews*<sup>276</sup> the train operation did turn a profit and was therefore deemed by half the court to be separable from the zoo operation of which it was a part.

In later decisions this ambiguity appears to have been resolved. In *Dohm v. Township of Acme*<sup>277</sup> it was held that a plaintiff who fell on the steps of the township hall during a wedding anniversary party there in progress might recover against the township because the second floor of the building was leased out to private parties, and the first floor, though used primarily as a town hall, was occasionally rented to persons who wished to hold private functions there. The purpose of the building was primarily governmental, but the anniversary party was a purely private transaction, which had nothing to do with a governmental use. The fact that the fee was small and the rentals infrequent did not change the nature and purpose of the use when the injury occurred. *Foss* and *Matthews* were both cited with approval<sup>278</sup> and thus gained a new lease on life. The principle was extended by *Munson v. County of Menominee*<sup>279</sup> to a situation where the county permitted the state welfare department to use an office in the courthouse in return for a payment covering the expense of maintenance and the amortization of some costs for modifications to fit the state office's needs. Plaintiff, an employee in the state office, was injured when a window shade fell on her head. The fact that the county did not anticipate a profit from the transaction was held not to be controlling; rather, the opinion seems to say, the county had involved itself in the rental business by supplying a facility for a consideration and in so doing was performing a function proprietary in nature.<sup>280</sup> The fact that the state department was performing a governmental function in the office did not alter the county's relation to the situation; furnishing space to the state office was not a governmental function vested by law in the county.<sup>281</sup>

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273. See text accompanying note 232 *supra*.

274. See text accompanying notes 230-31 *supra*.

275. See text accompanying notes 233-34 *supra*.

276. See text accompanying notes 246-48 *supra*.

277. 354 Mich. 447, 93 N.W.2d 323 (1958).

278. 354 Mich. at 451, 93 N.W.2d at 326.

279. 371 Mich. 504, 124 N.W.2d 246 (1963).

280. 371 Mich. at 512, 124 N.W.2d at 250.

281. 371 Mich. at 514, 124 N.W.2d at 250.

*Carlisi v. City of Marysville*<sup>282</sup> opened a complementary route of expansion. *Dohm* and *Munson* established that where governmental property is devoted primarily to a "governmental" use, the governmental unit may nevertheless be subject to the same liability as a private occupier toward persons on the premises in connection with a secondary, "nongovernmental" use. *Carlisi* established that where the premises are devoted primarily to a "proprietary" use, the governmental unit is subject to the same liability as a private occupier toward visitors on the premises even though their presence is not connected with, and their injuries are not caused by, the "proprietary" activity carried on there. In such cases, "[t]he city stands as an individual possessor of land with the duties imposed by law."<sup>283</sup>

The case arose from the drowning of two girls who were overwhelmed by the turbulence created by a passing ship when they went wading in the St. Clair River off premises owned by the city. The tract in question was across the road from a public park, but was itself occupied by the city waterworks; there was, however, a grassy area frequented by sightseers for the purpose of viewing traffic on the river. At the time of the accident a "no swimming" sign ordinarily posted at the location had been temporarily removed for repair. Reversing the city's judgment n.o.v., the court reasoned that, like *Matthews* and *Munson*, the case involved a dual use of property and that in such cases the rule is that, if the legislature's purpose in conferring the power to engage in the activity carried on there was *exclusively* public, the municipality will be deemed to be acting governmentally, but if it was "for private advantage or emolument," then, even if the public draws some incidental benefit, the municipality stands on the same footing as any private occupier.<sup>284</sup> In this instance the primary use was the waterworks, a "proprietary activity" carried on for the "private advantage and emolument" of the city; the use of the premises by sightseers was only incidental. Consequently, the applicable rule was that of the Restatement of Torts pertaining to privileged visitors, and the city became liable for a failure to warn of known dangers.<sup>285</sup>

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282. 373 Mich. 198, 128 N.W.2d 477 (1964). Although the decision was subsequent to *Williams v. City of Detroit*, discussed in text accompanying notes 1-5 *supra* & 420-21 *infra*, the accident occurred prior to that decision and was therefore not subject to the principle of that case.

283. 373 Mich. at 208, 128 N.W.2d at 483.

284. 373 Mich. at 205, 128 N.W.2d at 482.

285. 373 Mich. at 208-09, 128 N.W.2d at 483, *citing* RESTATEMENT OF TORTS § 345 (1934).

### C. *The Nuisance-Trespass Claim*

During the period in which the governmental-function defense gained its ascendancy, the nuisance-trespass concept, while it remained a viable basis of claim, was held in check by close attention to its origins. In later years, when recollection of the common law forms began to fade and the governmental-function defense came under fire, the concept lost some of its definition and was accepted by the court in some situations that are difficult to reconcile with the original category.

The original cases, it has already been noted, were *Pennoyer v. City of Saginaw*,<sup>286</sup> *Sheldon v. Village of Kalamazoo*,<sup>287</sup> and *Ashley v. City of Port Huron*.<sup>288</sup> *Pennoyer* sued the city for maintaining ditches that cast surface water upon his land. The trial judge, for reasons that did not appear, excluded from evidence the record of the proceedings in the city council that would have shown that the contract for the digging of the ditches existed prior to plaintiff's acquisition of his title. Holding this ruling to be erroneous, the supreme court said, "If on the ground that it was of proceedings anterior to the plaintiff's title, and his possession of the land—as stated in the brief submitted by defendant's counsel—it is only necessary to say that the city, by creating the nuisance, which the evidence offered tended to prove, is prima facie liable for its continuance."<sup>289</sup> In *Sheldon*, the village board of trustees, by resolution, directed the village marshal to remove plaintiff's front fence, which was believed to be within the limits of the highway, and he obeyed their command. It was held that the act was a trespass and a taking of private property; moreover, it had been commanded by the corporate body itself. The court could see no reason why the corporate entity should escape responsibility for the consequences.<sup>290</sup> In *Ashley*, again, the claim was that the city had cut a sewer, the necessary result of which was that water was cast upon plaintiff's land that would not otherwise have flowed there. In response to a defense that the city was exercising its legislative authority in ordering the sewer to be built, the supreme court answered that a municipal corporation enjoys no exemption from responsibility for a direct injury in the nature of a trespass accomplished by an act of the corporation itself.<sup>291</sup>

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286. See text accompanying note 41 *supra*.

287. See text accompanying notes 57-60 *supra*.

288. See text accompanying notes 81-82 *supra*.

289. 8 Mich. at 535. This is the entire discussion; no authorities were cited.

290. See text accompanying notes 57-60 *supra*.

291. See text accompanying notes 81-82 *supra*.

The court was dealing, in these cases, with an act, directed by the corporate decision-making body, that was, or the necessary consequence of which was, a physical intrusion on plaintiff's land. It was not a case of "mere neglect" on the part of the public authorities to perform some duty imposed upon them by law, nor was there any necessity to "impute" to the corporate entity responsibility for the acts of an underling, for the corporate body itself had ordered the thing done. Moreover, in *Sheldon* at least, the act impliedly laid claim to and appropriated possession of land that plaintiff claimed belonged to him. In these circumstances, neither the plea that the act was legislative in character, nor the contention that it was the act of the officers themselves, rather than that of the corporation, was applicable.

A case in which a conclusion of no liability was reached elucidates the court's reasoning further. In *Fuller v. City of Grand Rapids*,<sup>292</sup> plaintiff claimed that a contractor engaged in a street improvement project under contract with the city had deposited some earth on her land. Noting that the amount of earth deposited, if any, was trifling and that it was doubtful that plaintiff was entitled to maintain an action of trespass *quare clausum fregit* under her pleadings, the court said, "However this may be, the act of depositing earth upon her land was unnecessary, and not the natural result of making the improvement. The trespass, therefore, was one for which the contractor, and not the city, was liable."<sup>293</sup>

Four years later, in *Ferris v. Board of Education*,<sup>294</sup> personal injuries "proximately" caused by the "trespass" were included under this rubric. A Detroit school building was constructed in such a location and in such a fashion that ice and snow would naturally slide from its roof onto plaintiff's back steps. On one occasion plaintiff, informed by his wife that it had happened again, went out to survey the situation, slipped upon the deposit from defendant's roof, and fell.<sup>295</sup> It was held that the board of education had no more right to build its building in such a way that ice and snow would inevitably slide from the roof onto plaintiff's premises than it would have to accumulate water and permit it to be discharged in a body across the boundary line. There would have been no question if the claim had been for damages to the premises, and the personal injury was the proximate consequence of the erection of the building, designed as it was, with-

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292. 105 Mich. 529, 63 N.W. 530 (1895).

293. 105 Mich. at 534-35, 63 N.W. at 531.

294. 122 Mich. 315, 81 N.W. 98 (1899).

295. 122 Mich. at 316-17, 81 N.W. at 99.

out devices on the roof to prevent such slides. This was not a claim for "neglect in the performance of a corporate duty rendering a public work unfit for the purposes for which it was intended, but rather for the doing of a wrongful act, causing a *direct injury* to the person of the plaintiff, while outside the limits of the defendant's premises."<sup>296</sup>

*Ferris* was the genesis of various strategies, most of which proved unsuccessful, for outflanking the governmental-function defense. A court that had not been mesmerized by the latter idea might have recognized in *Ferris* and the cases that stood behind it the basis for a principle of liability on the part of governmental agencies for injuries resulting from the misfeasances of governmental officers and employees, which would have interfaced with the older principle of nonliability for mere failure to perform affirmative duties imposed by statute. But this line of development was blocked by *Alberts v. City of Muskegon*,<sup>297</sup> wherein plaintiff claimed that the loss of his house by fire was caused by the negligent emission of sparks from a steam roller used by city employees in street construction work. The court held the work was governmental in character and rejected a misfeasance argument based on *Sheldon*, *Ashley*, and *Ferris*. The case was not one, it was said, in which the misfeasance claimed amounted to a direct trespass; rather, the basis of the claim was negligence, substantially the basis of all liability in this country for damage caused by fire. The cases cited were inapplicable, for "it cannot be said that the burning of plaintiff's property was the *necessary* result of employing the roller as equipped upon the road. The machine and the agents of the city were properly employed in performing a public work. This employment involved no injury to plaintiff's property."<sup>298</sup>

In other cases the avoidance strategy was an attempt to pin the "nuisance" label on dangerous or defective conditions of public premises, which were injurious, not to outsiders, but to visitors on the premises, but the *Ferris* principle was held to be not applicable: to a claim that the board of education or its agents had supplied to plaintiff, a painter, a defective scaffold to be used on school premises;<sup>299</sup> to a claim that a school building contained a stairwell dan-

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296. 122 Mich. at 319, 81 N.W. at 100 (emphasis added).

297. 146 Mich. 210, 109 N.W. 262 (1906).

298. 146 Mich. at 215-16, 109 N.W. at 264 (emphasis added).

299. *Whitehead v. Board of Educ.*, discussed in text accompanying notes 206-07 *supra*.

gerous to the children who used it;<sup>300</sup> in *Kilts v. Board of Supervisors*,<sup>301</sup> to a wrongful death claim arising from the collapse of a platform on a water tower on which plaintiff's decedent was working; and in *Royston v. City of Charlotte*,<sup>302</sup> to a wrongful death claim arising from the collapse of a swing in a public park.

In *Kilts*<sup>303</sup> the distinction was clearly drawn between, on the one hand, a condition of the premises that threatens harm to persons off the premises, which is a public nuisance if the threat is to users of the public ways or a private nuisance if the threat is to neighboring property or persons thereon, and, on the other hand, a condition that is dangerous only to persons on the land. The court said that one who erects a weak structure upon his own land far enough from the perimeter that it can cause no injury to outsiders may become liable for negligence in some instances to those who enter and are harmed by it. But those who so enter have no right to have such structures, which are in no way related to property rights of their own, abated, and to hold the structures to be nuisances would undermine the law of negligence, for juries would then be asked to find all dangerous structures to be nuisances.<sup>304</sup> The same reasoning prevailed in *Royston*, where a child was killed when a post that served as a support for a swing broke off because it was decayed at its base, and the iron bar from which the swing was suspended fell upon the child. Plaintiff claimed the swing was a public nuisance, but the court replied that if the municipality performed a governmental function in erecting and maintaining the swing in a public park and was therefore not liable for negligence in its erection or maintenance, it would be inconsistent to say that the same negligence made the swing a public nuisance. Acts in discharge of a governmental function that create a nuisance per se do not come within the immunity, but want of care in maintenance presents a question of negligence only. To adopt the principle relied upon by plaintiff would abrogate the doctrine of governmental immunity by classifying as nuisance the result of the negligence of municipal agents and employees in the maintenance of any governmental instrumentality, thus immunizing the negligence but not its result.<sup>305</sup>

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300. *Daniels v. Board of Educ.*, discussed in text accompanying notes 208-09 *supra*.

301. 162 Mich. 646, 127 N.W. 821 (1910). See text accompanying note 235 *supra*.

302. 278 Mich. 255, 270 N.W. 288 (1936).

303. See text accompanying notes 235 & 301 *supra*.

304. 162 Mich. at 650-51, 127 N.W. at 822.

305. 278 Mich. at 260-61, 270 N.W. at 289-90.



*Bator v. Ford Motor Co.*<sup>306</sup> involved damage to plaintiff's premises resulting from the digging of a large water tunnel seventy feet below the surface of the street on which the premises were located. The work was done by a contractor working for the Ford Motor Company, pursuant to an arrangement whereby the tunnel would become the property of the city of Detroit and be used to furnish water to the Ford plant in Dearborn. As the tunnel shield passed through a plastic subsoil at this point, the earth was disturbed in such a way that subsidence occurred for a period of eighteen months, causing damage to the buildings abutting the street. The jury found that the work had been carried on with due care and skill, and there was evidence that the disturbance to the soil was the inevitable result of doing the job in the way that it was done. Judgment for plaintiff was entered upon a count asserting essentially a trespass theory, and the court held that the absence of negligence was no defense if it were true that it was impossible to carry on the construction without damage to the abutting property. The court said that there would have been no justice in requiring the plaintiffs, who were in no way interested, to bear part of the cost,<sup>307</sup> and that *Ashley*<sup>308</sup> and *Defer*<sup>309</sup> made it unnecessary to determine whether plaintiff's title ran to the center of the street, for the claim could be sustained without finding that the tunnel actually passed through his land.<sup>310</sup>

In *McDonell v. Brozo*<sup>311</sup> plaintiff was injured when, while passing by a school playground on a public sidewalk, she was bowled over by a fourteen-year-old physical education student running a dash under the supervision of school personnel. In support of her claim against the board of education, plaintiff relied on *Ferris* and argued that the distinction between *Ferris* and *Daniels*<sup>312</sup> was that the injury in *Ferris* had occurred off, rather than on the school premises. But the court held that the immunity was not limited to on-premises injuries. The instant case did not involve trespass to the land of another, and there was no nuisance, since there was no continuing danger to the lives or safety of the public or to the property or personal rights of persons so located as to be peculiarly subject to such a danger.<sup>313</sup> On

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306. 269 Mich. 648, 257 N.W. 906 (1934).

307. 269 Mich. at 666, 257 N.W. at 912.

308. See text accompanying notes 81-82 *supra*.

309. See text accompanying notes 84-87 *supra*.

310. 269 Mich. at 669, 257 N.W. at 914.

311. 285 Mich. 38, 280 N.W. 100 (1938).

312. See text accompanying notes 208-09 & 300 *supra*.

313. 285 Mich. at 43-44, 280 N.W. at 102.

the other hand, *Pound v. Garden City School District*<sup>314</sup> fell easily into the *Ferris* category. The claim was for a fall on the public sidewalk attributed to an icy condition caused by the discharge of water across the sidewalk by a school downspout. The trial judge's conclusion that the immunity defense was applicable was corrected by the supreme court, which explained that the immunity decisions relied on by defendant were all cases in which the injury did not occur, as it did in *Ferris*, outside the limits of the school premises, but rather in areas subject to school control.<sup>315</sup>

The loss of definition began to appear in *Donaldson v. City of Marshall*,<sup>316</sup> wherein it was claimed that plaintiff lost the use of a portion of his land because the city failed to keep clear of debris a tile drain under a street so that "it became clogged and was unable to carry off the water that accumulated on plaintiff's land."<sup>317</sup> Recovery was allowed, and *Seaman v. City of Marshall*<sup>318</sup> was cited as the controlling authority. There is nothing in the opinion to indicate that the water had been introduced upon the plaintiff's premises by the city drainage system, and it was said that

[t]he city of Marshall was under no obligation to drain the plaintiff's land, but when it established a drain in that vicinity it became its duty to maintain it in such a way as to carry off the natural flow of the water, and if by reason of its failure to do so water accumulated on plaintiff's land which otherwise would not have been there the city would be liable for any damages sustained.<sup>319</sup>

The distinction between the intrusion that is the intended or necessary result of the defendant's act and that which is accidental was again blurred in *Robinson v. Township of Wyoming*.<sup>320</sup> Plaintiff's claim was for loss of a garage building by fire allegedly caused by a short circuit produced by water that flowed into the garage after escaping from a reservoir in a park owned by the township. Plaintiff asserted that "it was the duty of the township to so construct and operate its park and impound the waters . . . in such a manner that they would not be a nuisance and would not trespass upon and damage" his property.<sup>321</sup> The township raised the governmental-function

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314. 372 Mich. 499, 127 N.W.2d 390 (1964).

315. 372 Mich. at 501-02, 127 N.W.2d at 392.

316. 247 Mich. 357, 225 N.W. 529 (1929).

317. 247 Mich. at 358, 225 N.W. at 530.

318. 116 Mich. 327, 74 N.W. 484 (1898).

319. 247 Mich. at 359, 225 N.W. at 530.

320. 312 Mich. 14, 19 N.W.2d 469 (1945).

321. 312 Mich. at 19, 19 N.W.2d at 471.

defense and objected to the court's failure to dismiss the case for lack of proof of negligence and its failure to instruct the jury on that point. The court said that the governmental-function defense is available where negligence is charged but not in a case of trespass; moreover, it said, in a trespass case it is not necessary to prove negligence. From the evidence the jury could find that the township had so constructed its park and lake that the flooding of plaintiff's property was a "natural" result of surplus water escaping from a break in the embankment by which the water was contained.<sup>322</sup>

In *Rogers v. Kent Board of County Road Commissioners*<sup>323</sup> the claim was that plaintiff's decedent died of injuries received when his mower ran into a steel stake that defendants placed upon his land in order to support a snow fence; they acted under a license granted by the deceased. The agreement between the defendants and the deceased allegedly contained an undertaking by the defendants that the fence and all its attachments would be removed from the land at the end of the winter season. The plaintiff's claim was styled as one based on trespass and negligence, but the trial court dismissed it on the ground that it was clearly a negligence claim and hence barred by the immunity defense. The supreme court, however, held that the claim could be maintained as one for trespass under the principle that one who, at the end of the term, fails to remove from the land of another a thing placed there pursuant to a license, becomes guilty of a trespass at that time.<sup>324</sup> Since there was no allegation that the defendants were aware of the continuing presence of the stake upon the land, this conclusion seems debatable.

The idea was even more loosely applied in *Defnet v. City of Detroit*.<sup>325</sup> The claim was for property damage resulting from the subsidence of the soil on plaintiffs' residential premises, which was allegedly caused by a broken connection in a sewer under a portion of their lot that had formerly been a public alley. The alley had been vacated with no reservation of rights in the city before plaintiffs acquired title to the lot, but nothing had been done to block off or remove the sewer. Its existence was not revealed by plaintiffs' abstract, but they learned of it when they received their deed, at which time the grantor told them the sewer had been blocked off. The truth was not discovered until some years later when the damage occurred and, after a number of complaints, the city investigated and discovered

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322. 312 Mich. at 23-25, 19 N.W.2d at 473.

323. 319 Mich. 661, 30 N.W.2d 358 (1948).

324. 319 Mich. at 666, 30 N.W.2d at 360.

325. 327 Mich. 254, 41 N.W.2d 539 (1950).

that the sewer still served a number of houses in the vicinity. The break was also discovered and repaired at that time. The trial judge decided that the city, in maintaining the sewer, was engaged in a governmental function and was therefore not liable for the damage caused by the faulty connection. The supreme court reinstated the plaintiffs' verdict on the ground that "the maintenance of an active sewer since 1915 beneath the plaintiffs' lands constitutes a trespass,"<sup>326</sup> and "[t]he city cannot excuse its tortious taking of private property by invoking the shibboleth of governmental function."<sup>327</sup>

Further evidence of the increasing ambiguity of the "trespass" basis of claim is provided by two cases arising out of one incident. To eliminate frequent overflows of a county road by the runoff of snowmelt and storm water from nearby high land, the Chippewa County Road Commission raised the grade of the road where the flooding occurred and increased the size of the culvert under the road by an amount grossly inadequate to accommodate the water that was thereafter impounded behind the higher grade in times of freshet. In May of 1959, during a period of unusually heavy rainfall, water accumulated in the pocket created by the convergence of this and other highways in such quantities that it eventually broke through one of the roads and poured in a torrent toward nearby Lake Superior. In the process it washed out a gully, into which a lakeside cottage and its occupants were precipitated. Actions against the road commission for the death of one of the guests in the cottage, and for the damage to the property, were dismissed by the trial court on a motion that set up a claim of immunity. That order was appealed in both cases, but *Herro v. Chippewa County Road Commissioners*,<sup>328</sup> the wrongful death case, was the vehicle for the supreme court's ruling. The complaint alleged that the defendant was on notice of the dangerous situation that it had created by reason of an accumulation of water in unprecedented quantities in the month preceding the incident in question. It also asserted a duty on the defendant's part, in constructing and maintaining its roads, to provide adequate escape routes for the water impounded, so that it "would not be a nuisance and would not trespass" upon the property "occupied" by plaintiff's decedent and to prevent the artificial creation of a dangerous body of water above the property and its sudden discharge in large and unnatural quantities on the plaintiff's decedent.<sup>329</sup> Justice Black called this an al-

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326. 327 Mich. at 258, 41 N.W.2d at 541.

327. 327 Mich. at 258, 41 N.W.2d at 541-42.

328. 368 Mich. 263, 118 N.W.2d 271 (1962).

329. 368 Mich. at 266-68, 118 N.W.2d at 272-73.

legation of "actionable trespass" resulting directly in decedent's death by drowning and held that it was governed by the *Ashley-Ferris-Rogers-Robinson* line of cases.<sup>330</sup> *In re Moross v. Hillsdale County*<sup>331</sup> and *Maffei v. Berrian County*<sup>332</sup> were distinguished on the ground that they were based, "mistakenly it would seem," on claims of negligence rather than trespass,<sup>333</sup> and it was asserted that in no Michigan case had a city, township, village, county, or any administrative subdivision thereof, been held immune from liability for destructive flooding of private property occasioned by trespass, provided that the trespass was pleaded and proved as it was in *Ashley*.<sup>334</sup> It was asserted further that the latter case stood for the proposition that "even the State 'could not intrude upon the lawful possession of a citizen.'"<sup>335</sup> The complaints were therefore sustained against the immunity defense on the ground that a trespass had been alleged. While there do not appear to have been allegations equivalent to those in the early cases that the water intrusion was "the necessary and natural result" of the defendant's acts, the assertions relative to the probability of such an occurrence and the notice of the situation that the defendant had received before the disaster put a less severe strain on the original principle than *Robinson* did.

But thereafter, in *Smith v. Board of County Road Commissioners*,<sup>336</sup> the property owner's claim was tried, and it succumbed to a jury verdict after the jury received an instruction based on an act-of-God defense. The judgment based on the verdict was affirmed. The majority of the court thought that the defense was supported by evidence tending to prove that the breakout would not have occurred but for the unusual rainfall that preceded it,<sup>337</sup> although, as was pointed out in Justice Black's dissent, it seems to have been indisputable that the change in the grade of the road had the inevitable effect of diverting from its natural drainage course the water that could not pass through the culvert and causing it to flow in an opposite direction. Therefore, the change in grade was a but-for cause of

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330. 368 Mich. at 265, 118 N.W.2d at 271.

331. 242 Mich. 277, 218 N.W. 683, cert. denied, 278 U.S. 635 (1928). See text accompanying note 240 *supra*. While the facts in *Moross* would arguably have supported a trespass claim, the argument was apparently not made, and the claim succumbed to the court's conviction that road building is a government activity.

332. 293 Mich. 92, 291 N.W. 234 (1940). See note 212 *supra*.

333. 368 Mich. at 271, 118 N.W.2d at 274.

334. 368 Mich. at 272, 118 N.W.2d at 275.

335. 368 Mich. at 272, 118 N.W.2d at 275, citing 35 Mich. at 300 (emphasis added).

336. 381 Mich. 363, 161 N.W.2d 561 (1968).

337. 381 Mich. at 368, 161 N.W.2d at 563.

plaintiff's inundation.<sup>338</sup> The court in these cases seems to be including under the "trespass" heading unintentional intrusions on land caused by negligent or extrahazardous activity. While this may be consistent with current usage,<sup>339</sup> it is not what the court meant by the term in *Ashley* and *Ferris*. The situation contemplated in those cases would scarcely have been subject to an act-of-God defense. What seems to be taking place in this area, through the blurring of the original outlines, is an acceptance of liability on the part of the governmental unit for intrusions on land (and their proximate consequences) caused by the unit, either intentionally or by negligent or extrahazardous activity.

It may be that the development is also being extended, though by a different logic, to include such harms caused by negligent omission. The claim in *Buckeye Union Fire Insurance Co. v. State*<sup>340</sup> was for damages caused by a fire that spread to plaintiff's premises from a neighboring property owned by the state. The state property was an abandoned factory, title to which was acquired by the state through a tax sale. The plant was dilapidated, subject to vandalism, and a recognized fire hazard, and the state had notice of these facts through citations issued by the city department of building and safety engineering. The fire occurred in 1963, at which time the state's "sovereign immunity" was intact. The claim was based on an assertion that, since the factory was a fire hazard, it was a nuisance, and the supreme court upheld that assertion against a contention that the gist of the claim was negligence.<sup>341</sup> But, probably because of the court's established view that exceptions to the rule of "sovereign immunity" are created only by statute where the state is concerned,<sup>342</sup> the court apparently felt that liability could not be rested upon the "nuisance" characterization, which derives from case law and has no statutory endorsement. In order to sustain the claim, therefore, the court was forced to characterize the situation as one involving a "taking" of private property, for which the constitution requires that compensation be made.<sup>343</sup> As I have criticised this holding else-

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338. 381 Mich. at 379-80, 161 N.W.2d at 568.

339. See, e.g., W. PROSSER, TORTS 64 n.17 (4th ed. 1971). Although in both *Herro* and *Smith* the claims were called "trespass," Justice Black, at least, thought they were governed by the principle of *Rylands v. Fletcher*, L.R. 1 Ex. 265 (1866), *affd.*, L.R. 3 H.L. 330 (1868). See 381 Mich. at 280, 161 N.W.2d at 568.

340. 383 Mich. 630, 178 N.W.2d 476 (1970).

341. 383 Mich. at 633-38, 178 N.W.2d at 478-80.

342. See text accompanying note 382 *infra*.

343. 383 Mich. at 641-43, 178 N.W.2d at 482-84.

where,<sup>344</sup> I will here only offer the opinion that this characterization of the situation represents a fiction of the most obvious and most unwise variety, since it obfuscates distinctions that are significant and useful, and further because it draws an indefensible line between personal injuries and property losses caused by governmental negligence. If the defendant were a subordinate governmental unit not covered by the state's "sovereign immunity," the liability would apparently have been deemed supported by the "nuisance" characterization alone. While this holding would do no great violence to the general concept of nuisance, again it represents an extension of liability beyond that which the Michigan cases had heretofore recognized. *Pennoyer v. Saginaw*<sup>345</sup> stated a continuing liability for damage resulting from a nuisance created by the city; *Buckeye Union* recognizes liability for damage resulting from a nuisance on government-owned property that the owner did not create, but which it failed to abate. Liability is therefore extended to an additional group of situations wherein the government, as owner of land, failed to take precautionary measures that ought to have been taken for the protection of persons outside the land; the gist of the liability in these situations is negligence, but negligence of the government *qua* landowner.

Finally, with all the emphasis upon the word "trespass" and upon injury "caused by a direct act," it seems strange that an attempt apparently was never made to formulate an argument for liability in instances of personal trespass, the most obvious instance being aggressions by the police. There was an opening for expansion beyond the limits of trespass to land in *Tzatzken v. City of Detroit*,<sup>346</sup> where the claim was that the city police had entered plaintiff's home without a warrant and wrongfully seized his private stock of fifty-three bottles of high quality brandy. The court, while regretting this high-handed action, held that the police were acting in a governmental capacity and that the city was therefore not liable even if a conversion had occurred.<sup>347</sup> There was no reference at all to the fact that there was both a "trespass" and a "taking." The opinion asserted that the police department operates as an arm of the state in its sovereign capacity, rather than as an agency of the municipality, and that this is so whether the department is organized by the direct act of the legislature or under a home-rule charter.<sup>348</sup> The decision is appar-

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344. Cooperrider, *Torts, 1971 Annual Survey of Michigan Law*, 18 WAYNE L. REV. 503, 520 (1972).

345. See text accompanying note 41 *supra*.

346. 226 Mich. 603, 198 N.W. 214 (1924).

347. 226 Mich. at 604, 198 N.W. at 214.

348. 226 Mich. at 608, 198 N.W. at 215.

ently an echo of the nineteenth-century perception that some local officials are actually state officers in disguise.

On the same day that it decided *Williams v. City of Detroit*<sup>349</sup> the supreme court rejected a wrongful death claim against the city wherein it was charged that Detroit police officers "negligently and carelessly exerted unnecessary force in effectuating the arrest of the deceased, as a result of which serious injury, ultimately causing his death, were [sic] inflicted."<sup>350</sup> All the justices agreed that the claim had been properly dismissed; they cited only their opinions in *Williams*. And in *Hirych v. State Fair Commission*,<sup>351</sup> a claim for assault and battery and false arrest against the state, the state fair commission, the city, and others, which arose out of a melee at the state fair grounds that had been broken up by police action (the incident occurred prior to the *Williams* decision), the claims against the state and the commission were dismissed for lack of jurisdiction, and the claim against the city was dismissed as based on a governmental activity.

#### D. *Claims Against the State—Motor Vehicle Liability—A Willing Legislature and an Unyielding Court*

The glib statement in *Nicholson* that "[i]n imparting [to municipalities] a portion of its powers, the State also imparts its own immunity"<sup>352</sup> was a vacuous reference so far as Michigan decisions were concerned. Prior to that time, 1902, the question of responsibility on the part of the state in tort situations had never been directly raised, since the court's position was that there was no *judicial* forum in which it could be raised. This, of course, was not an immunity that had been shared by the state with its subordinate units, for they were routinely subject to judicial jurisdiction.

At an early date the court expressed the view that a state cannot be sued in its own courts unless it has explicitly consented to submit itself to their jurisdiction.<sup>353</sup> While references were made to Blackstone and Puffendorf for their explanation of the position of the subject who seeks to hold the crown responsible in its own court, and to the absence in Michigan of a procedure corresponding to the English petition of right, this proposition, for the Michigan court, was a de-

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349. See text accompanying notes 1-5 *supra* & notes 420-21 *infra*.

350. *Wardlow v. City of Detroit*, 364 Mich. 291, 292, 111 N.W.2d 44, 45 (1961).

351. 376 Mich. 384, 136 N.W.2d 910 (1965).

352. See text accompanying note 199 *supra*.

353. *Michigan St. Bank v. Hammond*, 1 Doug. 527 (Mich. 1845); *Michigan St. Bank v. Hastings*, 1 Doug. 225 (Mich. 1844), *affg.*, 1 Walker Ch. R. 9 (Mich. Ch. 1842).



duction from constitutional and statutory allocations of jurisdiction in Michigan, rather than a doctrinal notion concerning the attributes of sovereignty.

In the early years the legislature was very much involved in the everyday business affairs of state government. It received and acted, by bill or resolution, upon numerous individual claims against the state, following procedures that were at first wholly legislative, but which evolved into a generally applicable administrative practice. Routine claims for services and supplies were routinely approved by the standing committees on claims; those that involved a more complex account, or some element of controversy, were typically referred to an ad hoc commission with power to act.<sup>354</sup>

In 1842, a Board of State Auditors was created; it was composed of the Secretary of State, the State Treasurer, and the Attorney General, and was authorized and directed to settle the accounts of state officers charged with the handling of state funds.<sup>355</sup> In the following year that Board was directed to investigate and settle all unsettled claims for damages arising from the construction of "works of internal improvement" prior to April 1, 1842.<sup>356</sup> The Board, in entertaining such claims, was directed to sit "as a legal body" and to swear and examine witnesses. Its determinations were declared to be final, the claims described were declared barred if not submitted to the Board after a prescribed notice had been given, and the Board's certificate was made a sufficient voucher for the Auditor General to draw a warrant for payment on the state treasury. Thereafter it became normal practice for the legislature, by joint resolution, to refer individual claims of a miscellaneous nature to the Board with directions to make a final settlement and authorize payment.<sup>357</sup>

This general procedure for the handling of claims not otherwise provided for apparently proved satisfactory, for the new constitution in 1850 provided that "[t]he Legislature shall not audit nor allow

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354. *E.g.*, Joint Resolution of March 4, 1840, No. 8, [1840] Mich. Acts 240 (Auditor General, State Treasurer, and Secretary of State directed to audit the claims of Joel Clemons for labor and materials and contingent damages as construction contractor for the central railroad, and to allow such sum as they deemed just and equitable). *See also* Act of Feb. 15, 1842, No. 23, [1842] Mich. Acts 47; Act of Feb. 15, 1842, No. 29, [1842] Mich. Acts 48; Act of Feb. 16, 1842, No. 55, [1842] Mich. Acts 78; Act of March 6, 1843, No. 45, [1843] Mich. Acts 53; Act of March 8, 1843, No. 61, [1843] Mich. Acts 138.

355. Act of Feb. 4, 1842, No. 12, [1842] Mich. Acts 13.

356. Act of March 8, 1843, No. 74, [1843] Mich. Acts 153.

357. *E.g.*, Joint Resolution of Feb. 23, 1843, No. 11, [1843] Mich. Acts 226; Joint Resolution of March 6, 1843, No. 13, [1843] Mich. Acts 227; Joint Resolution of March 8, 1843, No. 15, [1843] Mich. Acts 228.

any private claim or account"<sup>358</sup> and further provided for a Board of State Auditors, composed of the Secretary of State, the State Treasurer, and the Commissioner of the State Land Office and vested with jurisdiction "to examine and adjust all claims against the state, not otherwise provided for by general laws."<sup>359</sup> After the 1850 constitution was adopted, the duties and procedures of the Board were elaborated by law. The Board was forbidden to allow any claims against the state except those established by competent testimony and was directed to keep a record of its proceedings that contained an itemization of each claim and an abstract of the evidence taken. The members of the Board were given the power to administer oaths to claimants and witnesses, to examine such persons under oath, to issue subpoenas and attachments for failure to attend, and to set off against the claims asserted any legal or equitable claims in favor of the state.<sup>360</sup>

Not until 1875 was the supreme court required to comment upon the Board's claims function. Then, in *People ex rel. Dewey v. Board of State Auditors*<sup>361</sup> it held that under the constitution the Board was a separate and independent tribunal over which the court had no supervisory control. This position was reiterated three years later in *People ex rel. Ambler v. Auditor General*<sup>362</sup> and again in *People ex rel. Ayres v. Board of State Auditors*.<sup>363</sup> In the latter case Justice Campbell explained the matter at some length:

Except in regard to those ordinary claims against the State which became fixed by the action of various auditing officers, and involved no important inquiry, no claim against the State could, under the old Constitution, be allowed except by the Legislature. The State has never, before or since, allowed itself to be sued in its own courts, and no officer could lawfully subject it to suit. . . .

We had no Petition of Right and no court of claims. The policy of the State, (as at that time of the United States also), left the sole power to allow claims against the State to the Legislature. In providing for a different method of determining claims against the State, it was not deemed proper to include it within the judicial power; and the inquiry not being subject to judicial action, any interference by this court with the auditing body in the exercise of its constitutional

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358. MICH. CONST. art. IV, § 31 (1850).

359. MICH. CONST. art. VIII, § 4 (1850).

360. Act of April 7, 1851, No. 142, [1851] Mich. Acts 173 (codified at MICH. COMP. LAWS ch. 7, § 205 (1857)).

361. 32 Mich. 191 (1875).

362. 38 Mich. 746 (1878).

363. 42 Mich. 422, 4 N.W. 274 (1880).

functions, would have been practically entertaining a suit against the State to compel the disposition of a claim which they had already rejected as not a claim entitled to consideration, and which he had no right to pass upon in one stage more than another.<sup>364</sup>

Thus, while the common law immunity of the crown from ordinary judicial process was in the background, the court's thinking again appears to have been more importantly influenced by indigenous practice. The court's emphasis was not upon the theoretical unreachability of the sovereign, but rather upon the distribution of functions within the local version of republican government. As a matter of original Michigan *policy*, claims against the government were seen as falling within legislative rather than judicial cognizance and as subject to legislative conscience rather than to judicially administered rules of law. When this original policy was changed, in the constitution of 1850, "it was deemed not proper to include [the cognizance of claims against state government] within the judicial power"; instead, an administrative body was established for that purpose. It was this constitutional allocation of jurisdiction that placed these matters beyond the original and revisory jurisdiction of the courts.<sup>365</sup>

The advent of the motor vehicle created an entirely new set of problems, which quickly brought all these rules under a pressure that had not been felt before. The legislature quickly recognized this fact and at an early date moved to regulate the use of motor vehicles and establish responsibility on the part of owners for the harm that re-

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364. 42 Mich. at 427-28, 4 N.W. at 277-78. See also *Smith v. Aplin*, 80 Mich. 205, 45 N.W. 136 (1890); *Aplin v. Van Tassel*, 73 Mich. 28, 40 N.W. 847 (1888); *Board of Supervisors v. Auditor General*, 68 Mich. 659, 36 N.W. 794 (1888); *McElroy v. Swart*, 57 Mich. 500, 24 N.W. 776 (1885).

365. In just one case during this era did the court's action at all suggest a position concerning tort responsibility on the part of the state. The legislature passed a joint resolution for the relief of a person who claimed to have been imprisoned after conviction of a crime of which he was allegedly not guilty. The resolution directed the Board of State Auditors to investigate the claim and, if it found the facts asserted to be true, to authorize a payment to be made to the petitioner. The resolution was presented to the Board, which refused to consider the claim, and the supreme court denied the petitioner's subsequent application for a writ of mandamus requiring the Board to entertain the claim. *Allen v. Board of State Auditors*, 122 Mich. 324, 81 N.W. 113 (1899). In his opinion Chief Justice Grant heatedly denied that the legislature had power to establish a tribunal for the retrial of the crime and asserted that the resolution provided for a gratuity and therefore an appropriation for private purposes, which required an extraordinary majority for enactment. Further, he said that the petition did not contain a "claim" within the meaning of article VIII, section 4 of the constitution, and that the legislature was only empowered to authorize the Board to pass on "claims," as distinguished from requests, petitions, and claims for appropriations, which would represent mere gratuities or would be based on sentimental or moral grounds. 122 Mich. at 326-29, 81 N.W. at 113-14.

sulted from it. The Motor Vehicle Act of 1915<sup>366</sup> was concerned largely with the registration and identification of vehicles used on the public highways, but it also contained a requirement that vehicles be equipped with certain safety devices, including an adequate horn,<sup>367</sup> and a civil liability provision making owners responsible for the negligent use of their vehicles when driven with their consent or knowledge:

The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle, whether such negligence consists in violation of the provisions of the statutes of this State or in the failure to observe such ordinary care in such operation as the rules of the common law require: *Provided*, That the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner.<sup>368</sup>

The language defining the statute's coverage was ambiguous with regard to municipally owned vehicles, but it was not that ambiguity that defeated a claim for injury caused by the negligent operation of a city-owned truck engaged in street maintenance activities, wherein it was also asserted that the truck was not equipped with a horn or other signalling device. The court, in *Wrighton v. City of Highland Park*,<sup>369</sup> assumed that the horn requirement was applicable but disregarded the civil liability provision and stated that the question was whether, "because a municipality is required to place a horn on its vehicles while it is discharging governmental functions, . . . it thereby consents to be sued if this provision is violated?"<sup>370</sup> Its answer to that question was:

It is conceivable that the legislature might require the city to carry a horn on its vehicles in the interest of public safety without in any manner making itself liable for negligence while performing governmental operations. Concededly there would be no liability except for the automobile law, and from that law no legislative intention can be implied abrogating this old and well established rule of law. We think if the legislature had intended to change that rule of law it would not have done so in the uncertain way suggested by counsel.<sup>371</sup>

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366. Act of May 19, 1915, No. 302, [1915] Mich. Pub. Acts 533 (codified at 1 MICH. COMP. LAWS ch. 89, §§ 4797-832 (1915)).

367. Act of May 19, 1915, No. 302, § 16, [1915] Mich. Pub. Acts 533 (codified at 1 MICH. COMP. LAWS ch. 89, § 4812 (1915)).

368. Act of May 19, 1915, No. 302, § 29, [1915] Mich. Pub. Acts 543 (codified at 1 MICH. COMP. LAWS ch. 89, § 4825 (1915)).

369. 236 Mich. 279, 210 N.W. 250 (1926).

370. 236 Mich. at 281, 210 N.W. at 251.

371. 236 Mich. at 281, 210 N.W. at 251.

When the law was amended in 1925 the civil liability provision was retained, and the coverage of the statute was redefined in such a way as *clearly* to include vehicles owned by the state and by municipalities.<sup>372</sup> Nevertheless, in a claim arising thereafter based on a collision with a police cruiser, the court thought there was *still* no reason to conclude that the legislature had intended to recognize liability on the municipality's part for accidents arising in the performance of a governmental function. Citing *Wrighton* for the proposition that when the legislature intends to change a common law rule of law it does so in terms of certainty, the court, in *Butler v. City of Grand Rapids*,<sup>373</sup> said, "We see no reason to change the rule followed in Massachusetts and Michigan which holds that, there being no liability at common law, a statute is required to impose such liability before the same can be asserted. In the case at bar, the 1925 act does not impose such liability."<sup>374</sup> The decision was perverse. The statute said "The term 'motor vehicle' as used in this act shall include *all* vehicles impelled on the public highways of this state, by mechanical power" (with certain exceptions which explicitly included vehicles owned by the federal government but not those owned by municipal corporations or by the state);<sup>375</sup> it specifically required vehicles owned and operated by the state or any municipality to be marked so as to identify the department or institution by which they were employed<sup>376</sup> and also provided that the "owner of a motor vehicle shall be liable" for any injury occasioned by its negligent operation if the vehicle was being driven with his or her express or implied consent or knowledge.<sup>377</sup>

A few years later, in *Miller v. Manistee County Board of Road Commissioners*,<sup>378</sup> Justice McAllister calmly ignored the *Butler* decision and sustained a claim against the county and the county board of road commissioners for injury caused by the negligent operation of a vehicle owned by the latter; he rested his decision in part on the civil liability provision of the 1915 Act and in part on a section of the Uniform Motor Vehicle Act, adopted in 1927, which stated that

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372. Act of May 13, 1925, No. 287, § 1(a), [1925] Mich. Pub. Acts 418 (codified at 1 MICH. COMP. LAWS ch. 73, § 4632(a) (1929)).

373. 273 Mich. 674, 263 N.W. 767 (1935).

374. 273 Mich. at 679, 263 N.W. at 769.

375. Act of May 13, 1925, No. 287, § 1(a), [1925] Mich. Pub. Acts 418 (codified at 1 MICH. COMP. LAWS ch. 73, § 4632(a) (1929)) (emphasis added).

376. Act of May 13, 1925, No. 287, § 1(a), [1925] Mich. Pub. Acts 418 (codified at 1 MICH. COMP. LAWS ch. 73, § 4632(a) (1929)).

377. Act of May 13, 1925, No. 287, § 29, [1925] Mich. Pub. Acts 424 (codified at 1 MICH. COMP. LAWS ch. 73, § 4648 (1929)).

378. 297 Mich. 487, 298 N.W. 105 (1941).

the provisions of that Act, the "rules of the road," were applicable "to the drivers of all vehicles owned or operated by this State or any county, city, town, district or any other political subdivision of the State."<sup>379</sup> But this aberration was quickly corrected. In the following year, in *Mead v. Michigan Public Service Commission*,<sup>380</sup> the court had before it, on appeal from the recently created court of claims, a motor vehicle claim against the state public service commission. The trial judge had thought that *Miller* provided a basis for the liability asserted against the state. The court reconsidered its position, noted that the section cited by Justice McAllister from the Uniform Motor Vehicle Act applied to *drivers* rather than to owners and decided again that "it would be contrary to the great weight of authority to hold that by enacting" the civil liability provision of the 1915 law "the legislature intended to deprive the State of immunity from liability incident to the negligent use of its automobiles; and in that respect place the State on a par with private or corporate owners."<sup>381</sup>

By this time the idea that the immunity defense is peculiarly a possession of the legislature had taken firm hold. In the early municipal corporation cases Justice Campbell had not, it is true, been persuaded that when the legislature imposed an affirmative duty upon certain local officials, as it did by general statutes upon the township highway commissioners and by special charter upon city street commissioners, it necessarily intended that the local governmental unit should be responsible in damages for the failures of such officials to perform their duties. If that was what the legislature intended, he expected it to tell him so in explicit language. It told him so in the particular instance of duties relating to the repair of the public ways, and that came to be seen as the exception that proved the rule. Through frequent uncritical repetition of expressions of this attitude, there evolved a position that in *Mead*, with regard to the state's immunity, was put in the following words:

The doctrine of sovereign immunity has long been firmly established in the common law of this State, and it may not be held to have been waived or abrogated except that result has been accomplished by an express statutory enactment or by necessary inference from a statute. . . . Irrespective . . . of how impelling the argument may be that governmental agencies with large numbers of motor vehicles on the highway should not be absolved from liability to innocent victims of the carelessness of the drivers of such vehicles, a change in the

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379. Act of June 1, 1927, No. 318, § 32, [1927] Mich. Pub. Acts 591 (codified at 1 MICH. COMP. LAWS ch. 74, § 4724 (1929)).

380. 303 Mich. 168, 5 N.W.2d 740 (1942).

381. 303 Mich. at 172, 5 N.W.2d at 741.

established law of immunity of such governmental agencies as owners of such vehicles cannot be brought about by judicial fiat. It can only be done by the legislature.<sup>382</sup>

Thus, a principle that was originally nothing more than a judicial rule of interpretation came to be treated like a proposition written into the statute books in black-faced type. What the legislature had willed, only the legislature could waive, and only by language that could be given *no* other meaning. The curious thing is that the legislature had never expressed such a will in the first place. Indeed, one would be hard put to demonstrate from its actions, including the various versions of the highway statute and the civil liability provision in the Motor Vehicle Act, *any* intent to defend the principle of irresponsibility that had captured the court's thinking.

The Board of State Auditors was retained by the constitution of 1908,<sup>383</sup> but during the twenties its general claims function was largely transferred to a new entity, the State Administrative Board, which consisted of the governor and other high ranking state officers. The new Board was given authority to authorize payment of emergency claims,<sup>384</sup> to inquire into, settle, and pay claims for injuries to persons while they were in the employ of the state or any of its departments or institutions,<sup>385</sup> and to do the same for claims for compensation of dependents of state police officers killed in the line of duty<sup>386</sup> and claims for injuries received in the line of duty by members of the Michigan National Guard.<sup>387</sup> Of greater interest was the authority conferred upon the Board, by a statute that became section 238 of the Compiled Laws, to entertain and pay claims for damages arising from negligence in the construction, improvement, or maintenance of state trunk line highways,<sup>388</sup> and by another that became section 237 of the Compiled Laws, which vested it with discretionary power to hear and determine claims against the state arising from "negligence, malfeasance or misfeasance of any state officer, employee, commission, department, board, institution, or other governmental

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382. 303 Mich. at 173-74, 5 N.W.2d at 742.

383. MICH. CONST. art. VI, § 20 (1908).

384. Act of June 15, 1921, No. 29, [1921] Mich. Pub. Acts 803 (codified at 1 MICH. COMP. LAWS ch. 11, § 227 (1929)).

385. Act of May 11, 1927, No. 133, [1927] Mich. Pub. Acts 191 (codified at 1 MICH. COMP. LAWS ch. 11, § 230 (1929)).

386. Act of May 11, 1927, No. 134, [1927] Mich. Pub. Acts 192 (codified at 1 MICH. COMP. LAWS ch. 11, § 232 (1929)).

387. Act of April 29, 1927, No. 93, [1929] Mich. Pub. Acts 235 (codified at 1 MICH. COMP. LAWS ch. 11, § 235 (1929)).

388. Act of May 27, 1925, No. 374, [1925] Mich. Pub. Acts 736 (codified at 1 MICH. COMP. LAWS ch. 11, § 238 (1929)).

division" and to allow the same and order payment, provided that such payments should not in the aggregate exceed 25,000 dollars in any one year.<sup>389</sup>

These provisions would seem to evidence a developing willingness by the legislature to accept responsibility on the part of government for injuries arising from its activities, but that willingness was still not shared by the court. Indeed, section 238 may have been the legislature's reaction to the decision a year earlier in *Longstreet v. Mecosta County*,<sup>390</sup> which held that an action against the state highway commissioner was an action against the state and that there was nothing in the extensive powers the commissioner enjoyed over the construction and maintenance of state highways to indicate a legislative intent to waive the immunity of the state from suit arising from any failure to perform such duties. The claim in that case was that a partially completed bridge on a state highway had been left unprotected by barriers or lights, so that a passenger car was driven off the end and into the water, with fatal consequences.

A further step was taken in 1939, when the legislature adopted a statute that created a court of claims and conferred upon it *exclusive* jurisdiction "to hear and determine all claims and demands, liquidated and unliquidated, *ex contractu* and *ex delicto*, against the state and any of its departments, commissions, boards, institutions, arms or agencies."<sup>391</sup> Section 24 of the statute provided that "this act shall in no manner be construed as enlarging the present liabilities of the state and any of its departments, commissions, boards, institutions, arms or agencies."<sup>392</sup> The legislature's purpose in conferring jurisdiction upon the court to hear *ex delicto* claims while at the same time barring a construction that would enlarge the state's "present liabilities" is less than clear. In *Manion v. State Highway Commissioner*,<sup>393</sup> an injury claim against the state on behalf of a seaman employed by the highway commissioner on one of the Mackinac ferries, a majority of the court reconciled the two clauses by concluding that the state enjoyed *two* immunities—one from suit and one from tort liability while engaged in a governmental function—the first of which had been waived without relinquishing the second.<sup>394</sup> Justice Bushnell

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389. Act of May 22, 1929, No. 259, [1929] Mich. Pub. Acts 621 (codified at 1 MICH. COMP. LAWS ch. 11, § 237 (1929)).

390. 228 Mich. 542, 200 N.W. 248 (1924).

391. Act of May 23, 1939, No. 135, § 8(1), [1939] Mich. Pub. & Loc. Acts 249 (codified at 4 MICH. COMP. LAWS § 691.108 (1948)) (emphasis added).

392. Act of May 23, 1939, No. 135, § 24, [1939] Mich. Pub. & Loc. Acts 252.

393. 303 Mich. 1, 5 N.W.2d 527, *cert. denied*, 317 U.S. 677 (1942).

394. 303 Mich. at 19, 5 N.W.2d at 528.



noted in his prevailing opinion that, while the Court of Claims Act did not expressly *repeal* sections 237 and 238 of the Compiled Laws, it did appear to have assigned all claims jurisdiction exclusively to the new court.<sup>395</sup> The following year, in *McNair v. State Highway Department*,<sup>396</sup> an appeal from a court of claims action against the highway department for negligence in the maintenance of a state highway, it was argued by the plaintiff that the claim could rest on sections 237 and 238, though it came before the court of claims instead of the administrative board. The court's laconic response was:

From an examination of the above acts relied upon by the petitioner, we are unable to find an express or implied intent upon the part of the legislature to abolish the defense of sovereign immunity. The authority to waive such defense is in the legislature and until there is legislative action authorizing an officer or agent of the State to waive such defense, it may not be done by any officer or agent.<sup>397</sup>

Thus, by holding that the jurisdiction to hear claims against the state had been lodged exclusively in the court of claims, while rejecting the thought that that jurisdiction extended to claims of a type that had formerly been entertained by the administrative board under sections 237 and 238, the court managed to read those provisions out of the books and to attribute to the legislature, in its adoption of a systematic claims adjudication procedure, the intent, not just to assume no *new* liabilities, but to *reduce* the state's ability to respond to claims in tort situations.

Two weeks after that decision was handed down the legislature adopted a statute that made certain amendments to the Court of Claims Act, including the following substitute for section 24:

Upon the happening of any event subsequent to November 1, 1943, which gives rise to a cause of action, the state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the circuit court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee. Such claim must be

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395. 303 Mich. at 20, 5 N.W.2d at 528-29.

396. 305 Mich. 181, 9 N.W.2d 52 (1943).

397. 305 Mich. at 187, 9 N.W.2d at 55. The reference in the last sentence is to the fact that the attorney general had not pleaded or otherwise raised the defense below, which plaintiff argued was a waiver if none was found in the statutes themselves.

submitted pursuant to procedural provisions of the court of claims act. The provisions of this act shall not apply to (a) any claim for injury to or death of a prisoner, or for services rendered while an inmate of a penal institution; (b) any claim arising out of the injury to or death of an inmate of any state institution in connection with the rendition of medical or surgical treatment; (c) any claim for property damage or personal injury caused by the Michigan state troops and/or the national guard when called into the service of the state.<sup>398</sup>

But then the legislature flinched. In 1945, it repealed this general waiver of the state's immunity, and assumption of liability, and adopted in its place a statute providing that "[i]n all actions brought in the court of claims against the state of Michigan to recover damages resulting from the negligent operation by an officer, agent or employe of the state of Michigan of a motor vehicle of which the state of Michigan is owner . . . the fact that the state of Michigan was in the ownership or operation of such motor vehicle, engaged in a governmental function, shall not be a defense to such action."<sup>399</sup> At the same session the defense was abolished "[i]n any civil action brought against a political subdivision of the state of Michigan, including all municipal corporations, to recover damages resulting from the negligent operation by any officer, agent or employee of such political subdivision, of a motor vehicle of which said political subdivision is owner."<sup>400</sup> Thus, the legislature finally overrode thirty years of judicial resistance and gave the court the express directive that it had insisted upon. The motor vehicle liability problem was solved, though in the process the responsibility for other forms of governmental negligence, which, in so far as the state was concerned, had existed in rudimentary form before the administrative board and in general form for a brief period before the court of claims, was abandoned. In later years a majority of the supreme court was persuaded that this retreat at the state level was in fact an advance to the rear; it was construed as a legislative adoption of the "sovereign immunity" principle, qualified only by the statutory acceptance of liability in motor vehicle cases.

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398. Act of April 21, 1943, No. 237, [1943] Mich. Pub. & Loc. Acts 390.

399. Act of April 11, 1945, No. 87, [1945] Mich. Pub. & Loc. Acts 84 (codified at 4 MICH. COMP. LAWS § 691.141 (1948)). This provision was amended in 1960, to include within its coverage negligent operation of state-owned aircraft. Act of April 14, 1960, No. 33, [1960] Mich. Pub. & Loc. Acts 28. The statute, with minor word changes, is now contained in MICH. COMP. LAWS ANN. § 600.6475 (1968).

400. Act of April 27, 1945, No. 127, § 1, [1945] Mich. Pub. & Loc. Acts 132 (codified at 4 MICH. COMP. LAWS § 691.151(1) (1948)). This provision was repealed by Act of May 19, 1964, No. 170, § 14, [1964] Mich. Pub. & Loc. Acts 221.

## III. WILLIAMS AND ITS AFTERMATH

A. *The Court's Struggle with the Problem*

A brief recapitulation of what Michigan lawmakers had done, as distinguished from what they had said, prior to the decision in *Williams v. City of Detroit*,<sup>401</sup> would disclose the following pattern: After initial resistance by the court, the legislature established the principle of local government responsibility for unsafe conditions of the public ways.<sup>402</sup> Later, again after stiff resistance from the court, the legislature also established the principle of general governmental responsibility for the negligent operation of government-owned motor vehicles by government employees.<sup>403</sup> The court recognized governmental responsibility for activities by governmental officers that constituted or necessarily caused physical intrusion on or disturbance of private premises,<sup>404</sup> for maintenance on governmental premises of conditions that endangered and caused harm to persons or property outside those premises,<sup>405</sup> and for injury caused by revenue-earning activities of local government units.<sup>406</sup> On the other hand, the governmental-function defense was applied by the supreme court to negate liability in cases involving road construction and maintenance activities (though the area of immunity in this respect was greatly reduced in importance after 1945 by the statutory liability for negligent operation of motor vehicles),<sup>407</sup> activities of firemen and police officers,<sup>408</sup> and, in one instance, injury to a third party that was attributed to negligent supervision by school personnel of students engaged in school activities.<sup>409</sup> *But the great majority of all cases in which the governmental-function defense had been successful in the supreme court involved injury caused by the*

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401. 364 Mich. 231, 111 N.W.2d 1 (1961).

402. See text accompanying notes 90-136 *supra*.

403. See text accompanying notes 352-400 *supra*.

404. *Herro v. Chippewa County Road Commrs.*, 368 Mich. 263, 118 N.W.2d 271 (1962); *Bator v. Ford Motor Co.*, 269 Mich. 648, 257 N.W. 906 (1934); *Ashley v. City of Port Huron*, 35 Mich. 296 (1877); *Sheldon v. Village of Kalamazoo*, 24 Mich. 383 (1872). See text accompanying notes 286-351 *supra*.

405. *Pound v. Garden City School Dist.*, 372 Mich. 499, 127 N.W.2d 390 (1964); *Robinson v. Wyoming Twp.*, 312 Mich. 14, 19 N.W.2d 469 (1945); *Ferris v. Board of Educ.*, 122 Mich. 315, 81 N.W. 98 (1899). See text accompanying notes 286-351 *supra*.

406. See text accompanying notes 227-85 *supra*.

407. *Corning v. City of Saginaw*, 116 Mich. 74, 74 N.W. 307 (1898). See text accompanying notes 185-86 *supra*.

408. *Wardlow v. City of Detroit*, 364 Mich. 291, 111 N.W.2d 44 (1961); *Tzatzken v. City of Detroit*, 226 Mich. 603, 198 N.W. 214 (1924); *Brink v. City of Detroit*, 144 Mich. 472, 108 N.W. 430 (1906). See text accompanying notes 210-12, 346-48 & 350 *supra*.

409. *McDonnell v. Brozo*, 285 Mich. 38, 280 N.W. 100 (1938). See text accompanying notes 311-13 *supra*.

claimant's encounter on government premises with a condition dangerous only to visitors to those premises. The defense was first clearly articulated in *Nicholson v. City of Detroit*,<sup>410</sup> wherein the claim was for negligent exposure of plaintiff's decedent to government premises infected by smallpox. The instances in this category included those involving a defective scaffold used by plaintiff on school premises,<sup>411</sup> a dangerous stairway in a school building,<sup>412</sup> a defective platform on a water tower on county premises,<sup>413</sup> a swimming pool in a public park (the case also involved charges of negligent supervision),<sup>414</sup> a defective swing in a public park,<sup>415</sup> defective elevator mechanisms in public buildings,<sup>416</sup> a dangerous ramp in a school parking lot,<sup>417</sup> and collapsing bleachers on school and park premises.<sup>418</sup>

Since cases of this kind, including *Williams* itself, which was another dangerous elevator problem, were the source of the court's nascent dissatisfaction with the governmental-function defense, one wonders how subsequent developments might have differed if, instead of challenging the entire position, the court had quietly concluded that the time had come to recognize a community responsibility (generally corresponding to the responsibilities of private occupiers) toward persons entering public premises in circumstances that would entitle them to be characterized as "public invitees."<sup>419</sup> Such an opening in the governmental-function barrier might have been developed cautiously, with initial recognition of responsibility

410. 129 Mich. 246, 88 N.W. 695 (1902). See text accompanying notes 190-99 *supra*.

411. *Whitehead v. Board of Educ.*, 139 Mich. 490, 102 N.W. 1028 (1905). See text accompanying notes 206-07 & 299 *supra*.

412. *Daniels v. Board of Educ.*, 191 Mich. 339, 158 N.W. 23 (1916). See text accompanying notes 208-09 & 300 *supra*.

413. *Kilts v. Board of Supervisors*, 162 Mich. 646, 127 N.W. 821 (1910). See text accompanying notes 235, 301 & 303 *supra*.

414. *Heino v. City of Grand Rapids*, 202 Mich. 363, 168 N.W. 512 (1918). See text accompanying notes 236-39 *supra*.

415. *Royston v. City of Charlotte*, 278 Mich. 255, 270 N.W. 288 (1936). See text accompanying notes 302-05 *supra*.

416. *Martinson v. City of Alpena*, 328 Mich. 595, 44 N.W.2d 148 (1950); *Daskiewicz v. Detroit Bd. of Educ.*, 301 Mich. 212, 3 N.W.2d 71 (1942). See note 254 and text accompanying notes 252-54 *supra*.

417. *Watson v. School Dist.*, 324 Mich. 1, 36 N.W.2d 195 (1949). See text accompanying notes 255-57 *supra*.

418. *Penix v. City of St. Johns*, 354 Mich. 259, 92 N.W.2d 332 (1958); *Richards v. Birmingham School Dist.*, 348 Mich. 490, 83 N.W.2d 643 (1957). See text accompanying notes 258-66 *supra*.

419. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. RESTATEMENT (SECOND) OF TORTS § 332(2) (1965).

for such unreasonable dangers as defective elevators, collapsing bleachers, and pitfalls in unlighted parking lots, without raising the specter of unlimited and unpredictable liability for injuries that might arise in remote corners of publicly owned land or that might be attributed to failures of public services or to high-risk activities, such as those of the police and fire departments.

But the conservative approach was not the style of the time. Instead of deciding the case before it, the court plunged into a legislative thicket from which it has not yet emerged. The plurality opinion in *Williams*, accepted by four of the eight members of the court, purported to hold that "[f]rom this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan."<sup>420</sup> The intent of these justices was that the ruling should apply to all governmental entities, including the state, and should govern the *Williams* case itself, although not other cases arising from incidents that had occurred prior to the date of the decision; but the ruling gained whatever precedential effect it was ultimately to be accorded only from the additional support it received from Justice Black, who limited his concurrence to the *wholly prospective* abolition of the defense and that only in so far as it applied to claims against *municipal corporations*.<sup>421</sup> Since he did not support the application of the new ruling to the instant case, the trial court's dismissal of the claim was affirmed.

Justice Black's limitation on the scope of the ruling was nailed down three months later in *McDowell v. State Highway Commissioner*,<sup>422</sup> an action against the commissioner, the highway department, and the state, for injuries that arose from an automobile accident allegedly caused by defects in a state highway. A majority of the court distinguished between the immunity rule applicable to municipal corporations, which, it said, had been overruled by *Williams*, and the rule of *sovereign* immunity applicable to the state, which, it was held, continued to exist by virtue of the legislature's 1945 decision to repeal the general waiver of immunity that had been incorporated in 1943 in the Court of Claims Act.<sup>423</sup> The majority thought it had no power to overturn this legislative choice, a belief that is rather curious, since the only surviving legislative expression on the subject was a law that *deprived* the state of its governmental-function defense in actions arising from the negligent

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420. 364 Mich. at 250, 111 N.W.2d at 20.

421. 364 Mich. at 271, 111 N.W.2d at 10.

422. 365 Mich. 268, 112 N.W.2d 491 (1961).

423. 365 Mich. at 270-71, 112 N.W.2d at 492.

operation by state employees of state-owned vehicles and aircraft but said nothing about what the rule should be in other cases. While they concurred in the decision on the ground that the accident in question had occurred prior to the date of the *Williams* decision, Justices Edwards and Souris vigorously rejected the distinction between municipal corporations and the state.<sup>424</sup> That disagreement became a dissent by Justice Souris in *Sayers v. School District No. 1, Fractional*,<sup>425</sup> an action arising out of a playground injury, wherein a majority of the court upheld the immunity defense. The rationale offered by a plurality opinion was that under Michigan decisions "the school district as an agency of the State has been clothed with the State's immunity from liability."<sup>426</sup> Consequently, the school district's immunity was, under *McDowell* reasoning, also beyond the court's power of revision. A sense of *déjà vu* at this point is understandable. The immunity rationale was identical to the theory that produced the governmental-function defense in the first place.

Another step down this slope was taken in *Lewis v. Genesee County*,<sup>427</sup> wherein the reasoning was applied to a claim against a county and its board of welfare for injuries sustained by a patient in a county hospital. The board had been established pursuant to a general statute that subjected it to supervision by the state department of welfare in the administration of certain programs. The court held: "It clearly appearing that the defendants in the performance of the functions involved in the instant case were acting as State agencies, they were entitled to claim immunity from liability based on alleged negligence of employees."<sup>428</sup>

At this point it might have appeared that the determination expressed in *Williams* was rapidly slipping away, since it had encountered rebuffs in all subsequent cases. It was, however, reaffirmed in so far as cities were concerned in *Sherbutte v. City of Marine City*.<sup>429</sup> The issue in that case was whether the city might properly be joined as defendant in an action against a city policeman for excessive force in making an arrest. The answer depended upon the court's inter-

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424. 365 Mich. at 271-73, 112 N.W.2d at 493.

425. 366 Mich. 217, 114 N.W.2d 191 (1962).

426. 366 Mich. at 219, 114 N.W.2d at 192, citing *Whitehead v. Board of Educ.*, 139 Mich. 490, 102 N.W. 1028 (1905); *Daniels v. Board of Educ.*, 191 Mich. 339, 158 N.W. 23 (1916); *Richards v. Birmingham School Dist.*, 348 Mich. 490, 83 N.W.2d 643 (1957) (emphasis added). See text accompanying notes 206-09, 258-65 & 299-300 *supra*.

427. 370 Mich. 110, 121 N.W.2d 417 (1963).

428. 370 Mich. at 114, 121 N.W.2d at 419.

429. 374 Mich. 48, 130 N.W.2d 920 (1964).

pretation, in the light of *Williams*, of a pre-*Williams* statute<sup>430</sup> that permitted the city to indemnify a police officer for any judgment recovered against him based on a claim of tort committed in the performance of his duties but barred the joinder of the city as defendant in any such action. A bare majority of the court was able to agree that *Williams* had eliminated any immunity that the city would formerly have enjoyed in such a case and that the reason for the joinder prohibition had therefore disappeared.<sup>431</sup> The case was remanded for reinstatement of the city as a defendant.

Thereafter the court descended into chaos. The question of a county's liability on a claim arising from its operation of a hospital was raised again in *Myers v. Genesee County Auditor*.<sup>432</sup> A summary judgment favorable to the defendant was reversed, and the case was remanded for further proceedings, although no more than two justices were in agreement on any single rationale. Justice O'Hara, with Chief Justice Kavanagh's concurrence, asserted that, until *Myers*, the state and its agencies had been absolutely immune from tort liability, with only statutory exceptions; that subdivisions of government other than incorporated cities were immune when performing governmental, but not proprietary, functions; and that "municipal corporations" (by which he meant incorporated cities) were without immunity.<sup>433</sup> He could see no reason, however, in a distinction between cities, on the one hand, and counties, townships, and villages, on the other. The county might be differentiated historically, but it was a body corporate under the constitution, and there was no real difference between a "body corporate" and a "municipal corporation."<sup>434</sup> He noted also that the legislature had recently sought to provide a uniform rule for all governmental entities and concluded that this purpose would be served if the court eliminated the distinction between cities and other local units even before the law went into effect.<sup>435</sup> He therefore asserted that the rule of *Williams* was extended to "all political subdivisions of government."<sup>436</sup> The state and its departments, commissions, boards, institutions, arms, and agencies remained unaffected. The change would

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430. Act of May 24, 1951, No. 59, [1951] Mich. Pub. & Loc. Acts 78.

431. 374 Mich. at 53, 130 N.W.2d at 922.

432. 375 Mich. 1, 133 N.W.2d 190 (1965).

433. 375 Mich. at 8-9, 133 N.W.2d at 192.

434. 375 Mich. at 9-10, 133 N.W.2d at 193.

435. 375 Mich. at 10, 133 N.W.2d at 193, citing Act of May 19, 1964, No. 170, [1964] Mich. Pub. & Loc. Acts 221 (codified at MICH. COMP. LAWS ANN. §§ 691.1401-.1415 (1968), as amended, MICH. COMP. LAWS ANN. §§ 691.1404, .1406, .1407 (Supp. 1973)).

436. 375 Mich. at 11, 133 N.W.2d at 193.

be effective for the instant case and for "pending and future cases."<sup>437</sup> Justice Souris, with Justice Adams' concurrence, asserted that the effect of the decision was to overrule *Lewis* and that he assumed that *Williams* had already abrogated the immunity rule for all municipal corporations—including incorporated villages, fourth-class cities, special charter cities, home rule cities, charter townships, and school districts (though school districts should perhaps be stricken from the list by reason of *Sayers*).<sup>438</sup> Justices Dethmers and Kelly dissented, still maintaining their disagreement with *Williams*.<sup>439</sup> Justice Smith did not participate in the decision. Justice Black "concurred in the result," *i.e.*, in the reversal and remand for further proceedings.<sup>440</sup>

*Keenan v. County of Midland*,<sup>441</sup> which arose out of a drowning at a county beach, was before the court when *Myers* was decided and was therefore within the "pending and future cases" formula adopted by the *O'Hara* opinion. Four justices thought that the immunity defense was therefore not applicable, since in *Myers* a majority of those sitting had, in effect, abrogated the immunity rule as to counties, "thus overruling *Lewis*," and had also held the abrogation applicable to pending cases.<sup>442</sup> Justice Souris concurred in the plurality's action, but disagreed with its reasoning to the extent that it found a precedent in the concurrence in *Myers* of less than a majority of the entire court. His view was that *Keenan* for the first time put together a majority in favor of the abrogation of the immunity rule where counties were concerned.<sup>443</sup> The significance of this fact, he thought, was "that, in addition to all pending cases, only those claims against counties for negligent injury which arose after the commencement of the three-year statutory limitational period preceding our decision today and prior to July 1, 1965, the effective date of PA 1964, No. 170, rather than those which arose within the three-year period prior to our decision in *Myers*, in March of 1965, will be freed from the common-law defense of county immunity to actions for negligent injury, which defense we abrogate today by overruling *Lewis*."<sup>444</sup> And the end was not yet.

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437. 375 Mich. at 11, 133 N.W.2d at 193.

438. 375 Mich. at 12-13, 133 N.W.2d at 194.

439. 375 Mich. at 13, 133 N.W.2d at 194.

440. 375 Mich. at 12, 133 N.W.2d at 194.

441. 377 Mich. 57, 138 N.W.2d 759 (1966).

442. 377 Mich. at 60, 138 N.W.2d at 759-60.

443. 377 Mich. at 61-65, 138 N.W.2d at 760-62.

444. 377 Mich. at 65, 138 N.W.2d at 762. Query this reference to "pending" cases. The *Keenan* opinions carried no such qualification, and if *Myers* did not establish a precedent, presumably its assertion with respect to the cases affected by it was also a nullity.



*Smith v. Ginther*,<sup>445</sup> a claim against a city and a volunteer fireman, arose out of a collision that involved the fireman, who was driving his own car to the scene of a fire. Four justices held that the case was controlled by *Williams*, *Sherbutte*, and *Myers* and that a claim was stated.<sup>446</sup> Justice Brennan, in dissent, wrote a notable critique of the decisional techniques used by the court in these cases. He reminded the court of the limits upon its function and upon its ability to control future decisions, facts that have rarely been demonstrated more convincingly than in this sequence of cases.

Appellate judges make law by creating useful precedents. Appellate judges do not have the power to legislate, they do not have the power to declare what the law will be in the future, nor by resolution to decide how various classes of cases will be treated in the future. The function of an appellate court, as the function of all courts, is to decide cases. When an appellate court has decided a particular case in a particular way, that decision constitutes a precedent. The judges or justices participating in the decision cannot declare that their decision will not be a precedent. Such a declaration would constitute an attempted disavowal of the entire process of common-law jurisprudence. The distinction between what a court does and what it says must be kept clearly in mind if one is to read the reports of appellate courts with profit.

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The function of the court is to decide cases. It decides cases by applying the law to the facts. The rules which the court applies to the facts and which result in the decision are the applicable law. Rules of law which are not necessary to the decision are mere dicta and have no precedential value.<sup>447</sup>

His assessment of the precedents was that *Williams* had made no change in the law since Justice Black's vote for affirmance, in effect, maintained the immunity rule in that case. The views expressed, that the rule should be changed prospectively, were mere dicta. The immunity rule, therefore, survived at least until *Sherbutte*, when six justices joined in an opinion that held that the city enjoyed no such defense.<sup>448</sup> Justice Brennan felt that *Sherbutte* was wrongly decided and should be overruled because it disregarded the explicit provisions of an unrepealed statute.<sup>449</sup> He conceded, however, that if *Williams*, had not changed the law, *Myers* had, since in that case a majority of the justices had "applied the same rule of law to the

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445. 379 Mich. 208, 150 N.W.2d 798 (1967).

446. 379 Mich. at 212, 150 N.W.2d at 799.

447. 379 Mich. at 214-16, 150 N.W.2d at 800.

448. 379 Mich. at 216-17, 150 N.W.2d at 801.

449. 379 Mich. at 218-20, 150 N.W.2d at 802.

facts at hand, and the decision therefore constituted a precedent for the proposition that a county does not enjoy immunity."<sup>450</sup> His conclusion was not affected by the differences in the reasons given or by Justice Black's limitation of his concurrence to "the result."<sup>451</sup> He then noted

that young Sharon Myers was already dead almost 7 months when Mr. Justice EDWARDS made his now famous fiat on the subject of immunity. It would appear that in September of 1961, not a single member of the Court would have granted Sharon's administratrix the relief the Court ultimately saw fit to give her. This aside is included here to point out what we have already said about the limited function of an appellate court. Pronouncements about all future cases and pending cases, or all cases arising before or after the date of this or that opinion are, in the nature of things, meaningless poppycock. Each case will be decided when it gets to Court. It will be decided according to the best judgment of the Justices then sitting. It will be decided according to their view of and respect for the precedents which have been set.<sup>452</sup>

None of the opinions in the case considered the interesting question whether, under normal agency principles, the city should be responsible for the acts of a *volunteer* fireman *driving his own car*.

#### B. *The Legislature's Response*

In the midst of this confusion the legislature, in 1964, adopted Public Act No. 170.<sup>453</sup> Effective July 1, 1965, the Act preserved the existing statutory liabilities in highway and motor vehicle cases; accepted liability for negligence in regard to dangerous or defective conditions of public buildings held open for public use; extended these liabilities uniformly to all units, including the state and its agencies; accepted liability for the state and its agencies when engaged in the performance of a proprietary function, as defined in the statute, and, *for the first time*, affirmatively claimed the benefit of the immunity principle by restoring the governmental-function defense in all other cases for all governmental units. The immunity provision was set forth in section 7 of the statute:

Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein said government agency is engaged in the exercise and discharge of a govern-

450. 379 Mich. at 221, 150 N.W.2d at 803.

451. See 379 Mich. at 217-18, 150 N.W.2d at 801-02.

452. 379 Mich. at 221, 150 N.W.2d at 803.

453. Act of May 19, 1964, No. 170, [1964] Mich. Pub. & Loc. Acts 221 (codified at MICH. COMP. LAWS ANN. §§ 691.1401-.1415 (1968), as amended, MICH. COMP. LAWS ANN. §§ 691.1404, .1406, .1407 (Supp. 1973)).

mental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is hereby affirmed.<sup>454</sup>

The statute was drafted by a special committee of the Michigan Association of Municipal Attorneys and lobbied through the legislature with the strong backing of that association's parent organization, the Michigan Municipal League. One member of the special committee interpreted the legislative appeal of the proposed measure:

In lobbying for this legislation, its proponents traded heavily on the paradoxical state of existing law which found the State and its agencies, including school districts, still enjoying the defense of governmental immunity, while municipal corporations could no longer employ this defense. We sought to achieve legislation that would put all government on the same basis. . . .

. . . This statute puts all agencies of government on the same footing with regard to tort liability. It is the feeling of those who were active in securing passage of this legislation that the problems concerning governmental immunity from tort liability in Michigan have been settled for many years to come.<sup>455</sup>

The prediction contained in the final sentence proved to be overly optimistic, for the assault upon the new statutory immunity was not long deferred. In *Maki v. City of East Tawas*,<sup>456</sup> section 7 was held unconstitutional because, while it purported to establish immunity from tort liability, the statute was entitled "An act to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, when engaged in a governmental function, for injuries to property and person caused by negligence."<sup>457</sup> The discrepancy between "negligence" in the title and "torts" in the immunity provision led to a conclusion that the statute violated the constitutional prohibition that no law shall embrace more than one object, which shall be expressed in its title.<sup>458</sup> Since the defect had already been corrected by amendment of the

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454. Act of May 19, 1964, No. 170, § 7, [1964] Mich. Pub. & Loc. Acts 223. With minor changes in phrasing the section is now continued in MICH. COMP. LAWS ANN. § 691.1407 (Supp. 1973).

455. Communication from City Attorney Allen G. Hertler, of Royal Oak, Mich., reported in 28 NIMLO MUNICIPAL L. REV. 463, 464 (1965). Another account of the same effort appears in *id.* at 592.

456. 385 Mich. 151, 188 N.W.2d 593 (1971), more fully discussed in Cooperrider, *Torts, 1971 Annual Survey of Michigan Law*, 18 WAYNE L. REV. 503, 519-23 (1972).

457. Act of May 19, 1964, No. 170, [1964] Mich. Pub. & Loc. Acts 221 (emphasis added).

458. 385 Mich. at 159, 188 N.W.2d at 596. See MICH. CONST. art. 4, § 24.

title at the time of *Maki's* final disposition, the net effect of the decision seems to have been to suspend the operation of section 7 until August 1, 1970, the effective date of the amendment.<sup>459</sup>

In two other recent cases, *Grubaugh v. City of St. Johns*<sup>460</sup> and *Reich v. State Highway Department*,<sup>461</sup> a majority of the court seemed to be positioning itself for a ruling that the statutory immunity provision lies beyond the legislature's constitutional *power*, which would indeed be a switch from the dogma of the past. The liabilities recognized by the statute for defective highways and buildings are both conditioned upon a filing by the claimant, within a specified period after the accident, of a notice of the injury and defect that constitute the basis of the claim.<sup>462</sup> In the case of the highway claim provision, this requirement is the descendant of similar provisions that appeared first in the special charters of municipal corporations,<sup>463</sup> and later in statutes of more general application.<sup>464</sup> In 1915, with the expressed intent of establishing uniform procedures, the legislature added to the general highway statute a provision requiring notice of a claim to be filed within sixty days of the accident.<sup>465</sup>

Notwithstanding the fact that the notice provision in question, which was pleaded by the city in defense to a claim based on the highway statute, had been enacted forty-six years before the plaintiff suffered his injury and had antecedents of even greater age, an opinion in *Grubaugh*<sup>466</sup> subscribed by three justices asserted that the provision was unconstitutional on the strange ground that the statute deprived the plaintiff of a "vested right" (the right "vested" on March 14, 1961; the statute was enacted in 1915) without due proc-

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459. See Act of Aug. 1, 1970, No. 155, [1970] Mich. Pub. & Loc. Acts 496, amending MICH. COMP. LAWS ANN. §§ 691.1401, .1407 (Supp. 1973); *Kruger v. South Oakland County Mutual Aid Pact*, 49 Mich. App. 7, 211 N.W.2d 228 (1973); *Curry v. City of Detroit*, 49 Mich. App. 240, 211 N.W.2d 559 (1973).

460. 384 Mich. 165, 180 N.W.2d 778 (1970).

461. 386 Mich. 617, 194 N.W.2d 700 (1972).

462. MICH. COMP. LAWS ANN. §§ 691.1404, .1406 (1968), as amended, MICH. COMP. LAWS ANN. §§ 691.1404, .1406 (Supp. 1973).

463. See, e.g., *Davidson v. City of Muskegon*, 111 Mich. 454, 455, 69 N.W. 670, 670 (1897); *Springer v. City of Detroit*, 102 Mich. 300, 302, 60 N.W. 688, 689 (1894); *Dundas v. City of Lansing*, 75 Mich. 499, 500, 42 N.W. 1011, 1011 (1889).

464. See, e.g., Act of May 27, 1895, No. 215, ch. XXII, [1895] Mich. Pub. Acts 441 (codified at 1 MICH. COMP. LAWS § 2775 (1897)) (incorporation of fourth-class cities).

465. Act of May 19, 1915, No. 301, § 8, [1915] Mich. Pub. Acts 531 (codified at 1 MICH. COMP. LAWS § 4591 (1915); 2 MICH. COMP. LAWS § 242.8 (1948)).

466. Two other justices "concurred in the result," without explaining their concurrence. Chief Justice Brennan dissented. Justice Kelly did not participate. This case and its immediate background are more fully discussed in Cooperrider, *supra* note 456, at 525-28.

ess of law.<sup>467</sup> The justices cited as authority *Minty v. Board of State Auditors*,<sup>468</sup> wherein the question was whether the repeal in 1945 of the 1943 waiver of sovereign immunity should be related back to destroy a claim that had arisen in the interim. The problem in *Grubaugh* arose from plaintiff's claim that physical and mental incapacitation caused by the accident, which he attributed to a defective street, prevented him from taking the action necessary to comply with the statutory requirement within the term provided. In *Reich* the court extended the *Grubaugh* reasoning to cover claimants under disability by reason of minority, but also went on to hold the sixty-day notice provision<sup>469</sup> generally invalid as a violation of equal protection.<sup>470</sup>

The scope of the court's claims in these two cases can only be demonstrated by extensive quotation from the opinions. Apparently referring to the provision of the general highway statute that imposed on municipalities (but never on the state) liability for damage caused by unsafe highway conditions,<sup>471</sup> Justice T. M. Kavanagh's opinion in *Grubaugh* asserts:

The statute in question by waiving immunity from liability, puts the state and its municipalities upon the same legal footing and subject to the same substantive rules which are applied to any controversy involving a negligent tortfeasor.

The substantive right to proceed against the governmental tortfeasor, as distinguished from merely procedural requirements, must arise under the same conditions and undiminished by any special exemption as any other comparable cause of action.<sup>472</sup>

The opinion then refers to an earlier explication by the court of the reasons behind notice provisions of this variety—that they are designed “to furnish the municipal authorities promptly with notice that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient

467. 384 Mich. at 175-76, 180 N.W.2d at 783-84.

468. 336 Mich. 370, 58 N.W.2d 106 (1953).

469. By this time the statute that was the subject of the *Grubaugh* opinion had been superseded by the provisions of the 1964 statute, so that the attack was now upon that statute.

470. 386 Mich. at 623-24, 194 N.W.2d at 702.

471. The provision dates from 1879. See Act of May 29, 1879, No. 244, [1879] Mich. Pub. Acts 223. Neither in words nor in substance was it a “waiver of immunity.” Rather it was the creation by the legislature of a statutory claim in a situation wherein the court had earlier held that none existed, *not* because of “immunity,” but because the court thought *no duty was owed* by the municipality to individuals in regard to the condition of the public ways, either at common law or by statute. See text accompanying notes 90-105 *supra*.

472. 384 Mich. at 173-74, 180 N.W.2d at 783.

statement of the main facts, together with names of witnesses, to direct them to the sources of information so that they may conveniently make an investigation' ”<sup>473</sup>—and proceeds to the following evaluation:

Even if we assume the above original policy considerations were once valid, today they have lost their validity and ceased to exist due to changed circumstances. In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. MCLA § 691.1409 (Stat Ann 1969 Rev § 3.996 [109]). In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result these units and agencies are better prepared to investigate and defend negligence suits than are most private tortfeasors to whom no special notice privileges have been granted by the legislature.<sup>474</sup>

In *Reich* the important language in Justice Adams' opinion, this time subscribed by a majority of the court, is the following:

The object of the legislation under consideration is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tortfeasors. However, the notice provisions of the statute arbitrarily split the natural class, *i.e.*, all tort-feasors, into two differently treated subclasses: private tort-feasors to whom no notice of claim is owed and governmental tort-feasors to whom notice is owed.

This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses: victims of governmental negligence who must meet the requirement, and victims of private negligence who are subject to no such requirement. Contrary to the legislature's intention to place victims of negligent conduct on equal footing, the notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence after only 60 days. The victims of private negligence are granted three years in which to bring their actions. See MCLA § 600.5805; (MSA 27A.5805). Such arbitrary treatment clearly violates the equal protection guarantees of

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<sup>473</sup>. 384 Mich. at 175, 180 N.W.2d at 784.

<sup>474</sup>. 384 Mich. at 176, 180 N.W.2d at 784.

our state and Federal Constitutions. The notice provision is void and of no effect.<sup>475</sup>

I find the argument advanced in these two cases astounding. It must be clear that the legislature had no intention whatever to "put governmental units on an equal footing with private tortfeasors"; such an intention is irreconcilable with the specific definition and circumscription of the liabilities recognized by the statute. Moreover, there *are* real and vital differences between the situations of governmental units and of private parties as potential tort defendants. The legislature's appreciation of one such difference is evidenced by the fact that it did *not* incorporate a notice-of-claim requirement such as that contained in the highway and building claims sections in that section of the statute relating to motor vehicle claims.<sup>476</sup> There the governmental defendant *is* on a substantial par with other vehicle owners and operators, but no private party has a tort responsibility comparable to the governmental unit's responsibility for injuries allegedly caused by defective or unsafe conditions of highways. The confidence expressed in the ability of the modern municipality to protect its own litigational interests may be justifiable so long as the municipality becomes aware in some fashion of the potential claim, or of the condition from which it arises, in time for an effective investigation, but if there is no requirement of notification at any time prior to the filing of suit, the unit's efforts to uncover the facts relating to that condition as of the time of the accident may be fruitless. Taking into account the extent of the governmental unit's liability exposure where public ways and public buildings are concerned, and of the difficulties of keeping in current touch with all those conditions that might become a source of liability, surely there is nothing constitutionally unreasonable about a notice requirement that is not applicable to other tortfeasors and other claimants. It may be conceded that the notice provisions as enacted—those originally contained in Public Act No. 170, as well as those that antedated it—were too simplistic and therefore unduly harsh in their application to some situations. This harshness may in some part be attributed, in turn, to the rigorous construction that the court gave them prior to its sudden conversion to the view that they are wholly unconstitutional. That rigor was perhaps not ineluctable; at least Justice Souris was able to suggest an alternative construction that would have avoided the harshness of the situation

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475. 386 Mich. at 623-24, 194 N.W.2d at 702.

476. See MICH. COMP. LAWS ANN. § 691.1405 (1968).

to which *Grubaugh* was addressed.<sup>477</sup> If, because the court from time to time is transfixed by the plain-meaning rule, construction could not be used to smooth down the rough edges, a determination that the notice provision is unreasonable when strictly applied to persons under disability in a situation where the defendant has suffered no prejudice would have been a tolerable outcome.<sup>478</sup> But the ruling that the legislature is constitutionally deprived of power to enact, for cases involving governmental liabilities in the area subsumed under the rubric "tort," substantive rules different from those that apply to other tortfeasors is a startling curb on the lawmaking powers of the legislature. Moreover, if maintained, it is likely to make the entire problem of governmental tort responsibility unmanageable, for it is a problem that *does* require special rules.<sup>479</sup> The only question is whether it will be the legislature or the court that makes those rules.

Justice Adams concluded his opinion in *Reich* with a pause-giving footnote that may be a clue to the source of his reasoning: "For a recent case in which the entire doctrine of sovereign immunity was overruled as in violation of the equal protection provision of the Fourteenth Amendment to the United States Constitution, see *Krause v. Ohio* (1971), 28 Ohio App 2d 1; 274 NE2d 321 (1971)."<sup>480</sup> *Krause* was a wrongful death action arising out of the Kent State incident. The intermediate appellate court, in the opinion cited by Justice Adams, rejected the state's sovereign immunity defense and stated one of the issues as follows: "The underlying contention in the appellant's proposition of law has two branches; first the doctrine of sovereign immunity violates equal protection of law because it establishes two categories of claimants, those offended by state action and those offended by private action, with different protections but without a foundation in reasonable-

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477. See *Trbovich v. City of Detroit*, 378 Mich. 79, 95-109, 142 N.W.2d 696, 701-08 (1966) (Souris, J., dissenting).

478. Moreover, the legislature was not unresponsive to these problems. Before *Grubaugh* was finally disposed of, the statute had already been amended to extend to 120 days (180 days in the case of minors) the period during which notice could be filed in highway claims, and to provide a grace period of 180 days after termination of the disability for persons physically or mentally incapable of giving notice. Act of Aug. 1, 1970, No. 155, [1970] Mich. Pub. & Loc. Acts 496, amending MICH. COMP. LAWS ANN. § 691.1404 (Supp. 1973).

479. Indeed, the exhaustive study made by the California Law Revision Commission in 1963 is in large part an effort to spell out the differences between the problems of governmental and private tort liability, and to develop intelligent solutions to the questions that those differences pose. See 5 CAL. LAW REVISION COMM., REPORTS, RECOMMENDATIONS AND STUDIES 267-332 (1963).

480. 386 Mich. at 624 n.3, 194 N.W.2d at 702 n.3.



ness."<sup>481</sup> That decision, however, was reversed by the Ohio supreme court, and an appeal to the Supreme Court of the United States was dismissed for want of a substantial federal question.<sup>482</sup>

It is interesting in this connection to recall that in his opinion in *Williams* even Justice Edwards said:

There is, of course, no doubt of legislative authority to act in this area. The Michigan legislature may, if it sees fit to do so, reinstitute governmental tort immunity by statute. Or, as it has already done in some instances, it may specify the terms and conditions of suit. Our holding in this case does not affect any existing statute in the field concerned, or imply any limitation on legislative power to act where to date it has not acted.<sup>483</sup>

It may also be recalled that in *McDowell*,<sup>484</sup> Attorney General (later Justice) Adams' brief was quoted for the following proposition in the opinion that excluded the state's sovereign immunity defense from the fate suffered by the city's governmental-function defense in *Williams*:

"[T]he doctrine of sovereign immunity which presently exists in Michigan is not the archaic, obsolete, "king can do wrong" edition of 1066, but consists of a pattern of deliberate legislative choices which achieved its present form, so far as the State itself is concerned, by the enactment of PA 1945, No 87, and the amendment thereof by PA 1960, No 33. Since PA 1960, No 33, took effect after the events which gave rise to these actions, that act cannot serve to establish or abolish rights with respect to appellants herein. However, the fact that the legislature amends a statute in 1960 does show that the legislature is giving continuing consideration to, and acting with respect to, the doctrine of sovereign immunity. If the express reestablishments [sic] of the doctrine of sovereign immunity by the legislature in 1945 is obsolete, illogical, harsh, cruel, et cetera, then the legislature should be called upon to modify or abolish the doctrine.

So far as the State itself is concerned, the doctrine of sovereign immunity as it presently exists in Michigan is a creature of the legislature."<sup>485</sup>

In that opinion Justice Black, for the court, after quoting the above passage from the Attorney General's brief, added that "[t]he judiciary has no right or power to repeal statutes. As said by the

481. 28 Ohio App. 2d 1, 2-3, 274 N.E.2d 321, 322 (1971), *revd.*, 31 Ohio St. 2d 32, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

482. *Kraus v. State*, 31 Ohio St. 2d 32, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

483. 364 Mich. at 260-61, 111 N.W.2d at 25.

484. See text accompanying notes 422-24 *supra*.

485. 365 Mich. at 270-71, 112 N.W.2d at 492, *quoting* Brief for Defendants.

attorney general, the legislature has willed that the present defendants be and remain immune from liability for torts such as these plaintiffs have alleged. There they must stand, legally, until the legislature wills to the contrary."<sup>486</sup>

The contrast between these expressions in 1961 and the positions asserted in *Grubaugh* and *Reich* is some measure, not only of the court's current trespass upon the legislature's domain, but also of the low estate to which its own pronouncements of even the recent past have fallen.

### C. Further Evolution of Categorical Liabilities

Pending the resolution of any questions that may remain concerning the validity of the 1964 statute, the scope of the governmental-function defense continues to be contracted through a corresponding expansion of the liabilities recognized by the statute, an expansion to some extent along lines foreshadowed by earlier cases. It was established as early as 1889<sup>487</sup> that the municipality's responsibility under the highway statute was not limited to repair and maintenance of the road surface but extended also to negligent failure to remove obstructions and other hazardous road conditions created by others. In *Rufner v. City of Traverse City*<sup>488</sup> and *Cabana v. City of Hart*,<sup>489</sup> liability was recognized for deaths of persons in the street caused, respectively, by the fall of a rotten street light pole and by electrocution through contact with a metal street lamp post that was not properly grounded. Then, in *Mechay v. City of Detroit*,<sup>490</sup> it was held that a painter, working under contract with the city, was entitled to recover under the statute for injuries received when the street light pole on which he was working broke and threw him to the ground. The city argued that its statutory duty "to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all public highways, streets, etc." extended only to travelers and was therefore of no avail to a person in the plaintiff's position,<sup>491</sup> but the court held that this provision related to the standard of care and did not delimit the persons to whom the duty was owed.<sup>492</sup> The cause of action was created by

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486. 365 Mich. at 271, 112 N.W.2d at 492-93.

487. *Joslyn v. City of Detroit*, 74 Mich. 458, 42 N.W. 50 (1889), discussed in text accompanying notes 130-34 *supra*.

488. 296 Mich. 204, 295 N.W. 620 (1941).

489. 327 Mich. 287, 42 N.W.2d 97 (1950).

490. 364 Mich. 576, 111 N.W.2d 820 (1961).

491. 364 Mich. at 578, 111 N.W.2d at 821. *See* MICH. COMP. LAWS § 242.3 (1948).

492. 364 Mich. at 578-79, 111 N.W.2d at 821-22.

other language that provided that "[a]ny person or persons sustaining bodily injury upon any of the public highways or streets of this state by reason of neglect to keep such public highways or streets . . . in reasonable repair, and in condition reasonably safe for travel" is entitled to recover damages from the responsible unit.<sup>493</sup> Since the defective pole made the street unsafe for travel, plaintiff was entitled to recover even though he was not using the street for travel at the time of the injury.

In *Miller v. Oakland County Road Commission*,<sup>494</sup> the court of appeals recently reversed a summary judgment dismissing a claim against the county for injury suffered by plaintiff when a dead elm tree fell on the truck that she was driving on a county road. The complaint alleged that the road commission had been warned that trees were a hazard to the road in question and had negligently failed in its statutory duty to protect the safety of the highway. The defense was based on a clause in the statute that provided that "[t]he duty of . . . the county road commissions to . . . maintain highways, and the liability therefor, shall extend only to the portion of the highway designed for vehicular travel and shall not include sidewalks, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel"<sup>495</sup> and on the observation that the complaint did not identify the location of the tree prior to its fall. The court thought this omission irrelevant: "Plaintiff alleged that the tree was alongside Andersonville Road, that defendants were advised that it constituted a potential hazard, and that the tree ultimately fell on plaintiff and her truck as she was traveling on Andersonville Road. These facts are sufficient to allege a cause of action in negligence."<sup>496</sup>

As presently interpreted, therefore, the statute provides a basis of liability toward persons on the highway at the time of injury, which may arise not only from travel risks as such, but also from collateral hazards. In other words, it may not be too much to say that the governmental unit's highway liability has become a species of premises liability.

There are also signs that the statutory liability for defective public buildings will be maximized. By a per curiam opinion in *Green v. Department of Corrections*<sup>497</sup> that provision was applied to

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493. MICH. COMP. LAWS § 242.1 (1948).

494. 43 Mich. App. 215, 204 N.W.2d 141 (1972).

495. MICH. COMP. LAWS ANN. § 691.1402 (1968).

496. 43 Mich. App. at 219, 204 N.W.2d at 144.

497. 386 Mich. 459, 192 N.W.2d 491 (1971).

permit recovery against the state by an inmate of the Detroit House of Correction for the loss of a finger attributed to the absence of proper safety devices on a planing machine in the prison shop. The court's theory was that, since the machine was permanently attached, it was a fixture and therefore a part of the building.<sup>498</sup> The relevant statutory language is "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building. . . ."<sup>499</sup> The attorney general's contention that the situation was not within the intent of the statute because the prison was not a building held open to the public at large was rejected. Thus, an area of liability that had been excluded even by the short-lived general waiver of immunity adopted in 1943<sup>500</sup> was opened. If, as the reasoning adopted by the supreme court has it, the statutory term "public building" means any "building owned by a public body," and the clause "open for use by members of the public" includes prison buildings occupied by prisoners because they too are "member[s] of the public community, whether in or out of jail,"<sup>501</sup> it is difficult to conclude that any publicly owned building, no matter how restricted the entry may be, will be excluded.

The future application of the proprietary-function category was made somewhat uncertain by the 1964 statute. Drafted under the apparent assumption that the state and its agencies enjoyed a total sovereign immunity from tort liability and were never subject, as were municipalities, to the proprietary-function exception, section 13 of the statute waived the state's immunity from liability for damage "arising out of the performance of a proprietary function."<sup>502</sup> That term was given an explicit definition applicable to the state (including the state's "agencies, departments, and commissions . . . and every public university and college of the state")<sup>503</sup> but not to other governmental agencies. That definition—"any activity which

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498. Cf. *Cody v. Southfield-Lathrup School Dist.*, 25 Mich. App. 33, 181 N.W.2d 81 (1970), wherein the court of appeals rejected a claim for injury to a school child on a trampoline in the school gymnasium, because the trampoline was not attached.

499. MICH. COMP. LAWS ANN. § 691.1406 (1968), *as amended*, MICH. COMP. LAWS ANN. § 691.1406 (Supp. 1973).

500. Among three specific exclusions in that statute was "any claim for injury to or death of a prisoner." Act of April 21, 1943, No. 237, [1943] Mich. Pub. & Loc. Acts 392. See text accompanying note 398 *supra*.

501. 386 Mich. at 464, 192 N.W.2d at 493.

502. MICH. COMP. LAWS ANN. § 691.1413 (1968).

503. MICH. COMP. LAWS ANN. § 691.1401 (1968).

is conducted primarily for the purpose of producing a pecuniary profit for the state, excluding, however, any activity normally supported by taxes or fees"<sup>504</sup>—with its emphasis on a profit-making *primary purpose*, appears to have been drafted with the intent of confining the state's exposure narrowly. Whether it will have that effect seems doubtful; indeed, it may turn out to have two edges.

*Bofysil v. Department of State Highways*<sup>505</sup> was a claim for injury suffered by a teenager who struck his head on an underwater obstruction when he dived into a lake created by the accumulation of water in an excavation that had been made by the highway department for the purpose of obtaining sand and gravel for a highway construction project. The lake was an intended consequence of the excavation, so that the parcel on which it was located would be more salable after it had served its highway purpose, and the parcel was in fact sold at a profit subsequent to the accident. The department had been aware that the bottom of the excavation was irregular, and that people had been swimming in the lake, but it had failed to post warnings or take other precautions. The accident occurred prior to the enactment of the 1964 statute, but the court of appeals held that the state was subject to liability for negligence in the performance of a proprietary function according to the law in existence prior to the statute.<sup>506</sup> This was a question that had never been settled, and the court's position was supported only by dicta, particularly from cases that discussed the liabilities of school districts, which have, of course, repeatedly been described as "state agencies" and therefore identified with the state's immunity. It was necessary for the court to disregard dicta in some of the post-*Williams* opinions that had described the state's sovereign immunity as total, subject only to statutory exception.<sup>507</sup> Nevertheless, these latter expressions were not themselves well-reasoned, and the snub they received was perhaps deserved.

There remained the question of whether the highway department's activity in *Bofysil* was, in fact, proprietary. The court's answer was that, although highway construction is clearly governmental, "it is equally clear that a state agency may be engaged in a proprietary function at the same time it is engaged in a governmental

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504. MICH. COMP. LAWS ANN. § 691.1413 (1968).

505. 44 Mich. App. 118, 205 N.W.2d 222 (1972), *leave to appeal denied*, 389 Mich. 768 (1973).

506. 44 Mich. App. at 128-29, 205 N.W.2d at 229.

507. *See, e.g., Myers v. Genesee County Auditor*, discussed in text accompanying notes 432-40 *supra*.

function. When such a dual use of property is in evidence, the proprietary function must be separated from the governmental function and the governmental agency loses its immunity as to the proprietary use."<sup>508</sup> When it created the lake to make the land salable and then sold it at a profit, the highway department was engaged in an activity not different from that of any business improving land to make a profit. It would seem that the statutory definition of proprietary function would in no way interfere with this conclusion, since it does not preclude the analysis of governmental operations for the purpose of finding among the fragments a profit-making activity. Carried as far as it will go, this technique may change many of the answers that were reached in the past. For instance, would not the school football games in *Watson* and *Richards* clearly fall within the proprietary category today?<sup>509</sup> If so, the statutory reincarnation of the governmental function is less robust than its case law progenitor.

The 1964 statute does not mention the nuisance-trespass theory of liability and that silence is a source of some difficulty. The first sentence of section 7 of the statute<sup>510</sup> negates tort liability on the part of any governmental agency engaged in the exercise or discharge of a governmental function, unless the statute itself provides otherwise. As the statute contains no language preserving the nuisance-trespass basis of claim, a literal reading would lead to the conclusion that it had been abolished. In historical context, however, the existence of such a legislative intent seems scarcely credible. The Michigan court has recognized this head of liability from the very beginning. It seemed so obvious to the nineteenth-century court that it was practically taken for granted, and it antedates the governmental-function defense by decades. It reflects one of the strongest claims for relief that can be asserted, for it is built around the paradigm of damage that is the direct and intentional consequence of the munic-

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508. 44 Mich. App. at 130, 205 N.W.2d at 229, citing *Carlisi v. Marysville*, 373 Mich. 198, 128 N.W.2d 477 (1964); *Munson v. Menominee County*, 371 Mich. 504, 124 N.W.2d 246 (1963); *Dohm v. Acme Twp.*, 354 Mich. 447, 93 N.W.2d 323 (1958). See text accompanying notes 277-85 *supra*.

509. See *Richards v. Birmingham School Dist.*, 348 Mich. 490, 83 N.W.2d 643 (1957); *Watson v. School Dist.*, 324 Mich. 1, 36 N.W.2d 195 (1949); text accompanying notes 255-65 *supra*. But see *Smith v. Board of Commrs.*, 49 Mich. App. 280, 212 N.W.2d 32 (1973), holding a metropolitan park authority immune from liability for injury arising from its operation of the "Island Queen," a sightseeing boat, on a lake within the park, on the ground that, although a nominal fee was charged for excursion rides, the "Queen" had not turned a profit in the four years preceding the accident. Cf. *Matthews v. City of Detroit*, 291 Mich. 161, 289 N.W. 115 (1939), discussed in text accompanying notes 246-48 *supra*.

510. See text accompanying note 454 *supra*.

ipality's act, with principles of unjust enrichment also frequently relevant. There is nothing in their public expressions to indicate that those who drafted the statute had any such change in mind; indeed, one of them summed the statute up in these terms: "The net effect of Act 170, 1964, is to largely return to municipal corporations the position they enjoyed prior to the decision of the *Williams* case."<sup>511</sup> This is surely a situation where the legislature should be expected to express an intent to make an important change in the law in words incapable of being misunderstood, rather than relying upon implication. On this basis the sentence can justifiably be construed to avoid the consequence that the words, in the abstract, seem to suggest. The term governmental function has no clear and indisputable core of meaning. It is a term of art, definable only by reference to the instances to which it has been applied. It has never been applied by the Michigan court to protect any governmental agency against liability in a situation recognized to be within the nuisance-trespass category. This sentence, I submit, should be seen as a restoration of the governmental-function defense *as it existed in the case law*, alongside the nuisance-trespass head of liability.

But what then of the second sentence in section 7, which prohibits any construction of the statute that would reduce the immunity from tort liability enjoyed by the state, except as provided in the statute itself? No Michigan case prior to the enactment of the statute had directly held the state subject to liability under the nuisance-trespass heading. Such a holding may have been intended in *Buckeye Union Fire Insurance Co. v. State*,<sup>512</sup> which was decided in 1970 but related to an occurrence prior to the enactment, but the obscurity of the reasoning in that case and the apparent felt necessity to redescribe the fire-hazard nuisance as a "taking of private property for public use" leaves its significance uncertain. As has been noted,<sup>513</sup> dicta in post-*Williams* opinions have asserted that the state's sovereign immunity has no exceptions other than those created by statute. On the other hand, there is evidence that the nineteenth-century court assumed that the nuisance-trespass situation was an appropriate basis of claim against the state,<sup>514</sup> although no

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511. 28 NIMLO MUNICIPAL L. REV. 464 (1965). See also discussion in text accompanying note 455 *supra*.

512. 383 Mich. 630, 178 N.W.2d 476 (1970). See text accompanying notes 340-45 *supra*.

513. See text accompanying notes 433 & 507 *supra*.

514. See text accompanying note 59 *supra*, quoting *Sheldon v. Village of Kalamazoo*, 24 Mich. 383, 385-86 (1872). See also *Ashley v. Port Huron*, 35 Mich. 296, 301 (1877); *Herro v. Chippewa County Rd. Comms.*, 368 Mich. 263, 272, 118 N.W.2d 271, 275 (1962).

judicial jurisdiction existed within which such a claim could be entertained.<sup>515</sup> For the latter reason, the question could not be raised in court until after the adoption of the Court of Claims Act in 1939. As the court of appeals points out in *Bofysil*, the cases decided immediately thereafter, which denied to that legislation the effect of a waiver of the state's sovereign immunity to tort liability, *assumed that* immunity existed "when the sovereign is engaged in a governmental function."<sup>516</sup> If the analysis that in Michigan the nuisance-trespass claim is older than and not subject to the governmental-function defense is valid, nothing in Michigan law would require a decision that the state was not subject to such claims prior to the effective date of the 1964 statute. This conclusion is bolstered by the fact that it has been clear ever since 1899 that the claim is good against boards of education,<sup>517</sup> notwithstanding the contemporaneous identification of such units, as "agencies of the state," with the state's immunity.<sup>518</sup> Finally, the apparent legislative intent in 1964 to create uniformity of liability and immunity among all governmental units argues in favor of a construction of section 7 that would bring the state's liabilities into line with those of other units, if this objective can be achieved without violence to the language of the statute. I am persuaded that such a construction is possible and historically valid, and that it would preserve the traditional nuisance-trespass category as a viable basis of claim against all governmental units.

#### IV. CONCLUSIONS

The system described above leaves something to be desired, but it is a reasonable base from which to work. Given its consolidation in statutory form, the time may be ripe for an attempt to sharpen some of the terms, for there is no doubt that indefiniteness has been an impediment to progress. Since the turn of the century the court has viewed the scene always in its negative rather than its positive

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515. See text accompanying notes 353-65 *supra*.

516. 44 Mich. App. at 125-26, 205 N.W.2d at 227, quoting *Manion v. State Highway Commr.*, 303 Mich. 1, 19, 5 N.W.2d 527, 528 (1942) (emphasis added). See also *Mead v. Public Serv. Comm.*, 303 Mich. 168, 171, 5 N.W.2d 740, 740-41 (1942).

517. See, e.g., *Ferris v. Board of Educ.*, 122 Mich. 315, 81 N.W. 98 (1899); *Whitehead v. Board of Educ.*, 139 Mich. 490, 102 N.W. 1028 (1905) (dicta); *Daniels v. Board of Educ.*, 191 Mich. 339, 158 N.W. 230 (1916) (dicta); *McDonnell v. Brozo*, 285 Mich. 38, 280 N.W. 100 (1938) (dicta); *Pound v. School Dist.*, 372 Mich. 499, 127 N.W.2d 390 (1964).

518. Attorney General, *ex rel. Kies, v. Lowrey*, 131 Mich. 639, 92 N.W. 289 (1902); *Sayers v. School Dist. No. 1, Fractional*, discussed in text accompanying note 425 *supra*; *Bofysil v. Dept. of State Hwys.*, discussed in text accompanying notes 505-08 *supra*; authorities cited in note 517 *supra*.



aspect, choosing invariably to discuss the government's immunity rather than its responsibility. That habit was the product of a conceptualism that posited immunity as an attribute of sovereignty, part of the nature of things and the norm to which responsibility was always an exception. Accuracy of perception would be advanced if the habit were now abandoned, for the conceptualism has been destroyed by intervening criticism, and, in reality, immunity no longer dominates the scene. Rather, in respect to harmful activities of its officers and employees, government has a liability equivalent to that of nongovernmental entities for harms that are proximate consequences of motor vehicle operation, of proprietary activities generally, and of intrusions that are intended or highly probable consequences of government action; toward outsiders, for injury causally related to conditions of premises, government has substantially the liability of a nongovernmental occupier in respect to public buildings, premises devoted primarily to a proprietary use, and secondary proprietary uses of premises devoted primarily to a governmental function; and toward persons using the public ways, not necessarily for travel, government also has a species of premises liability.

While the 1964 statute retains the term "immunity" in respect to "all cases wherein the government agency is engaged in the exercise or discharge of a governmental function," those terms are of judicial origin and presumably subject to judicial refinement, for the statute makes no attempt at definition. "Immunity," no longer a logical necessity, has become a policy question, and "governmental function" may properly be understood as a designation for situations where the government *should* be able to act or to remain passive without compensating citizens adversely affected by the decision—a species of *privilege* extending to those instances where there are sound policy reasons for nonliability despite the existence of circumstances that would subject a nongovernmental defendant to liability.

The word "function" has been used in a departmental sense: The "function" that is characterized as "governmental" usually encompasses *all* the activities of the police and fire departments, road-building, parks, and schools, except to the extent that a department has involved itself in an isolated profit-making action. Moreover, it has been assumed that if the function is not "proprietary," it must necessarily be "governmental." Neither usage appears necessary. The search now is for reasons why a particular act or omission that would cast liability upon another entity should not have that effect if a governmental unit is the defendant. It would seem that the answer

should be found in the nature of the act or omission, rather than in the over-all public or governmental objectives of the department by which the actor is employed, for, as Justice Edwards pointed out in *Richards v. Birmingham School District*,<sup>519</sup> in one sense all functions performed by governmental units are "governmental." He went on to say that some are more proprietary than others. He might have said that some are more *governmental* than others, for this today is the characterization that needs justification. It would seem appropriate, then, to focus upon the particular employment rather than upon the departmental purpose and, within that focus, to reverse the traditional presumption that a function is governmental unless some excuse can be found for calling it proprietary, adopting in its place the approach that a function is *not* governmental for the purpose of the privilege *unless* the activities that it entails are uniquely associated with governmental enterprise and circumstantially different from those carried on by nongovernmental actors, or unless liability would be an unacceptable interference with government's ability to govern.

The principal argument against the immunity doctrine is that government, like enterprise, should pay its way; that the special burdens created by the miscarriage of governmental activities should be borne by the community rather than by the unfortunate individuals upon whom those burdens fall. That principle argues most strongly for liability in situations where harm is caused by the affirmative actions of government officers and employees. Such liability *exists* where the act in question is the operation of a government vehicle, a "direct trespass," part of a proprietary enterprise, or when it creates a dangerous and injurious condition in a public way or building. On the other hand, the governmental-function defense negates liability for harms caused by law enforcement and by protective actions of employees such as policemen, firemen, inspectors, and custodial employees, who are by law compelled to act directly upon persons and property, overcoming resistance if necessary. Mistakes are an inevitable consequence of such activity, and it may be that resultant losses should, to some extent, be absorbed by the community, but the problems of separating instances where compensation would be appropriate from those in which it would not is complex, and it is difficult to see how, with any fidelity to language, it could be held that these employments are anything but governmental. I would suppose, therefore, that if there is to be liability in this area it should come through legislation, wherein the criteria and the limits can be specified, and the basic policy questions resolved

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519. 348 Mich. 490, 521, 83 N.W.2d 643, 659 (1957) (dissenting opinion).

in the appropriate forum. The defense, as presently understood, also covers the acts of such employees as construction, maintenance, and sanitation workers and medical and administrative personnel, the nature and circumstances of whose activities are not materially affected by the fact that they work for a governmental employer. Here the argument for nonliability of the unit is at its weakest. There is nothing peculiarly governmental about the activities of a doctor employed on the staff of a public, rather than a private, hospital, nor about the activities of a worker employed on a street project, rather than on building a private driveway for a private employer. Employments such as these might well be deemed *not* to be governmental in character for the purpose of determining the applicability of the defense.

The defense, by exempting the governmental occupier of premises from liability in cases of injury causally relatable to conditions of premises not devoted to a proprietary use (other than public ways and buildings), covers a wide range of situations. On one hand, premises, such as playgrounds, compact urban parks, and premises surrounding school and government buildings, may be developed in contemplation of intensive public use. In respect to such premises the governmental occupier is in much the same position as nongovernmental occupiers: The public is actively encouraged, or perhaps even required, to enter. Remembrance of some of the past cases involving school premises and parks<sup>520</sup> suggests the need for a liability principle. Problems of inspection and maintenance seem manageable, considerably more so, indeed, than in the case of public ways, for which responsibility already exists. The decisions that must be made by judge and jury in order to determine whether reasonable procedures have been followed in this respect do not excessively intrude into the area of policy-making that belongs to other officials. I would suggest that the "function" here is the provision of facilities for frequent and intensive use by the public and that there is nothing uniquely governmental about it. The relationship between the occupier, the premises, and the public is in no essential respect different from the same relationship where nongovernmental occupiers are concerned.

On the other hand, the defense also covers injuries causally relatable to conditions of publicly owned premises that, while left open for entry by the public, are not developed for intensive use. This would include areas such as large rustic parks, forest and other

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520. See *Penix v. City of St. Johns*, 354 Mich. 259, 92 N.W.2d 332 (1958); *Richards v. Birmingham School Dist.*, 348 Mich. 490, 83 N.W.2d 643 (1957); *Watson v. School Dist.*, 324 Mich. 1, 36 N.W.2d 195 (1946); *Royston v. City of Charlotte*, 278 Mich. 255, 270 N.W. 288 (1936); text accompanying notes 255-66 & preceding note 305 *supra*.

lands left substantially in their natural condition, and public waters other than supervised beach areas. The private sector offers no analogy here, for no private party is the occupier<sup>521</sup> of premises remotely comparable in extent. Moreover, a private occupier of similar premises would rarely invite the public to enter and would therefore normally enjoy the limitations on responsibility that the law provides in respect to visitors who are at best licensees. In opening such areas for use and enjoyment by the public, the governmental unit does not hold out that measures have been taken to make them safe for entry. They are offered and enjoyed as and because they are approximations of nature in the raw, and nature in the raw is frequently unsafe.

To assume applicability to this situation of conventional premises-liability principles based on knowledge or constructive notice of the existence of dangerous conditions and a jury judgment upon the measures taken in response to that knowledge would be to create an unpredictable liability exposure, to imply an unmanageable operational duty, and to introduce a major negative factor into the decision-making process by which such areas are opened for public use. It may be argued that a jury can take such factors into account in deciding whether the usual reasonableness standard has been breached, but I would maintain that here the unit should not be subject to a jury risk. Such an area is offered for use without warranty, the user may fairly be said to have assumed the risk, and the applicable general principle should be one of nonliability. The function of providing public access to such areas, I would contend, is uniquely governmental.

The governmental-function defense also serves at the present time to exclude a miscellany of claims relating, not to what government did *to* the claimant, but rather to what it did *not* do *for* him, to losses it failed to prevent. Within this general class involving assertions of failure to perform an affirmative duty there is, of course, liability for failure to perform a duty arising in the exercise of a proprietary function and for failure to repair or make reasonably safe public ways and buildings; and, of course, a negligent omission may be the culpable factor in the context of actions for which the unit is otherwise subject to liability. But aside from these instances, were there no such defense, there would be an essentially unpredictable exposure to miscellaneous accusations of nonfeasance. Government's ubiquity in modern life makes it vulnerable, in a legal milieu wherein the search for a plausible loss-bearer is candidly recognized,

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521. The term itself seems out of place in this context. Is the state the "occupier" of the woods, fields, lakes, and streams under its ownership?

to blame for individual misfortunes that are in no real sense the product of its enterprise. The principle that government should pay *its* way could shade imperceptibly into a principle that it should pay *our* way. Such a principle may well be appropriate in given circumstances. Perhaps modern government *should* absorb, to a greater degree than it does, the burdens of personal misfortune arising from its failure to shield individual citizens from harmful occurrences, such as crime and flood, that citizens are in a poor position to avoid or to lay off in other ways, but that type of decision belongs to the political rather than to the judicial process.

There is again a range of possibilities. It would include, on the one hand, the failures of public services already in place—such as the sewer or drain that becomes clogged, the fire department that is slow or ineffective in its response or that appears on the scene with defective or inadequate equipment, and the police department that fails to take steps deemed reasonably adequate to protect against crime or negligently permits a felon to escape. On the other hand, given the applicability of contemporary attitudes in regard to fault, causation, and damages, legally plausible claims might be constructed for harms causally relatable to the asserted failure of the authorities to provide services of a quality or quantity that a jury might reasonably believe should have been provided—such as the absence of sufficient sewerage or drainage or of an adequate police or fire establishment. Still further down the scale might be assertions of harms causally relatable to a failure to adopt or to enforce laws or regulations that a jury might reasonably conclude ought to have been adopted or enforced and that might have prevented the loss from occurring. If the governmental-function defense did not foreclose these questions, the remaining control would lie in judicial manipulation of the duty question, which would mean that in those instances in which he permitted the claim to go to the jury, the judge would frequently be permitting the jury to substitute its judgment concerning the extent of public services and their deployment for that of the political and administrative authorities to whom such judgments belong.

Similar considerations apply to another type of claim that is presently blocked by the governmental-function defense. Were it not for that principle, damage claims might be advanced for economic disadvantages asserted to have been caused by miscellaneous governmental decisions, such as those relating to street grades, location of public facilities, zoning, building regulations, licensing and the regulation of licensed activities, dissemination of information, and decisions made in individual cases by educational authorities. In-

dividual rights are safeguarded in this area by liabilities for nuisance, trespass, and the taking of private property for public use, and by normal review processes and preventive relief obtainable where the political and administrative authorities seek to exceed their authority. To open such decisions further to challenge in damage actions would reduce government to a bargaining process, if not to substantial immobility. Such decisions, along with the decisions of "whether" and "how much" noted above, are of the essence of government, and the function of making them is surely governmental. Justices Campbell and Cooley were feeling their way toward acceptable principles for dealing with claims of this kind during their tenure on the court. They phrased those principles in terms of nonliability for "mere neglect" to perform a statutory duty, absent indication of contrary legislative intent, and nonliability for "legislative" or "discretionary" decisions of authorities to whom the making of such decisions is entrusted. Unfortunately, the growth of these ideas was stunted at an early stage when they were overshadowed by the rank growth of the "governmental-function" cliché.

In sum, the purpose of these conclusory paragraphs is to suggest that the statutory "governmental-function" reservation, in contemporary context, may appropriately be interpreted as a limited privilege serving as a defense in a class of cases, miscellaneous in nature and difficult to define, wherein it is important to preserve the elbow-room that must be available for political decision-making, wherein tort liability would imply duties of care that would be impossible or impracticable to perform or would require government to absorb losses that are not the product of its intervention, and wherein the acts that governmental agents must perform within the scope of their normal duties have no common analogy in the private sector because they reflect the imperative element in government, the implementation of its right and duty to govern. A return to considerations such as these would make the term "governmental" functionally intelligible and give it a core of meaning as a term the purpose of which is to facilitate the drawing of distinctions between the activities of governmental and nongovernmental actors that say something rational about the conditions of tort liability. Such an interpretation would, I believe, not be unfaithful to Michigan legal tradition in historical depth. It would correct for an aberration that occurred when the professional stopped thinking about these problems and resorted instead to a facile but mindless formula.

This suggestion for modification of existing doctrine will not be taken, I trust, as a proposal for another revolution. The court's adventures in this area since 1961 are to me persuasive evidence

that legislative techniques are better left to legislatures. The community will be no better served by the assumption that governmental activity, for tort liability purposes, is no different from non-governmental activity than it was by the opposite assumption. What is jurisprudentially sound when General Motors is the defendant is not necessarily so if the defendant is the state of Michigan, the city of Detroit, or the township of Leoni. What is needed at this point is not a broad brush technique, but careful consideration of the factors that differentiate injury and liability problems in this context from those that occur in other spheres.

After the most extensive and careful study of these problems that has yet been made, the California Law Revision Commission made the following point in its report to the California legislature:

The problems involved in drawing standards for governmental liability and governmental immunity are of immense difficulty. Government cannot merely be made liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision-making has been allocated among three branches of government—legislative, executive and judicial—and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.<sup>522</sup>

In the study that backs up that report there is a detailed consideration of the various kinds of situations from which questions of governmental tort liability may arise, and of the policy factors relevant to their appropriate solution. Further consideration of these problems in Michigan might well start there.

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<sup>522</sup>. 4 CAL. LAW REVISION COMMN., REPORTS, RECOMMENDATIONS AND STUDIES 810 (1963). The study on which the Commission's recommendations were based is contained in 5 *id.*