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MUNICIPAL TORT LIABILITY: A CONTINUING ENIGMA

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Yearly large numbers of people in Florida suffer property loss, physical injury, and even death as the result of accidents involving municipal corporations: a woman stumbles over a four-inch hole in a public sidewalk; a palm frond falls on the head of a tourist sitting on a city bench; a fire truck strikes a motorcyclist; a falling branch from a tree in a park damages a car. The claims resulting from these accidents and other tortious acts of municipal corporations run into millions of dollars annually. These claims, however, are settled not only with reference to the general rules of tort law but according to an additional number of unique doctrines applicable to municipalities and not to persons and private corporations. Legal scholars and commentators since the turn of the century have almost unanimously condemned the confusions and contradictions of municipal tort law.[1] This article reviews the doctrines and practices in Florida and suggests possible reforms.

GOVERNMENTAL-CORPORATE RULE*

The peculiarities of Florida municipal tort law revolve largely around the distinction between governmental and proprietary, or corporate, functions.[2] This dichotomy, accepted in forty-seven states,

*A table of headings and subheadings is appended at the end of this article.

[1]Well over 200 law review articles have appeared since 1900. Serious attention was early focused by a series of essays written by Prof. Edwin M. Borchard. See his *Government Liability in Tort,* 34 YALE L. J. 1, 129, 229 (1924-1925), and *Governmental Responsibility in Tort,* 36 YALE L. J. 1, 757, 1039 (1926-1927). Studies of the varying status of municipal tort law have been published for approximately half the states. For a general summary see 9 LAW & CONTEMP. PROB. 179-370 (1942). Among the more telling criticisms of the current situation are: Fordham and Pegues, *Local Government Responsibility in Tort in Louisiana,* 3 LA. L. REV. 720 (1941); Green, *Municipal Liability for Torts,* 38 ILL. L. REV. 355 (1944); Harno, *Tort Immunity of Municipal Corporations,* 4 ILL. L. Q. 28 (1921); Peterson, *Governmental Responsibility for Torts in Minnesota,* 26 MINN. L. REV. 293, 700, 854 (1942); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test,* 22 VA. L. REV. 910 (1936); Tooke, *The Extension of Municipal Liability in Tort,* 19 VA. L. REV. 97 (1932).

[2]For an indication of the confusion that this concept can cause on the state

presents the municipality as a Dr. Jekyll and Mr. Hyde organism.[3] When acting in its governmental capacity the municipality is generally immune from liability in tort; when acting in its proprietary or corporate capacity it is usually liable to the same extent as an individual or private corporation.[4]

As applied in Florida, Mr. Justice Whitfield summarized the governmental-corporate rule in *Tampa v. Easton*:[5]

> "The governmental functions and the corporate duties and authority of a municipality may be regarded as being distinct, with different duties, privileges or immunities and, as to corporate matters, correlative liability for negligence of its officers and agents in performing or omitting municipal nongovernmental or corporate duties or authority as may be in accord with statutory provisions or common-law principles. The liability of municipal corporations in their governmental functions or in their corporate duty or authority in furnishing public corporate improvements or facilities, is regulated by substantive law. . . . What are governmental functions and what are corporate authority or duties of a municipality are not comprehensively defined in the law but are to be determined in each case upon a judicial interpretation and application of appropriate provisions or principles of law to the facts legally shown or omitted as may be provided by controlling substantive and procedural law."

It would seem, then, that the sole problem would lie in the admittedly difficult question of deciding which functions are governmental and which are corporate.[6] Such, however, is not the case in Florida. In the period between the First and Second World Wars the Florida Supreme Court became concerned over the injustices in-

level see New York v. United States, 326 U.S. 572 (1946). New York sought unsuccessfully to establish immunity from federal excise taxes on bottled mineral water taken from state-owned springs.

[3]With admirable honesty the South Carolina Supreme Court abandoned the classification, Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911). Unfortunately, rather than establishing general governmental responsibility the court has consistently granted immunity except when otherwise directed by the legislature.

[4]See 18 McQUILLIN, MUNICIPAL CORPORATIONS §53.01 (3d ed., Smith, 1950).

[5]145 Fla. 188, 191, 198 So. 753, 754 (1940).

[6]See 18 McQUILLIN, MUNICIPAL CORPORATIONS §53.29 (3d ed., Smith, 1950).

herent in the governmental-corporate rule and developed a series of rationalizations to avoid its application, including the doctrines of implied contract, nuisance, and liability for "dangerous instrumentalities."[7] Moreover, at one time the Court went so far as to use evidence of a city-commission type of government to prove that a city is essentially a business rather than a government.[8]

Even so, within the scope of the rule the Court has attempted through the years an elaborate classification of functions. But the record is so confused that two recent Florida Supreme Court decisions contain remarkable statements. First:[9]

> ". . . as to municipalities, liability for tort has not been limited to cases in which the city was engaged in a proprietary or corporate function. In other words if, in the performance of a governmental function, a city uses its instrumentalities in an unlawful, reckless or careless manner it may not in every case claim immunity from liability."

And, just five years later:[10]

> ". . . it is clear from the decisions that in those instances where a municipality has been held liable for the unlawful commission by its agents of an act otherwise lawful, recovery has been confined to those cases where the act attempted and the unlawful manner of its execution have been clearly outside the area of governmental functions."

This year the Court reached the nub of this problem in a series of cases that divided the justices four to three.[11] The majority, com-

[7]These devices utilized to avoid application of the governmental-corporate rule are discussed in detail *infra*.

[8]Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922). The Court in Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938), dropped the view that the existence of a commission-manager or city manager type government proves the business character of a municipality.

[9]Bragg v. Board of Public Instr'n, 160 Fla. 590, 592, 36 So.2d 222, 223 (1948). For a summary of cases in which the Florida Court has either twisted the governmental-corporate classification or held the city liable for a governmental function see Avon Park v. Giddens, 158 Fla. 130, 27 So.2d 825 (1946).

[10]Miami v. Bethel, 65 So.2d 34, 35 (Fla. 1953).

[11]*E.g.*, Williams v. Green Cove Springs, 65 So.2d 56 (Fla. 1953); Olivier v. St. Petersburg, 65 So.2d 71 (Fla. 1953). Although only two justices dissented in Miami v. Bethel, *supra* note 10, Justice Hobson's special concurring opinion, at p. 35,

posed of Justices Thomas, Sebring, Mathews, and Drew, indicated their willingness to continue the governmental-corporate rule substantially as in the past—no small task considering the exceptions and modifications that have arisen in the 133 years since the leading case of *Tallahassee v. Fortune.*[12]

Mr. Justice Hobson, in opposition, eloquently indicated in *Miami v. Bethel*[13] that the reasons underlying the rule are in this era of modernity neither logical nor sound. He concluded: "The principle of municipal nonliability while acting in a purely governmental capacity which was established in the long, long ago has become archaic and is now outmoded."[14] Mr. Justice Terrell, a leader in the fight for broader liability during his long years on the bench, and Chief Justice Roberts have also shown dissatisfaction with the existing state of affairs and a desire for re-examination of municipality immunity.[15] But a majority of one holds the fort for the traditional approach, at least on the verbal level.

Historical Background

In view of this serious contention over the governmental-corporate test, the historical background may be worthy of passing attention. Its origin is traced back to the English case of *Russel v. Men of Devon,*[16] decided in 1788. That decision merely relieved the inhabitants of an unincorporated county from liability for damages resulting from failure to repair a bridge. An early Massachusetts case relied upon this decision to distinguish corporations created for their own benefit and subject to the same liability as individuals from quasi-corporations created for purposes of public policy and exempt from liability.[17] The bifurcation of American municipal tort law became clearly established with the leading case of *Bailey v. Mayor of New York;*[18] and the division continued in most municipal tort cases.

is more at variance with the majority view than the dissents. In the most recent such case, Britt v. Ocala, 65 So.2d 753 (Fla. 1953), temporary unanimity was achieved by settling the case solely on the authority of Williams v. Green Cove Springs, *supra,* to which three justices had dissented.

[12]3 Fla. 19 (1850). This appears to be the earliest reported Florida case dealing with the problem of municipal liability.

[13]65 So.2d 34 (Fla. 1953).

[14]*Id.* at 37.

[15]See dissenting opinions in cases cited in note 11 *supra.*

[16]2 T.R. 667, 100 Eng. Rep. 359 (1788).

[17]Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

[18]3 Hill 531 (N.Y. 1842).

The assault upon the rule received its greatest impetus from a series of articles published by Professor Edwin Borchard in the period from 1924 to 1927.[19] With the expansion of municipal functions, the urbanization of the population, and the concern for human rights in comparison with property rights,[20] criticism has enormously increased. Much comment has appeared against the rule.[21] As regards resort to the courts the rule leaves the injured party a Hobson's choice of either going uncompensated for his injury or attempting to obtain damages from the particular municipal employees involved, who of course are usually without large funds of their own.

The history of the rule in Florida is checkered. In the period following World War I the Florida Court moved about as far as possible in the direction of narrowing municipal immunity without completely abolishing the distinction.[22] This trend became a point of pride, as evidenced by the following statement of Mr. Justice Brown in 1936:[23]

> "Even in the early days there was a disposition to limit the common-law doctrine of governmental immunity from liability, which gave rise to the saying, 'The King can do no wrong, but his ministers may.' This ancient doctrine of immunity has been greatly pruned and pared down . . . with regard to municipal corporations, and no court in the land has probably exceeded this court in participation in that process."

In attempting to give meaning to whatever remnants of the rule remain, the Court frankly recognized the difficulties inherent in

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[19]See note 1 *supra*. This was, of course, not the first criticism of the subject. Professor Goodnow of Johns Hopkins included a criticism of municipal immunity in his MUNICIPAL HOME RULE 180-183 (1895). See also Fleischmann, *Dishonesty of Sovereignties,* 33 REP. N.Y. BAR ASS'N 229 (1910).

[20]For the view that property rights and human rights cannot always be easily divided see Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533 (1951); *cf.* Hand, *Chief Justice Stone's Conception of the Judicial Function,* 46 COL. L. REV. 696, 698 (1946).

[21]See note 1 *supra*. Borchard, *State and Municipal Liability in Tort,* 20 A.B.A.J. 747 (1934), has an extensive bibliography of the earlier contributions. But see McCash, *Ex-Delicto Liability of Counties in Iowa,* 10 IOWA L. BULL. 16 (1924).

[22]Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922).

[23]Ballard v. Tampa, 124 Fla. 457, 464, 168 So. 654, 657 (1936).

classifying functions as either governmental or corporate.[24] It also recognized that the granting of immunity to a municipal corporation may violate Section 4 of the Declaration of Rights of the Florida Constitution,[25] which, broadly speaking, provides open courts for all injured parties. At the same time, after wisely noting that most functions of a city are ministerial and deal with public utilities,[26] the Court stated that the council-manager form of city government was conclusive evidence of the business character of its activities, and added that it would require very little stretching to say that as regards tort liability no municipal function is governmental.[27]

Governmental Functions

As indicated, the Court appeared ready to place municipal torts on the same legal basis as ordinary torts.[28] Unfortunately no cause arose that permitted a definitive opinion until a time when the justices were inclined to follow the search for nebulous distinctions. This search continues. Laudably the Court has consciously restricted its findings of governmental functions to a narrow field.[29]

Legislative and Executive. Since ordinance-passing is obviously a legislative function, the Court has held that a salesman jailed under an unconstitutional city ordinance is not entitled to damages.[30] Nor does wrongful refusal of a building permit constitute a cause for tort action.[31] A municipality is not liable for malicious prosecution[32] even though it results in false imprisonment.[33]

[24]Smoak v. Tampa, 123 Fla. 716, 719, 167 So. 528, 529 (1936).

[25]Ellis, J., succinctly stated this position in the unanimous decision in Kaufman v. Tallahassee, *supra* note 22 at 638, 94 So. at 699.

[26]Kaufman v. Tallahassee, 84 Fla. 634, 638, 94 So. 697, 699 (1922).

[27]*Id.* at 639, 94 So. at 699.

[28]The Court's position was recently misunderstood by scholars. See KNEIR AND FOX, READINGS IN MUNICIPAL GOVERNMENT AND ADMINISTRATION 49 (1953): "While the Florida courts adopted the governmental-proprietary distinction, they later realized its superficial nature and threw it overboard. Today the Florida courts deem the functions of modern cities as partaking 'more of the nature of a business than a government' and treat all functions as proprietary—even police and fire."

[29]See Chardkoff Junk Co. v. Tampa, 102 Fla. 501, 135 So. 457 (1931). The Court held that "all functions not governmental are strictly municipal." By "municipal" the Court evidently means proprietary or corporate.

[30]Elrod v. Daytona Beach, 132 Fla. 24, 180 So. 378 (1938).

[31]Akin v. Miami, 65 So.2d 54 (Fla. 1953).

[32]McCain v. Andrews, 139 Fla. 391, 190 So. 616 (1939).

[33]Swanson v. Fort Lauderdale, 155 Fla. 720, 21 So.2d 217 (1945).

Policemen. Quite controversial are those decisions concerning the liability of municipalities for torts of their police officers. An early case, repeatedly followed, held that a city is not liable for unlawful, negligent, or prohibited acts of policemen.[34] Recently, however, the Court affirmed an award of $25,000 for injuries suffered by an eight-year-old boy in an accident caused by a policeman who was driving a vehicle with defective brakes.[35] *Miami v. Bethel,*[36] decided this year, involved the beating of a suspect alleged to have been engaged in a dice game. The Supreme Court divided four to three. The majority asserted that any action of a policeman, even the beating of citizens, is governmental and immune from liability. Justices Hobson, Terrell, and Roberts indicated their dissatisfaction with this decision. Clearly the immunity of a municipality even for such ultra vires acts of its police is undesirable, not only for the reason that most policemen would be judgment-proof when the amount involved is substantial but also because of the important civil rights involved.[37]

Firemen. Although American courts generally hold fire fighting, like police action, to be a governmental function, the Florida Supreme Court has led the way in establishing responsibility in this field. In *Kaufman v. Tallahassee*[38] the Court held the city liable for injuries

[34]Brown v. Town of Eustis, 92 Fla. 931, 110 So. 873 (1926), followed in Gerschwiller v. Winter Haven, 95 Fla. 427, 115 So. 846 (1928); Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938) (false imprisonment and assault and battery by chief of police); Phair v. Byder, 155 Fla. 677, 21 So.2d 208 (1945); Bradley v. Jacksonville, 156 Fla. 493, 23 So.2d 626 (1945).

[35]Avon Park v. Giddens, 158 Fla. 130, 27 So.2d 825 (1946). This was more or less in line with the Court's unstated denial of immunity in cases involving motor vehicles. In a number of states the legislature has imposed general liability upon municipalities for operation of their motor vehicles. New York, Ohio, and California have among the most comprehensive statutes on the subject.

[36]65 So.2d 34 (Fla. 1953). Remarkably, the majority opinion, Justice Hobson's concurrence on completely opposite grounds, p. 35, and the dissent of Justice Terrell (concurred in by Chief Justice Roberts), p. 38, all learnedly discuss the extent to which a policeman's beating of a suspect until he puts an eye out may or may not be a governmental function, without considering the decisive question of whether a municipality should be responsible for ultra vires acts of its police. Obviously assault and battery are neither governmental nor corporate but are unlawful, unauthorized, and ultra vires.

[37]For a discussion of dangers inherent in a right without a substantial remedy see the dissenting opinion of Justice Murphy in Wolf v. Colorado, 338 U.S. 25, 48 (1949).

[38]84 Fla. 634, 94 So. 697 (1922), *aff'd sub nom.* Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150 (1924).

to a pedestrian hit by a negligently operated fire truck. Finding no remedy in the existing law of tort, the Court handled the matter as an abatement of nuisance.[39]

In a later case[40] the Court allowed recovery to a woman injured by the stream of water from a fire hydrant handled in a negligent manner by the fire department while in the process of fighting a fire.[41] Still later the Court held the City of Miami liable when a negligently driven fire truck injured a motorcycle rider.[42] Here, however, the Court relied on the *Easton* doctrine that a motor vehicle constitutes a dangerous instrument for which the city may be liable even in the exercise of governmental functions.[43]

Thus, over a period of three decades the Court has consistently held municipalities liable for accidents caused by negligent actions of firemen by applying various rationalizations — failure to abate a nuisance, negligence in keeping streets safe, operation of a dangerous instrumentality — which evade rather than overrule the governmental-corporate test.

Penal Functions. Another thorny area in governmental functions involves the care and maintenance of prisoners. At first the Court expressed the general rule as denying liability[44] but escaped the application of its rule of nonliability by holding a city liable for the death of a prisoner caused by the negligence of his keeper while the prisoner was working on city streets. The Court reasoned that the maintenance of streets, even by convicts, is a corporate function. In

[39]Apparently upon the reasoning that the speeding fire truck, whether governmental or corporate, constituted a nuisance which the city had a duty to abate. This ruling was followed in Maxwell v. Miami, 87 Fla. 107, 100 So. 147 (1924) (car hit by fire truck). The Court pointed out that "municipalities are given police powers to conserve, not to impair, private rights," *id.* at 114, 100 So. at 149.

[40]Swindal v. Jacksonville, 119 Fla. 338, 161 So. 383 (1935).

[41]Brown, J., dissented at p. 341, 161 So. at 385: "The maintenance of nuisance doctrine, upon which most of our previous decisions on this subject appear to be founded, should not be unduly expanded as applied to the strictly governmental operations of a municipality."

[42]Barth v. Miami, 143 Fla. 692, 197 So. 498 (1940), affirmed denial of liability, but the Court recalled the case and reversed both the lower court decision and the former holding, 146 Fla. 542, 1 So.2d 574 (1941). Chief Justice Brown and Justice Thomas dissented on the ground that the *Easton* rule should not be made retroactive, *id.* at 552, 1 So.2d at 578.

[43]For a discussion of the dangerous instrumentality doctrine see Note, 5 U. OF FLA. L. REV. 412 (1952).

[44]Ballard v. Tampa, 124 Fla. 457, 168 So. 654 (1936).

a later case, in which the prisoner, a minor, became infected with venereal disease, the Court allowed recovery on the ground that a statute required the city to segregate diseased prisoners.[45]

Recently the whole problem of the status of prisoners and the responsibility of the municipality for them has come to the fore. A widow sued for damages for the death of her husband in a fire which destroyed the city jail. The Supreme Court, three justices dissenting, delivered a per curiam order denying liability on the ground that the incarceration of prisoners is a governmental function.[46]

Traffic Signals. The old notion of governmental immunity persists, occasionally in an unanticipated setting. In 1943, in a 4-3 decision, the Court denied that a municipality was liable to plaintiffs injured when a traffic signal light failed to function for a period of between 24 and 48 hours.[47] Apparently it is proprietary to maintain streets and sidewalks, governmental to maintain traffic lights!

Corporate Functions

On the bright side are the number of cases the Court has construed as arising from corporate acts of municipalities. These holdings generally permit injured persons to recover in accordance with the usual tort practices developed for the satisfaction of claims between private parties and corporations.

[45]Lewis v. Miami, 127 Fla. 426, 173 So. 150 (1937).

[46]Williams v. Green Cove Springs, 65 So.2d 56 (Fla. 1953). Solely on the authority of this case the Court has denied liability of a city to a minor taken into custody while bleeding and unconscious but not provided with medical aid at the time of arrest, Britt v. Ocala, 65 So.2d 753 (Fla. 1953). Thus it appears that damages may be obtained when a prisoner contracts a communicable disease because of the negligence of municipal authorities but not when he suffers injury or dies, unless he was engaged in a corporate function as in the *Ballard* case, *supra* note 44.

[47]Avey v. West Palm Beach, 152 Fla. 717, 12 So.2d 881 (1943). This 4-3 decision is difficult to reconcile with the Court's announcement only 3 months previously that "we must follow the line of reasoning which we have heretofore adopted with reference to such matters . . . ." Miami v. Oates, 152 Fla. 21, 24, 10 So.2d 721, 722 (1942). This reasoning was then stated as follows: " 'Generally the governmental or public duties of a municipality for which it can claim exemption from damages for tort have reference to some part or element of the state's sovereignty granted it to be exercised for the benefit of the public whether residing within or without the corporate limits of the city. All other duties are proprietary or corporate, and in the performance of them the city is liable for the negligence of its employees.' " *Id.* at 24, 10 So.2d at 723.

Streets and Sidewalks. As early as 1850 the Florida Supreme Court held the City of Tallahassee liable for damages when appellant's horse fell into a ditch in a street and died from the injuries.[48] Some early city charters granted immunity from liability as a result of defective streets and misfeasance or nonfeasance of officers. The Court, however, held that this immunity did not extend to obstructions placed in the street[49] and, after a long avoidance of the question of the constitutionality of immunity for defective conditions, has recently held such provisions invalid.[50] Other charters limited liability to cases of "gross negligence." Although the Court has defined varying degrees of negligence,[51] it has stated that, in order to prevent the construction from being unconstitutional as a violation of Section 4 of the Declaration of Rights, the term "gross" as applied to negligence must be interpreted as giving no added meaning.[52] Consequently, the basic liability of a city in connection with defects in streets and sidewalks continues.[53]

This liability is somewhat limited by a requirement, dating from an 1892 decision,[54] of notice of the defect or the passage of a reasonable time to allow for its discovery.[55] Moreover, even though a city may be liable to suit, each case must be further analyzed according to regular tort concepts; and instances arise in which the Court declares that the city owes no duty to the particular plaintiff, who as a result is not allowed to recover. Regarding streets, the Court has stated that, although the city owes a duty to the public to keep the streets reasonably safe, a municipality need not keep all of its streets safe for normal pedestrian use as distinct from normal vehicular traffic.[56] On the other hand, the Court has held that contributory negligence does not necessarily arise from the fact that a pedestrian crosses a street outside the painted crosswalk.[57] The fact that a

[48]Tallahassee v. Fortune, 3 Fla. 19 (1850).

[49]Bryan v. West Palm Beach, 75 Fla. 19, 77 So. 627 (1918).

[50]Woods v. Palatka, 63 So.2d 636 (Fla. 1953).

[51]Sebring v. Avant, 95 Fla. 960, 117 So. 383 (1928).

[52]Williams v. Jacksonville, 118 Fla. 671, 160 So. 15 (1935).

[53]Miami Beach v. Quinn, 149 Fla. 326, 5 So.2d 593 (1942).

[54]Orlando v. Heard, 29 Fla. 581, 11 So. 182 (1892).

[55]Notice requirements are considered in detail *infra.*

[56]Tallahassee v. Coles, 148 Fla. 606, 4 So.2d 874 (1941). A woman walking toward her car tripped in a rut and fell. In denying liability the Court again stated that cities are not insurers of those using the streets.

[57]Mullis v. Miami, 60 So.2d 174 (Fla. 1952); Brandt v. Dodd, 150 Fla. 635, 8 So.2d 471 (1942).

statute authorizes a city to require abutting owners to build and maintain sidewalks does not relieve the city of responsibility for their maintenance and liability in case of negligence.[58]

The Court has wisely refrained from attempting to set up exact standards as to the size of a defect which will constitute sufficient cause for action.[59] Each defect must be considered in the light of each incident. The Court, however, has indicated a number of conditions that may affect liability: darkness,[60] obscurity because of grass,[61] covering of ice and snow or slickness of light snow, or a loose flagstone.[62] The Court has pointed out that in the many miles of sidewalks of a modern city there may be numerous defects that can cause injury to the unwary walker but that are not of a character to make the municipality liable; otherwise the city would become an insurer. In other words, the city must be able reasonably to know of these defects.[63]

Oddly enough, the liability of cities for defects in sidewalks does not extend to depressions or obstructions in public parks, parkways, or the grass-covered area between a public sidewalk and the street.[64] In similar circumstances private corporations are liable.[65]

Although a city is not generally required to erect barriers along streets,[66] the Court held the City of Palm Beach liable for damages

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[58]Woods v. Palatka, 63 So.2d 636 (Fla. 1953); Key West v. Baldwin, 69 Fla. 136, 67 So. 808 (1915); Pensacola v. Jones, 58 Fla. 208, 50 So. 874 (1909).

[59]St. Petersburg v. Roach, 148 Fla. 316, 4 So.2d 367 (1941).

[60]Nestel v. Miami, 141 Fla. 896, 194 So. 248 (1940); Key West v. Baldwin, *supra* note 58.

[61]Clearwater v. Gautier, 119 Fla. 476, 161 So. 433 (1935).

[62]*See* St. Petersburg v. Roach, 148 Fla. 316, 318, 4 So.2d 367, 368 (1941).

[63]In the occasional cases in which a pedestrian on a city street is hit by a falling limb, coconut, or palm frond the city will seldom have had any visible notice and consequently is not liable. Probably the ultimate in strange municipal tort cases came recently when a man sued a city for damages and doctor's bills for a severe cold supposedly contracted while having to change a tire after driving over a break in the pavement.

[64]Kitchen v. Jacksonville, 158 Fla. 621, 29 So.2d 441 (1947); Miami Beach v. Quinn, 149 Fla. 326, 5 So.2d 593 (1942).

[65]Kitchen v. Jacksonville, *supra* note 64. See, *e.g.*, Gulf Refining Co. v. Gilmore, 112 Fla. 366, 152 So. 621 (1933), affirming liability of a filling station operator who left a brown cord on stakes around a grass plot between curb and sidewalk and a woman tripped over the cord in the dark.

[66]Brinson v. Mulberry, 104 Fla. 248, 139 So. 792 (1932). The Court pointed out, however, that ". . . wherever railings or barriers are necessary for the safety of travelers it is negligence not to construct and maintain them." *Id.* at 150, 139

for the death of a girl who fell over the edge of a precipice at the end of a street where the city had failed to erect a barrier.[67]

Bridges. The maintenance of city bridges is also a corporate function of a city.[68] The city is consequently liable for faulty repairs, even though it contracts with a third party for the work.[69]

Public Utilities. The Court has indicated that municipal water works and lighting and power plants are corporate enterprises.[70] The operation of an incinerator is also a corporate function;[71] and sewage disposal plants have been held to be legally equal to garbage incinerators.[72]

Other Municipal Functions. The city is likewise liable for damages for the faulty operation of drainage systems,[73] municipal hospitals,[74] municipal airports unless being used solely for governmental[75]

So. at 793. It must be shown, of course, that the alleged injury could have been avoided if precautions had been taken, Key West Elec. Co. v. Albury, 91 Fla. 695, 109 So. 223 (1926).

[67]Palm Beach v. Hovey, 115 Fla. 644, 155 So. 808 (1934). In the *Brinson* case, *supra* note 66, a barrier had been constructed but had rotted.

[68]Jacksonville v. Drew, 19 Fla. 106 (1882).

[69]The fact that a city contracts with a third party to repair a bridge does not relieve it of responsibility, Jacksonville v. Drew, *supra* note 68, nor does the fact that an experienced engineer drew plans and specifications for a bridge relieve the municipality of liability for damages when the bridge is negligently left in a dangerous condition, Panama City v. Eytchison, 134 Fla. 833, 184 So. 490 (1938).

[70]*See* Keggin v. Hillsborough County, 71 Fla. 356, 360, 71 So. 372, 373 (1916).

[71]Chardkoff Junk Co. v. Tampa, 102 Fla. 501, 135 So. 457 (1931).

[72]Lakeland v. State *ex rel.* Harris, 141 Fla. 795, 193 So. 826, *amended,* 143 Fla. 761, 197 So. 470 (1940).

[73]Bray v. Winter Garden, 40 So.2d 459 (Fla. 1949). The Sanitary Sewer Financing Act of 1951, FLA. STAT. §184.04 (1951), provides for a compensation fund for damages to public or private property when constructing sewage disposal systems. This coverage, however, does not extend to ordinary drainage or flood control systems.

[74]Miami v. Oates, 152 Fla. 21, 10 So.2d 721 (1942); *accord,* Suwannee County Hospital Corp. v. Golden, 56 So.2d 911 (Fla. 1952).

[75]Peavey v. Miami, 146 Fla. 629, 1 So.2d 614 (1941). In Brooks v. Patterson, 159 Fla. 263, 31 So.2d 472 (1947), the Court refused to grant an injunction against operation of the municipal airport in such a manner that planes invaded the airspace over adjacent land at an altitude of less than 500 feet, but added that the city was responsible for enforcing rules and regulations prohibiting planes taking off and landing from being at a height of less than 150 feet over any structure and 100 feet at the boundaries of the field.

purposes, municipal parks,[76] swimming pools,[77] and bathing beaches.[78]

Other Controlling Rules

Notice Requirements and Statute of Limitations

In addition to the uncertainties of the governmental-corporate rule, there are three special restrictions regulating tort actions against Florida municipalities: the common law rule requiring notice of the defect, various local charters requiring written notice of injury, and a statute of limitations established by the Legislature.

Notice of Defect. The Court has repeatedly stated that a city is not an insurer of the public and is responsible only for such defects as have been reported to the proper authorities or which have existed for a sufficient length of time to constitute notice. This doctrine is now well established;[79] however, the Court looks for a preponderance of evidence to establish constructive notice.[80] This notice requirement alerts the city to its standard of care and is not a problem altogether peculiar to municipal tort law.[81]

Notice of Injury. Many city charters require formal notice by the plaintiff within a thirty, sixty, or ninety-day period following the accident.[82] This has been justified on grounds of necessity to allow prompt examination of injuries received, to determine the condition

[76]Although the maintenance of parks is a corporate function, liability for accidents due to depressions in a city park is not the same as that on a city sidewalk or street. See p. 340 *supra.*

[77]Pickett v. Jacksonville, 155 Fla. 439, 20 So.2d 484 (1945).

[78]Ide v. St. Cloud, 150 Fla. 806, 8 So.2d 924 (1942). Mrs. Ide sued for damages after her husband and minor son drowned in an unmarked deep hole in a lake where the city had a bathing beach. The fact that the beach was located outside the city limits was held not to relieve the city of liability, since the legal responsibility rested on the use of the premises and not on title.

[79]Mullis v. Miami, 60 So.2d 174 (Fla. 1952); Jacksonville v. Foster, 41 So.2d 548 (Fla. 1949); Pensacola v. Herron, 112 Fla. 742, 150 So. 877 (1933).

[80]Pensacola v. Herron, 112 Fla. 742, 150 So. 877 (1933).

[81]The standard may be either the common law rules of negligence or those imposed by the legislature.

[82]Specific form of the notice varies from city to city. That of St. Petersburg may be taken as typical. Fla. Spec. Laws 1937, c. 18896, provides: ". . . no suit shall be instituted or maintained against the City of St. Petersburg, Florida, for damages arising out of any personal injury unless written notice of such claim or

of the defect at the time of the accident, to insure prompt investigation and procurement of witnesses, to allow the city time for preparation of defense, to limit claimant to recovery on injuries received because of a single defect, and to allow cities a period in which to attempt to settle claims out of court.[83] The Florida Supreme Court has consistently upheld these notice provisions, commencing with an opinion in 1906.[84] But in *Skinner v. City of Eustis*[85] the plaintiff failed to bring action for injuries sustained in a municipal skeet range within the six-months period provided by the city charter. The Court held the requirement unconstitutional as an attempt to regulate the practice of courts, other than municipal courts, in violation of Section 20, Article III, of the Florida Constitution, stating that "such special statutes of limitations should not be made available to municipalities."[86] The Court has indicated that such notice requirements are not applicable in cases of wrongful death.[87]

Although a charter that requires the plaintiff to file notice within a short period as a prerequisite to filing a tort claim tends to regulate the practice of courts to the same extent as a local statute of limitations of like period, the Court has recently upheld local notice requirements.[88] It has further interpreted them so strictly as to overrule its earlier holdings and to insist upon exact rather than substantial compliance with the requirement.[89] In a recent case, how-

injury is within sixty days from the date of receiving alleged injury, given to the City Manager of the City of St. Petersburg with specifications as to the time and place of said alleged injury."

[83]The overzealous manner with which some city attorneys attempt to use technical errors or omissions in the notice to escape liability may indicate the more important reason for their existence.

[84]High v. Jacksonville, 51 Fla. 207, 40 So. 1032 (1906). This decision upheld the 30-day notice requirement of the Jacksonville charter when a child died after touching a live wire.

[85]147 Fla. 22, 2 So.2d 116 (1941). The case actually involved a local statute of limitations.

[86]*Id.* at 28, 2 So.2d at 118. Whitfield and Adams, JJ., dissented at p. 29, 2 So.2d at 118.

[87]Marsh v. Miami, 119 Fla. 123, 160 So. 893 (1935). But see note 90 *infra.*

[88]Olivier v. St. Petersburg, 65 So.2d 71 (Fla. 1953); Miami Beach v. Alexander, 61 So.2d 917 (Fla. 1952); Miami Springs v. Lasseter, 60 So.2d 774 (Fla. 1952); Aspy v. Hollywood, 60 So.2d 726 (Fla. 1952). To avoid these requirements a plaintiff may find it possible to bring an action in contract rather than tort, Holbrook v. Sarasota, 58 So.2d 862 (Fla. 1952).

[89]In the *Olivier* case written notice of the name and address of the injured child and date and time of the accident was delivered to the proper official within

ever, an accident victim remained unconscious in the hospital for the entire period allowed for tort notice.[90] The Court conscientiously allowed the plaintiff to file an action but proudly stated this case to be "an exception, a very narrow one." Why these notice requirements, varying in length of period, changing from time to time, differing from place to place, and generally little publicized, should be interpreted with any more strictness than necessary to see that the municipality does acquire knowledge of the accident the Court has not seen fit to explain. As expected, in the recent decisions the justices have sharply divided.[91]

A uniform, state-wide thirty-day notice requirement, interpreted in terms of the old substantial compliance doctrine, would be a reasonable and valuable aid to determine a city's responsibilities in tort actions. The present confusion in regard to notice requirements, however, is made into confusion confounded by the contradictory decisions of the Court even as to the right of a municipality to waive such an ordinance. In 1934 the Court held that a charter provision of the Town of Mount Dora requiring that tort actions be brought within twelve months prescribed a mandatory limitation which the town must plead.[92] Then in 1939 the Court, after holding a sixty-day notice ordinance applicable only to personal injuries and not to actions for trespass, added that such a requirement "is at most but a limitation and its provisions may be waived in cases where they

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the proper period. The fact, however, that it specified only that the accident occurred because of a defect in the streets, without indicating the specific place, was held fatal. In the *Aspy* case the husband of the injured party went to the city manager's office 4 days after the accident and reported the necessary details. He was informed that a written report, with photographs and statements of witnesses, had been made and forwarded to the city attorney. The attorney received this detailed notice and made a further investigation, but when the case came up the city sought to escape responsibility because of technical noncompliance with the notice provisions. The Court affirmed immunity.

[90]Miami Beach v. Alexander, 61 So.2d 917 (Fla. 1952). In the *Olivier* case the injured party died but an exception was not made, although the Court had previously declared that cases involving wrongful death are not tort actions and not subject to charter provisions requiring notice. See p. 343 *supra*. As a matter of fact, the notice is almost never given by the injured party, whatever the nature of his injuries. Exceptions based on the reported condition of the injured would seem a poor substitute for the former rule of substantial compliance.

[91]The rationale of the *Aspy, Olivier,* and *Lasseter* cases, *supra* note 88, split the Court 4-3.

[92]Mount Dora v. Green, 117 Fla. 385, 158 So. 131 (1934).

are applicable."[93] Recently, however, the Court has stated that a notice requirement is in the same legal classification as the statute of limitations and cannot be waived by municipal authorities.[94]

Statute of Limitations. Partly as a result of the confusion resulting from the various local statutes of limitations as distinct from notice of injury provisions in city charters, the 1941 Legislature required all tort actions against municipalities to be filed within twelve months of the date of the accident.[95] This provision was attacked unsuccessfully in both federal and state courts.[96] Although there is no pressing need for a different period of time in which to allow tort actions against municipalities, the statute does not seem to have worked widespread hardship, as some of the local notice provisions have.

Consequential Damages

At common law municipalities are generally immune from liability for consequential damages that are the direct and necessary consequences of lawfully authorized acts. Such damages commonly arise in the grading of streets and construction of sewers. The Florida Supreme Court has indicated that in the grading and paving of streets cities are not liable for such "consequential damages,"[97] although they may well be liable for primary damage resulting from the negligent performance of the duty.[98] As previously noted, in connection

[93]State *ex rel.* Miami v. Knight, 138 Fla. 374, 378, 189 So. 425, 427 (1939).

[94]Miami Springs v. Lasseter, 60 So.2d 774 (Fla. 1952). Justice Roberts, in his dissent in Olivier v. St. Petersburg, 65 So.2d 71, 73 (Fla. 1953), points out that Skinner v. Eustis, 147 Fla. 22, 2 So.2d 116 (1941), held local charter statutes of limitation unconstitutional and that by analogy to uphold varying local charter requirements of notice "would result in a lack of uniformity in the practice in courts of justice intended to be preserved by Section 20 of Article 3 of our constitution, and that such provision is therefore violative of that organic command."

[95]Fla. Laws 1941, c. 20885, §§1, 2, FLA. STAT. §95.24 (1951).

[96]In Wilson & Co. v. Jacksonville, 170 F.2d 876 (5th Cir. 1948), the court of appeals upheld the 12-month statute of limitations for cities. The court held that, although actions against other persons and corporations could be brought within three years, this different rule for municipal corporations was not a special or local law and did not violate the 14th Amendment. The provision has since been upheld in Martineau v. Daytona Beach, 47 So.2d 538 (Fla. 1950), and Coleman v. St. Petersburg, 62 So.2d 409 (Fla. 1953).

[97]Bowden v. Jacksonville, 52 Fla. 216, 42 So. 394 (1906); Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906).

[98]Gonzalez v. Pensacola, 65 Fla. 241, 61 So. 503 (1913).

with construction of sewage drainage systems the Legislature has provided for a compensation fund to cover such damages.[99]

Although municipalities are thus not held liable at common law for necessary damages resulting from the construction or repair of public improvements, the Court has held that when private individuals have acquired a valuable interest in oyster beds the city may not dump sewage in such a manner as to damage that interest without just compensation.[100]

Other Tort Doctrines as Applied to Municipal Corporations

Sufficient Cause. The Court has had occasion to apply the rules relating to definition of "sufficient cause" to acts of municipal corporations. The justices have held that when two causes combine to produce an injury, one resulting from the negligence of the city and the other being unavoidable, the city is liable provided the accident would not have occurred but for the defect for which the city is responsible.[101] The "minor defect rule" as applied to surface defects of paving has already been discussed.[102]

Respondeat Superior. A city, though otherwise liable, may avail itself of the defense of the absence of respondeat superior. Thus the Court has held that city police are not agents or servants so as to make the city responsible for unlawful, negligent, or prohibited acts in discharge of their public duties.[103] In *Miami v. Oates*[104] the Court

[99]See note 73 *supra.*

[100]Gibson v. Tampa, 135 Fla. 637, 185 So. 309 (1938).

[101]Janes v. Tampa, 52 Fla. 292, 42 So. 729 (1907). This ruling was followed in DeFuniak Springs v. Perdue, 69 Fla. 326, 68 So. 234 (1915), in which the Court held that a municipality cannot avoid liability by claiming an injury to be due to an act of God when the negligence of the municipality was an efficient cause without which the injury would not have occurred.

[102]See p. 340 *supra* in regard to the impossibility of setting a definite minimum size for actionable defects.

[103]Brown v. Town of Eustis, 92 Fla. 931, 110 So. 873 (1926). See p. 336 *supra* regarding torts of policemen.

[104]152 Fla. 21, 10 So.2d 721 (1942). In the similar case of Suwannee County Hospital Corp. v. Golden, 56 So.2d 911 (Fla. 1952), the Court likewise held a county hospital to be a proprietary function which could not be immunized by statute from liability to paying patients. This case appears to be the first in which the Court has dropped the legal fiction that counties, as subdivisions of the state, partake of sovereign immunity. See Bragg v. Board of Public Instr'n, 160 Fla. 590, 36 So.2d 222 (1948) (immunity of boards of public instruction upheld); Keggin

upheld an award of $3,500 damages to a woman burned in a city hospital because of the negligence of an intern, stating that respondeat superior applies to an intern in a municipal hospital as much as to a regular employee.

Ultra Vires Acts. Another area in which the Court has consistently upheld the immunity of municipal corporations is that of ultra vires acts of municipal employees or agents. In *Orlando v. Pragg*[105] the Court reversed an award of damages, saying that although a municipality is liable for lawful acts done in an unauthorized manner it is not liable for unlawful acts. In 1944 the Court was presented with the problem of an appeal from a lower court award of $15,000 to a widow for the death of her husband in an accident while riding in the car of the fire chief of Palm Beach. The Court reversed the award because the accident occurred outside the city's corporate limits while the fire chief was on a fishing trip.[106]

Assumption of Risk. Assumption of risk is another affirmative defense that may be applied in municipal tort cases.[107] For example, the Court has interpreted the statute barring defense of assumption of risk in operation of automobiles for public use as not including the operation of a city garbage collection truck.[108]

Contributory Negligence. In *Jacksonville v. Bell*[109] the Court held

v. Hillsborough County, 71 Fla. 356, 71 So. 372 (1916) (county immune from consequences of faulty bridge). The Legislature has required county boards of public instruction to carry liability insurance against injury to children being transported to or from school and has waived immunity to the extent of such insurance, FLA. STAT. §234.03 (1951); see note 2 *supra.*

[105]31 Fla. 111, 12 So. 368 (1893). This doctrine was followed in Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938), and Scott v. Tampa, 62 Fla. 275, 55 So. 983 (1911).

[106]Palm Beach v. Vlahos, 153 Fla. 781, 15 So.2d 839 (1944).

[107]In Payne v. Clearwater, 155 Fla. 9, 19 So.2d 406 (1944), the Court denied damages when plaintiff fell from a slippery diving board on a municipal pier. The Court pointed out that "one who participates in the diversion afforded by an amusement device accepts the dangers that inhere in it so far as they are obvious and necessary." *Id.* at 13, 19 So.2d at 407.

[108]Smoak v. Tampa, 123 Fla. 716, 167 So. 528 (1936). Municipal employees are now covered by the Workmen's Compensation Act, FLA. STAT. §440.02 (1951). "Employment" under the terms of the act does not extend, however, to such voluntary positions as that of a caddie on a city golf course who offers his services through no solicitation of the city, Miami v. Fulp, 60 So.2d 18 (1952).

[109]93 Fla. 936, 112 So. 885 (1927).

that a concrete "safety island" in the streets is not a nuisance and that a driver who is aware of the obstruction and still hits it is guilty of contributory negligence. Contributory negligence as a defense has been applied in cases involving pedestrians,[110] airplane pilots,[111] and automobile drivers.[112]

Pleading of Negligence. The Court has long indicated that "general averments of negligence in a declaration without specifying the particular act complained of will be sufficient";[113] but in cases involving defects in city streets or sidewalks a general allegation is insufficient if it fails to state that the city has been notified of the defect.[114]

Damages in Tort Actions

In tort actions the Court generally follows the theory that the purpose of damages is to recompense the injured person rather than to punish.[115] In *Waller v. First Savings & Trust Co.,* however, the Court indicated that punitive damages will lie against cities as against individuals in especially aggravated cases.[116] The peculiar situation then arises that in one case the Court will deny damages altogether on an ancient theory of governmental immunity and in another uphold not only a compensatory award but even puntitive damages.

If personal damages are allowable, they may be measured by loss of time, expense, pain and suffering, and permanent disability based

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[110]St. Petersburg v. Roach, 148 Fla. 316, 4 So.2d 367 (1941).

[111]Peavey v. Miami, 146 Fla. 629, 1 So.2d 614 (1941).

[112]Miami v. Saunders, 151 Fla. 699, 10 So.2d 326 (1942); Jacksonville v. Bell, 93 Fla. 936, 112 So. 885 (1927).

[113]Brinson v. Mulberry, 104 Fla. 248, 139 So. 792 (1932).

[114]Daytona v. Edson, 46 Fla. 463, 34 So. 954 (1903). This requirement arises from the doctrine of notice expounded in Orlando v. Heard, 29 Fla. 581, 11 So. 182 (1892). The declaration, however, need not allege the existence of a "persistent habit and habitual custom" of negligence on the part of the municipality, Miami v. McCorkle, 145 Fla. 109, 199 So. 575 (1940).

[115]Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780 (1931).

[116]In Miami v. McCorkle, *supra* note 114, the Court considered whether a municipality might be held liable for punitive damages when a minor was injured by a negligently driven fire truck. The Court regarded the $5,000 verdict as "meager for compensatory damages" but indicated that in such circumstances "the municipality will be held to the same degree of liability as would an individual committing the same wrong and injury." *Id.* at 113, 199 So. at 577.

on mortality tables.[117] The measure of loss is capacity to earn rather than actual earnings at the time of the accident.[118] A new trial will not be granted because of excessive damages unless the amount is such as to shock the judicial conscience or indicate passion or prejudice of the jury.[119]

In regard to actions involving property damage the Court has been called upon to consider several rather unusual cases.[120] When the City of Lakeland dumped its sewage into a canal, a local property owner brought suit. The Court held the city liable not only for actual damage to the property but also for the plaintiff's loss in the use and enjoyment of the property.[121] At that point the Court drew the line: the plaintiff's further contention that he should receive additional damages for loss of employment because of malaria contracted from mosquitoes alleged to have bred in the sewage was thrown out as too speculative.

Alternatives to Tort Action against Municipalities

In some cases an individual may obtain relief or bring suit under more favorable conditions by relying on an alternative form of action rather than suit against the city for damages in tort. The courts, for example, have held that even the unconstitutional refusal by municipal authorities to grant a building permit does not constitute cause for a tort action.[122] Here a writ of mandamus would bring relief, although it would not recompense the individual for possible delays.

Occasionally a passenger on a city bus[123] or a patient in a city

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[117]Key West v. Baldwin, 69 Fla. 136, 67 So. 808 (1915).

[118]Mullis v. Miami, 60 So.2d 174 (Fla. 1952).

[119]Jacksonville v. Vaughn, 92 Fla. 339, 110 So. 529 (1926). Although each of the cases reaching the Florida Supreme Court generally involves thousands of dollars, these are hardly typical of the average claim or judgment. Most detailed studies which have been made indicate that the great majority of cases involve surprisingly small amounts; see authorities cited in note 134 *infra*. A comprehensive survey in Virginia revealed that prior to suit the median claim is $150 and the median settlement $32.50; after suit the median claim is $3,250, the median settlement $135, and the median judgment $50, Warp, Municipal Tort Liability in Virginia (1941).

[120]*E.g.*, Gonzalez v. Pensacola, 65 Fla. 241, 61 So. 503 (1913).

[121]Lakeland v. Douglass, 143 Fla. 771, 197 So. 467 (1940).

[122]Akin v. Miami, 65 So.2d 54 (Fla. 1953).

[123]Doyle v. Coral Gables, 159 Fla. 802, 33 So.2d 41 (1947).

hospital[124] is injured in an accident. In such cases the Court permits suit for breach of an implied contract, and this type of action is beyond the scope of local notice requirements applying to tort claims.[125]

Individuals may, of course, allege that a city is maintaining a nuisance and obtain relief through injunction.[126] In connection with suits alleging municipal maintenance of a nuisance it is settled in Florida that a city cannot plead poverty or inability to remove a nuisance deleterious to the public health.[127]

When neither tort law nor other legal remedies will lie against a municipality an aggrieved party may bring a civil or criminal action against the municipal employee or agent alleged to have been responsible for the tortious act. Although such civil damage suits may sometimes result in a judgment, the very limited financial responsibility of most municipal employees makes this a rather speculative remedy.[128]

When neither the municipality nor its individual employees can be held liable in a court of law, the injured party may appeal to the appropriate local governing body for special compensation. This is, naturally, a rather uncommon procedure. But when a city desires to accept liability but is prevented from doing so under existing law,[129]

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[124]Goff v. Fort Lauderdale, 65 So.2d 1 (Fla. 1953).

[125]*Ibid.*; Doyle v. Coral Gables, *supra* note 123.

[126]It should be pointed out, however, that the Court has consistently held that the lawful use of property that causes inconvenience does not constitute a nuisance per se. In Brooks v. Patterson, 159 Fla. 263, 31 So.2d 472 (1947), the Court refused to enjoin the City of St. Petersburg from permitting airplanes approaching the municipal airport to fly at less than 500 feet above property of plaintiffs. See note 75 *supra*. The Court added that "the individual, although harrassed, annoyed and subjected to inconvenience, cannot stand in the way of progress but must yield to the summum bonum — the greatest good for the greatest number." *Id.* at 267, 31 So.2d at 474. More recently, in State *ex rel.* Knight v. Miami, 53 So.2d 636 (Fla. 1951), the Court refused to declare a garbage disposal plant a nuisance when it was shown that the plant had been in use in its present location for 28 years and complainants acquired their property with knowledge of its existence.

[127]State *ex rel.* Harris v. Lakeland, 141 Fla. 795, 193 So. 826 (1940).

[128]Frequently those groups most likely to suffer such damages — members of minority groups or in the very low income brackets — are least able to initiate such actions. The immunity of the city may also place an extreme burden on the city employee who is honestly trying to do what he assumes is required of him.

[129]This can happen, *e.g.*, in a case where the city officials find circumstances making waiver of the charter requirement of notice desirable. See notes 93 and 94 *supra*. The North Carolina Supreme Court has even held that a city could not waive the defense of governmental immunity, Stephenson v. Raleigh, 232 N.C. 42, 59 S.E.2d 195 (1950).

or when the city is clearly morally obligated,[130] such a special dispensation does not seem unreasonable.[131]

Conclusions and Recommendations

The preceding review reveals the unsatisfactory nature of the existing law.[132] The reported cases, of course, only indicate a small portion of the problems that arise. It is impossible to say how many additional citizens are injured and yet for one reason or another fail to file a claim, do not litigate the claim if it is refused, or fail to appeal an adverse decision.

A detailed study of the administration of municipal tort liability would require information that is only partially obtainable at the present time. The necessary minimum facts would include the following:

(1) Description of the claimants — pedestrians, motor-vehicle users, property owners, males or females, adults or minors, whites or Negroes.
(2) Analysis of the claims — amount of damages asked, claims rejected, settlements made without litigation, judgments awarded.
(3) Source of payment of damages by municipality — general funds, self-insurance, commercial liability insurance.
(4) Legal reasons assigned for rejection of claims not settled — inadequate notice of injury, minor-defect rule, governmental function, contributory negligence, and so forth.
(5) Breakdown of tortious acts — condition of sidewalks, operation of motor vehicles (fire trucks, police cars, garbage trucks),

[130]Consider the problem of an innocent bystander wounded by a policeman's stray bullet during an attempted bank robbery or jail break.

[131]This is, of course, the former procedure for handling most claims against the federal and state governments. A growing sense of public responsibility for public actions and the weight of the hundreds of such bills introduced in Congress finally resulted in the Federal Tort Claims Act of 1946. Over half the states now have made some sort of provision for settling at least certain classes of claims, either through a waiver of sovereign immunity, as in New York since 1929, or by establishing a special court of claims with appropriate jurisdiction.

[132]One authority has summarized the problem of municipal immunity as follows: "The principles which control the disposition of liability cases are difficult to ascertain and more difficult to apply, and, above all, they give rise to results of a questionable character from the standpoint of reasonable standards of justice and sound public policy." Schulz, American City Government 97 (1949).

drainage and sewage, recreational facilities, public utilities, municipal transit service, and perhaps others.[133]

Despite the plethora of legal commentaries on municipal immunity in tort, there has been remarkably little study of the actual administration of municipal tort claims.[134]

The authors undertook a study to poll the 28 incorporated cities in Florida that had a population of over 10,000 as of the 1950 census. Unfortunately the results did not prove to be of substantial value. Twenty-two of these communities had inadequate records or failed for other reasons to answer the questionnaires. Of the remaining six, Gainesville had only two claims over a six-year period, neither of which went to trial, and St. Augustine had only one claim, which was filed too late for consideration.

Three cities, Sarasota, Bradenton, and West Palm Beach, filed returns that showed a fairly similar pattern; the results from these three communities, for the period 1946-1951, are summarized in the following table:

Number of Claimants	90	Reasons Assigned for Rejected Claims	
Claims Settled	57	Inadequate Notice	2
Claims Rejected	33	Inadequate Proof of Negligence	2
Total Damages Sought (data incomplete)	$604,665.28	Minor Defect Rule	3
		Municipality not Involved	4
Total Settlements	$25,422.68	Settlement with Co-tort-feasor	1
Description of Claimants		Unknown or Unrecorded	21
Pedestrians	53	Type of Legal Representation	
Motor Vehicle Users	32	By Attorneys	34
Property Owners	5	By Claimants or Representatives	56

The City of Tampa returned comprehensive figures for a 6-year period and indicated that injured persons had filed 206 claims. Of

[133]This analysis is merely suggestive and not conclusive. Any convenient equivalent study would be acceptable if it presented the flow of events: who is doing what to whom for what purposes with what results. See generally Laswell and McDougal, *Legal Education and Public Policy,* 62 YALE L.J. 203 (1943). In essence, of course, this entire study is concerned with what Lasswell describes as the value of "safety," or, as is sometimes used with somewhat wider connotations, "well-being." For a brief description see LASSWELL, THE WORLD REVOLUTION OF OUR TIME 5, 6 (1951), THE ANALYSIS OF POLITICAL BEHAVIOUR 51, 52 (1949).

[134]Before World War II the Social Science Research Council sponsored a number of such studies, and the results of several of these were published: DAVID AND FELDMEIER, THE ADMINISTRATION OF PUBLIC TORT LIABILITY IN LOS ANGELES, 1934-1938 (1939); FULLER, TORT LIABILITY OF MUNICIPALITIES IN MASSACHUSETTS (1941); Warp, *The Law and Administration of Municipal Tort Liability,* 28 VA. L. REV. 360

these, 42 were rejected, 164 settled without litigation. In no case was a judgment awarded. The types of alleged tortious acts did not differ substantially from those acts alleged in the three smaller communities.

General conclusions cannot be drawn on the basis of returns from only four cities, but it does seem clear that the scope of municipal immunity is already so narrow that abolition of the governmental-corporate rule would hardly place any great financial strain on the cities.

The appellate cases, however, indicate that the doctrine of municipal immunity was not in the common law as adopted in Florida; that the governmental-corporate rule has been not only stretched and twisted beyond meaning but actually breached; and that municipal immunity may violate the constitutional rights of Florida citizens as guaranteed by Section 4 of the Declaration of Rights. The existing body of decisions, far from presenting the pattern of a fabric with warp and woof, suggests rather a patchwork quilt of inconsistencies.[135]

Whatever the social injustices promoted by the current policy of partial immunity, the financial effects of an alternative policy of complete municipal responsibility must be considered.[136]

Ultimate solution of the tangle of municipal tort liability calls for legislative action. The gathering of statistics, holding of hearings, and outlining of broad social policy are not activities normally associated with the judicial function.

The fact that some such reform of tort law as applied to municipalities is now long overdue should not deter the Florida Supreme

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(1942). Unpublished studies were also made by Paul A. H. Shultz, Asst. Corporation Counsel, Chicago; Gus Levy, Director of Personnel, Austin, Texas; and Mark E. Gallagher, Jr., City Solicitor, Medford, Mass.

[135]To a considerable extent the existing confusion in tort law as applied to municipalities in Florida may be assigned to the very creditable desire of the Florida Supreme Court to evade the stultifying results of the long-outmoded governmental-corporate rule. Over a period of decades, however, the various rationalizations used in "pruning" the area of municipal immunity have multiplied in number without ever getting at the heart of the problem — the strange concept of governmental irresponsibility.

[136]There is, *e.g.*, the problem of the small communities for whom one very large award may constitute a real financial crisis. The solution, however, lies not in granting any special immunity but in providing some means whereby the risk can be spread. A state-wide insurance fund for all municipalities below a certain size is one alternative. Some Florida cities are already carrying private insurance against damage suits. For a recent summary of the insurance problem see Clay, *Insurance by Cities against Tort Claims*, NIMLO MUN. L. REV. 404-421 (1953).

Court from a continued re-examination of the governmental-corporate rule. This distinction, which "originated chiefly in a combination of misguided logic and misapplied precedent,"[137] is discredited in theory and unwarranted in fact. It would be most heartening if the Court permanently eliminated this enigma from the law.

TABLE OF HEADINGS AND SUBHEADINGS

[137]See Fleischmann, *Dishonesty of Sovereignties*, 33 REP. N.Y. BAR ASS'N 229, 250 (1910).