

1895

Liability of Municipal Corporations for Negligence

Benjamin Levy
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses



Part of the [Corporation and Enterprise Law Commons](#)

Recommended Citation

Levy, Benjamin, "Liability of Municipal Corporations for Negligence" (1895). *Historical Theses and Dissertations Collection*. Paper 39.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE.

---000---

THESIS PRESENTED BY

BENJAMIN LEVY

FOR THE DEGREE OF BACHELOR OF LAWS.

-----0000000-----

CORNELL UNIVERSITY

SCHOOL OF LAW

1895.

CONTENTS.

--0000--

page

PREFACE..... I

CHAPTER I.

MUNICIPAL CORPORATION DEFINED..... 1

Section 1. City, Village and Town..... 1

Section 2. Quasi Corporations..... 2

Section 3. Liability..... 3

CHAPTER II.

GROUPS OF LIABILITY.

Section 1. Theory of Liability..... 5

Section 2. General Rule..... 6

Section 3. Limiting Liability..... 6

Section 4. Licenses!..... 8

Section 5. Negligence..... 9

CHAPTER III.

WHEN NOT LIABLE.

Section 1. No General Rule..... 11

Section 2. Public and Private Duties..... 11

Section 3. Quasi Duties and Liabilities..... 12

Section 4. Quasi Officers..... 13

Section 5. Contractors..... 15

Section 6.	Licenses.....	page 17
------------	---------------	------------

CHAPTER IV.

DISCRETIONARY POWERS.

Section 1.	What is a Discretionary Power.....	19
Section 2.	Ordinances.....	20
Section 3.	Plans and method.....	21
Section 4.	Ultra Vires Acts.....	22
Section 5.	Limiting Liability.....	24

CHAPTER V.

MINISTERIAL DUTIES.

Section 1.	Distinguished from Discretionary Duties....	26
Section 2.	As Property Owner.....	26

CHAPTER VI.

SEWERS.

Section 1.	Liability.....	28
Section 2.	Degree of Care.....	29

CHAPTER VII.

SURFACE WATERS.

Section 1.	Natural Streams.....	31
Section 2.	Surface Drainage.....	31

CHAPTER VIII.

HIGHWAYS AND SIDEWALKS.

	page
Section 1. Rules of Liability.....	33
Section 2. Sidewalks.....	34
Section 3. Ice and Snow.....	35

PREFACE.

---000---

My subject "Municipal Negligence" though a subdivision of the law of municipal corporations is still too broad to do justice to any phase of it in a production of this character. I have only been able to discuss the general principles of negligence; and merely touch upon certain concrete phases which are most common, but nothing like comprehensiveness has been attempted.

The sources from which I have obtained my material is appended. The works on Public Corporations are limited to Beach, Tiedeman and Dillon. From Judge Dillon's admirable work I have received most aid.

B. L.

CHAPTER I.

MUNICIPAL CORPORATION DEFINED.

---000---

All individuals and corporate liability arises either from the common law or by virtue of statutes. (1) In considering the subject of municipal liability these sources must be kept clear and distinct. "When applied" Judge Dillon, says, "not alone is this distinction established but as practically applied it has tended to promote justice and to secure individual rights".(2) Public corporations are divided into Municipal corporations proper and quasi corporations. A Municipal corporation is defined by Dillon as "A body politic and corporate constituted by the incorporation of the inhabitants of a city, town or village for the purpose of local government." (3) It is corporate chiefly to regulate the internal or local affairs of the city or town, not for the public but local convenience and in this sense not an agent of the state.(4)

Sec. 1. City, Village and Town. Here we must distinguish between the vernacular and territorial or technical meaning of town and village. Some text writers and courts

(1) Pollock on Torts. page 23.

(2) Dillon on Municipal Corporations 765.

(3) Morawetz on Corporations 5.

(4) Hamilton County v Nighels, 7 Ohio St. 10

have used these terms in but one sense, while the term is relative depending upon the territory wherein it is applied.(1) In the New England states towns are not territorial divisions, but unincorporated settlements,- good examples of pure democracy. Their powers and liabilities are limited and for all purposes quasi corporations.(2) In New York towns are political divisions of the county. In Delaware, Maryland, New Jersey and other states the term town is used indiscriminately with village.(3)

Sec. 2. Quasi Corporations. A quasi corporation may be defined as a branch of the state, possessing some corporate faculties and attributes only granted to aid in performing public duty. (4) Such are the school districts, counties, towns in New York, overseers of the poor and the New England towns.(5) Some quasi corporations are made municipal corporations by statute and are liable to the same extent as, the District of Columbia. In New York by the Laws of 1892 all quasi corporations are made municipal corporations for the purpose of suing and being sued. (6) Bearing these distinctions in mind we can pursue our discussion of municipal

(1) Am & Eng. Enc. of Law Vol. 15, 955.

(2) Dillon on Mun. Cor. 43-55.

(3) Enfield v Jordan, 119 U.S. 686; Hill v Boston, 122 Mass. 122

(4) Dillon on Mun. Cor. 823.

(5) Chap. 687 Laws 1892. N.Y.

liability.

Sec. 3. Liability. According to the lines of decisions, the quasi corporations (including the New England towns) are never liable to individuals for injuries received through its agents negligence, unless such liability is imposed upon it by statute. There are political divisions of the state and not subject to liability. (1) Thus a county is not liable for neglect to repair public roads, to keep in repair public buildings etc. There is no reason why this distinction should be made between the liability of a city and a county, and an agent of the Common Council and an agent of Board of Supervisors. A county has certain local privileges and advantages as well as cities, In lieu of these privileges given by the state they should be held to strict integrity and diligence as a consideration for such grant, this will in no way interfere with the immunities of state agencies, but such distinction is well established in most courts. (2)

In New York actions to recover damages resulting from injuries caused by defects in the public highway in the counties and towns are of comparatively modern origin. As

(1) Dillon on Mun. Cor. 965.

(2) Cleveland v King, 132 U.S. 205.

late as the case of *Garlinghuse v Jacobs*, 29 N.Y. 297 decided in 1864, it was held that the commissioners of the town nor the town itself was responsible for defects in the highway. But in 1870, the Court of Appeals receded from its position and decided in favor of such actions.⁽¹⁾ The Legislature in 1881, came to the aid of the courts and by a special statute (Laws 1881, Chap. 700) towns were made liable for damages to person and property sustained by defects in the public highway. By the Act of 1892 before referred to, the town is for all purposes of suing and being sued a municipal corporation. A town is thus liable *eo instanti* for negligence of its commissioners, but he is liable to the town on the judgment rendered against the town. This liability is approaching that of the municipal corporation, as Judge O'Brien in 142 N.Y. 515 said, "While in theory the town is not liable except in cases where the commissioner was or would be liable himself yet it cannot be doubted that the practical working of the statute has been to enable parties in some cases to recover verdicts against the town where none would have been rendered against the commissioner personally on the same facts."

(1) *Hover v Barkoff*, 44 N.Y. 113.

(2) *Robinson v Fowler*, 30 Supp. 25; *Albrecht v Queens County* 84 Hun 401; *People v Pople*, 81 Hun 383; *Dorn v Oyster Bay*, 84 Hun 510; *People v Slater* 31 Supp. 752.

CHAPTER II.

GROUNDS OF LIABILITY.

---000---

Sec. 1. Theory of Liability. A municipal corporation proper is liable for its negligence as a private corporation. This liability does not rest upon statute, but implied from the duty or duties imposed upon it by its charter. (1) "The grant of a corporate franchise to a municipal corporation", says Judge Coely, "is usually made only at the request of the citizens to be incorporated and it is justly assumed that it confers what is to them a valuable privilege. This privilege is a consideration for the duties which the charter imposes, larger powers are given than are confided to towns or counties, special authority is conferred to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes permissible elsewhere." In this respect these corporations are looked upon as occupying the same position as private corporations which have accepted valuable franchises. To bind the city or village it must be clothed with sufficient power by its charter to that end and its responsibility may

(1) Dill on Mun. Cor. 930

be limited by its creation for its existence is statutory and based upon an agreement between the sovereign power of the state and the corporation by which the former confers valuable franchises and powers and the latter becomes bound to certain corresponding duties.(1)

Sec. 2. General Rule. Upon the theory of undertaking duties and assuming the powers of a private corporation before alluded to, a municipal corporation is liable for its (1) misfeasance, positively injurious to individuals done by municipal agents in the course of their employment or performance of corporate duties,(2) for its non-feasance or omission to perform an absolute ministerial duty; (3) or for the proper performance of its corporate and local duty express or implied.(2) With the last two liabilities only will we deal.

Sec. 3. Limiting liability. The sources of such liability being the charter and thus statutory it may be limited by charter or statute and it would also follow that its liability may be enlarged. This is the case in many cities of New York State. Some cities exempt themselves from lia-

(1) Cain v Syracuse, 29 Hun 605.

Meat v Broekport, 16 N. Y. 161.

(2) Morrill on City Neg.61

Thompson on Negligence 732.

bility as Brooklyn for its negligence, but the remedy if any, is only available against the officers individually. Although this act was held constitutional the latter cases held, "Unless the duty has been plainly devolved upon some officers of the city against whom a remedy can be had the remedy must be against the city!"(1) Binghamton's charter is the same as Brooklyn's charter on this point and the latter cases are followed, also the charter of Ogdensburg. The charter can define the negligence and limit the negligence of municipal corporations, it can require presentment of claims before suit and within a time limited.(2) A city cannot relieve itself from liability for its negligence in the care of streets by imposing the same duty upon the owners of the adjacent lots. The abutting owners are not primarily answerable for care of the highways.(3)

A charter provision requiring lot owners to keep their sidewalks in repair does not raise the presumption that the lot owners have done their duty so as to free the city.(4) Service of notice by the city to make repairs does not relieve for resulting injuries. But in all cases of such

(1) Fitzpatrick v Sloeum, 89 N.Y. 358.

Fitzgerald v Binghamton, 40 Hun 322.

(2) Van Vraake v Schenectady, 31 Hun 516.

Gray v Brooklyn, 50 Barb. 365.

(3) Niven v Rochester, 76 N.Y. 619.

liability the ultimate liability is upon the author or the maintainer of the nuisance and a suit lies against him. If defendant fail to keep his hatch door in proper repair and safe condition he is liable to a person injured, and it being the duty of the city to keep its streets and sidewalks in repair it could also be held liable. The parties are analogous to joint tort feasons and an action lies against either or both.(3)

A city charter may require all legal remedies to be brought against the owner of the land causing the defect in the first instant, (but such act is strictly construed.(1) A city is not held to the highest degree of care, of insuring the safety of the streets, so it may happen that while a suit does not lie against the city for its breach of duty, it may against the individual, and a suit unsatisfied against one is not a bar to a suit against the other.(2) The municipality and the property owner are not in *pari delicto* or joint tort feasons to bar indemnity or an action over.(4)

See. 41 Licenses. In case the obstruction was caused under a license, the right of recovery over depends upon the

(1) Raymond v Sheboygen, 70 Wis. 318.

(2) Severn v Eddy, 53 Ill. 189.

(3) Livingstone v Bishop, 1 Johnson R. 290.
Chitty Pleading 86-87.

(4) Lowell v Boston R.R. 23 Pick. 24.

licensee's contract, express or implied, to perform the act permitted in such a manner as to protect the public from danger and the city from an action against it.(1) But a wrongdoer causing an unsafe street without contract or license is liable to recover over upon the principle that he is a guarantor of the safety of the street. Notice of suit brought and opportunity to defend, to the person causing the injury by the corporation intending to hold him. If the owner had express notice of such pendency and could have defended, he has been held to be concluded as to the existence of the defect as to the corporation and as to the damages it occasions.(2) But the courts hold such judgment after notice only prima facie evidence of the validity of the claim thereby established.(3) The omission to give notice does not go to the right of the action, but simply changes the burden of proof.(4)

Sec. 5. Negligence. A municipal corporation is not an insurer against every accident upon its streets, nor is every defect actionable. But here as in personal liability the municipality must be under a duty and for the negligent

(1) Port Jervis v Bahk, 96 N.Y. 550.

(2) Troy v R.R. 47 N.Y. 475.

(3) Bridgeport v Wilson, 34 N.Y. 275.

(4) Aberdeen v Black, 6 Hill 324.

exercise of that duty it is liable (1) and whether that is done or not is a practical question of fact to be determined on trial in each case.. So also it is essential to liability that the plaintiff should have used reasonable or ordinary care to avoid the accident as negligence on his part would prevent recovery.

Reasonable care is always the test, and whether the streets or public property was in safe condition is a question for the jury.(2) In constructing sewers, drains, grading roads etc. , a municipal corporation is bound to exercise that care and prudence, which a discrete and cautious person would use if the loss or risk were his own.(3) The degree of care and foresight which it is necessary to use must always be in proportion to the nature and magnitude of the injury that will be likely to result, the care in a city being greater than that required in a village.

(1) Dillon, 939.

(2) Huston v N.Y. 9 N.Y. 163.

Evans v Utica, 69 N.Y. 166.

Todd v Troy, 61 N.Y. 506.

(3) Rochester Co. v Rochester, 3 N.Y. 463.

CHAPTER III.

WHEN NOT LIABLE

---000---

Sec. 1. No General Rule. Where the duty is imposed by statute, the liability must be within the purpose and intent of the statute.(1) But in the absence of statutory liability as we have seen, the municipal corporation is liable only in certain adjudicated circumstances. What these are is difficult to determine, Mr. Justice Foote has said, "all that can be done with safety is, determine each case as it arises!" (2) We will first consider when a municipal corporation is not liable for its negligence.

Sec. 2. Public and Private Duties. A municipal corporation is not liable for omission or commission of any act occurring while in the performance of a political duty laid by the state for the public benefit as distinct from local or corporate advantages.(3) The power here is intrusted to it as one of the political divisions of the state and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power

(1) Loyd v N.Y. 5 N.Y. 369.

Radeliff v Mayor, 4 N.Y. 195.

(2) Dillon, 966. Hill v Boston, 122 Mass. 344.

(3) Loyd v N.Y. supra.

for the benefit of all its citizens, the corporation is not liable for non-user nor for misuser by the public agents.(1)

"The corporation of the city of New York possesses two kinds of power, one of governmental and public and to the extent they are held and exercised is clothed with sovereignty; the other, private and to the extent they are held and exercised is a legal individual. In the former the corporation cannot be held, in the latter the duty is clearly ministerial and falls under private powers." (2) But where the liability is fixed by statute the rule cannot apply, a statute may give an action against the state or any of its administrative agencies. In the New England towns no such distinction is necessary, all departments of state being public and for the common benefit, no action lies, in absence of statute against them.(3)

Sec. 3. Quasi Duties and Liabilities. It is in this connection that the courts distinguish between quasi and municipal corporations.. Quasi corporations, mere political divisions of the state having powers and duties common to the public are not liable to individuals in the absence of statute, for the breach of such duties.(4) When the municipal cor-

(1) Radcliff v Mayor, 4 N.Y. 195.

(2) Maximillan v Mayor, 62 N.Y. 164.

(3) Mower v Leicester, 9 Mass.247.

(4) Ency. of Law Vol. 14. page 1143.

Lorillard v Monroe, 11 N.Y. 392.

poration exercises such functions as a political duty to the public, or through officers appointed by the state, they are not liable for such negligence in performing their obligations. "There is a diversity of opinion" says J. Dillon, "as to when duties are corporate and when the officers, though appointed by the corporation are to be regarded as the officers of the municipality and not of the state or public generally."⁽¹⁾

Sec. 4. Quasi Officers. Not every officer of a municipal corporation, though appointed and removed by it, is its agent within respondeat superior, nor officers elected directly by the people or appointed by the legislature, even if the city is obliged to pay their salaries.⁽²⁾ If the officer or his subordinate is appointed to perform a public duty, and not one undertaken by the municipality, whether appointed by the state or city, then he is a public or quasi and not a municipal officer. Such officer cannot be regarded as an agent of the city for whose negligence or want of skill it can be held liable.⁽³⁾

In order to clothe an officer as a municipal servant, he must be engaged in a local, private duty, appointed by and

(1) Dillon, 966.

(2) Shearman and Redfield on Negligence, 292.

(3) Baily v N.Y. 3 Hill 531.

Fisher v Boston, 104 Mass. 87.

paid by the municipality in such capacity and have control and power to remove him. It is only in these capacities that the city is liable for negligence of its agents and their acts. Only when it is within their scope of official duties and as before stated, a private and not a public function. The rule respondeat superior must be applied within the bounds of municipal as distinguished from quasi corporate function.

Police officers and police departments of a city are not its agents, so as to render the corporation responsible for neglect of duties to individuals, unless expressly provided by statute.(1) Neither is a city liable for negligence of its firemen and fire department appointed and paid by it; their duties are for the public and not for the corporate interests.(2) The same principle applies to city boards, of public charity; of hospitals; of health; of poor.(3) Or any distinct city board provided by state legislature as, Board of Revision,(assessment) water commissioners, department of public instruction or public works in the City of New

(1) Meritto v Baltimore, 9 Md. 160; Phila. v Galverston, 71 Pa. St. 140; Kunz v Trot, 36 Hun 615.

(2) O'Mora v Mayor, 1 Daly 425; Smith v Rochester, 26 N.Y. 513; Dillon, 976.

(3) Maximilian v Mayor, 62 N.Y. 160; Conrad v Ithaca, 16 N.Y. 150

York.(1)

But the city is liable for the negligence of engineers, boards of health, park commissioners, executive boards, water boards etc., when it has the appointment and supervision, and when the duty is for the local or direct benefit of the corporation and not ultra vires.(2) This liability is based upon the right which the employer has to elect his servants, to direct and control them, and to discharge them if not competent.(3)

Sec. 5. Contractors. The principle of respondeat superior as a rule extend to cases of independent contractors, where the principal has no control in the manner and method of performing the contract. But this rule is modified in its application to municipal contracts. A municipal corporation cannot in any guise throw off its imposed duties by contracting work on its streets, and this is true although the contractor is independent, for all other purposes. It is immaterial as respects primary liability whether it has or has not inserted such a disavowal of liability in its contract.(4)

(1) Russel v New York, 2 Denio 461; Ehrogot v N.Y. 96 N.Y.264

(2) Morrill, 96.; Toomy v N.Y. 12 Hun 297.

(3) Kelly v N.Y. 11 N.Y. 432.

(4) Storrs v Utive 17 N.Y. 104; Harrington v Lansingburgh, 110 N.Y. 145; Brusso v Buffalo, 40 N.Y. 679.

The New York cases beginning with Blake v Ferris, 5 N.Y. 48 decided in 1837, followed by Pack v Mayor 8 N.Y.522 that where the city officers superintend the work, it does not necessarily make the city liable if the contractor is otherwise independent. In Storrs v Utica, 17 N.Y. 104, followed in many courts, the doctrine is, that where the accident was the result of the work itself in the actual performance of the very work contracted for the corporation still remains liable. As stated by J. Dillon "respondeat superior does apply where the contract directly requires the performance of a work intrinsically dangerous however skilfully performed. In such a case the party authorizing the work (city) is justly regarded as the author of the mischief resulting from it whether he does the work himself or lets it out by contract.

Where the obstruction or defect is purely collateral to the work contracted to be done and is entirely the wrongful act of the contractor or his workmen, the rule is that the city is not liable." But where the injury results directly from the acts which the contractor agrees and is authorized to do the city is equally liable.(1) Where the work is of itself a nuisance or is necessarily dangerous the corporation is bound not only to require the contractor to take every

(1) Robins v Chicago 4 Wall. 679.;

Mc Caffrty v The Laften Co. 61 N.Y.178

reasonable and proper precaution to prevent any mischief ensuing, but to see that such precautions are taken by the contractor. Excavations contracted to be finished,- it was held that the city was liable for injury to the plaintiff because the excavations were needlessly and negligently suffered to be in the street for an unreasonable length of time, and for that, responsibility attached to the city.(1)

Sec. 6. Licensees. Consent of a municipality in pursuance of its authority to a citizen to excavate or obstruct a public street does not make it responsible for the wrongful or negligent manner in which the licensee and his employees do the work. (2) The licensee is amenable to individuals who may have suffered from their negligence or by reason of misuser of the license.(3) If the grant of license in excess of the corporate and injury resulted from it the corporation will not be protected,(4) but not where the grant is in good faith and a mere misconstruction of its powers. The licensees of a municipal corporation permitted to exercise any independent trade or business for their own profit are not the agents of the corporation, so as to make it impliedly

(1) Shearman & Redfield, 293.

(2) Fogel v N. Y. 92 N.Y. 19.

(3) Port Jervis v Bank, 98 N.Y. 55; Shearman & Redfield, 263.

(4) People v Brooklyn, 65 N.Y. 349; Barton v Syracuse, 36 N.Y. 54.

liable on the principle of respondeat superior.(1)

These rules are subject to the general liability of the city, to keep its streets in safe and proper condition and the corporation is thus held for injuries caused by obstructions or excavations created by their licenses. In all grants of privilege to interfere with the duty owed to the public, it is nevertheless bound to exercise a supervision of the work so as to prevent consequent injuries,(2) or a private individual to lay pipes from the main to their houses the city must provide all means to prevent consequential injuries.

Speaking generally a city is not liable for the acts of persons acting with license, except after due notice to charge the city, under general liability to keep streets in safe condition for travel.(3)

(1) Dillon, 953.

(2) Shearman & Redfield, 353; Storrs v Utica, 17 N.Y. 104.

(3) Huston v N. Y. 5 Sandford 234; Campbell v Stillwater, 31 Alb. Law Journal 119; Griffin v N.Y. 9 N.Y. 456.

CHAPTER IV.

DISCRETIONARY POWERS.

---eoo---

Sec. 1. What is a Discretionary Power. A municipal corporation is not impliedly liable in an action for damages either for the non-exercise of, the motive or manner in which, in good faith it exercises its legislative or judicial power.(1) In the negligent or non-exercise of such discretion they are not liable.(2) It is not liable for its failure to provide for the removal of a nuisance,(3) or to exercise its power to supply water and apparatus for extinguishing fires,(4) or for injuries to supply suitable drains and sewers or any drain or sewer at all.

Where the duty alleged to have been violated is purely a judicial one, no action lies in any case for misconduct, however gross in the performance of them. Although the officer acts corruptly and answerable criminally, he may not be liable civilly! A city has power to open streets and for doing so, is not liable even if it discommodes a property owner.(5)

The need of drains, sewers, culverts, walls, paving, grading

(1) Dillon, 949; Rochester Co. v Rochester 52 N.Y. 437.

(2) Cain v Syracuse, 95 N.Y. 91.; Dillon, 957,977.

(3) Carr v Northern Liberties, 78 Am. Dec. 344.

(4) Smith v Rochester, 76 N.Y. 503.

etc. is a discretionary power of the legislature of the city and no action can be sustained, for the manner of plan or (time) time of continuing it.(1)

But Judge Taylor says (2) "these duties so mingle as not to be easily distinguished from each other. Ministerial duties must not be violated with impunity although imposed upon a judicial officer. Thus a power may be given to build sewers whether they shall be constructed, and what places, and to what extent, is discretionary with local legislation, while the duty if the work is undertaken, of proper care and afterwards, of necessary repair becomes an absolute duty."(3)

Sec. 2. Ordinances. Failure to enforce ordinances or by-laws without notice--- A city is not impliedly bound to secure a perfect execution and regulation of its by-laws and it is not such negligence as to render the city liable for the manner in which, the ordinances are executed, any more than the state would be liable for any imperfection in carrying out its administrative duties. An injury resulting from the want of regulations or ordinances; or from an unreasonable or negligent application of existing remedies, can have no re-

(1) Mills v Brooklyn, 52 N.Y. 495.

(2) Cain v Syracuse, 95 N.Y. 91.

(3) Wilson v Mayor, 1 Denio 395; Mills v Brooklyn, supra.

dress from the city. "The contrary doctrine" says Judge Denio, "would oblige its treasurer to make good to every citizen any loss which they might sustain for want of adequate laws."(1)

Thus it was held that failure to pass or execute certain police ordinances; to prohibit swine from running at large; or to establish street grades; to maintain a required number of men in certain departments; or to take required bonds from auctioneers, will not render the corporation amenable to an action.(2) Though not actionable, these cases may bind the corporation by continuous disregard of the needs of the city and after notice.(3)

Sec. 3. Plans and Method. For a mistake, defect or error in the plans of constructing or repairing drains, sewers, roads etc. the corporation is not responsible.(4) But the exercise of a judicial or a discretionary power by a municipal corporation which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continued, and is remedial by prudential measures renders the corporation liable for such

(1) Levy v N.Y. 1 Sands. 465. Forcyth v Atlanta, 12 Am. R. 576.

(2) Thompson on Negligence, 732 note 2; Hun v N.Y. 47 N.Y. 639.

(3) Mc Ginty v N.Y. 5 Duer 657.

(4) Johnson v D. of C. 118 U.S. 21; Miller v Brooklyn, 32 N.Y. 489

damages as occur in consequence of such continuance of the original cause after notice and an omission to adopt such remedial measures as experience has shown to be necessary and proper.(1)

This distinction is firmly established in the New York courts.(2) Thompson says, "The distinction is repugnant to justice and destitute of solid foundation in reason.(3) This rule would guard public infringements of private property." It practically prohibits taking private property for public use. As private corporations, cannot work an injury to the citizens without compensation any more than individuals, so public corporations cannot.(4)

Sec. 4. Ultra Vires Acts. A corporation is not liable for acts of persons, color officio, acting beyond their authority. So where an injury results from an act wholly beyond the powers conferred upon a municipal corporation; the latter cannot be held responsible in damages for the doing of it. We have previously stated that a city is only liable for imposed, express or necessarily implied duties, and not those which are ultra vires.(5)

(1) Wood's Law of Nuisance, 752. Siefert v Brooklyn, 101 N.Y. 142

(2) Lynch v Mayor, 76 N.Y. 60; Watson v Kingston, 43 Hun 367.

(3) Lansing v Farlan, 37 Mich. 152;

(4) Nevins v Peoria, 41 Ill. 502.

(5) Thompson on Negligence 737; Dillon, 968-969.
Cuyler v Rochester, 12 Wendell 165.

Such want of power must be presumed to be known to all concerned, for this is the purpose of limiting the charter powers.(1) The acts of the agents may be ultra vires and void and no liability attaches to the principal.(2) The corporation is not estopped to set up the nullity of its agent's proceedings, the officer himself may remain liable.(3) The general rule is unquestionably settled but the application is best met by the circumstances in each case. Some courts are seemingly in conflict but they may be reconciled by the differences in their charters and the extent of their implied powers.(4)

But an exception exists in pleading ultra vires in keeping the streets in safe condition. It originated with the New York Court of Appeals and is followed in many other courts. To apply the ultra vires defense to keeping streets in safe condition would make all sorts of nuisances tolerable.(5) This superior duty to its streets, checks the possible immunity from all legal obstructions.(6)

(1) *Schumacher v St Louis*, 3 Mo. App. 299; *Pekin v Newell*, 26 Ill. 220

(2) *Boon v Utica* 2 Barb. 103.

(3) *Moag v Vanderberg*, 6 Ind. 511; *Smith v Rochester*, 76 N.Y. 506

(4) *Stanley v Davenport*, 54 Iowa 463.

(5) *Mayor v Cunliff*, 2 N.Y. 165; *Cohen v Mayor*, 113 N.Y. 532.

(6) *Boon v Utica*, supra.

Sec. 5. Limiting Liability. As the city derives its existence and power by virtue of its charter, can the city limit its liability for negligence therein? As to the former there can be no question, but can the city contract away all its liability? The corporation can place any reasonable restriction upon its citizens as a condition precedent to an action, as to bring action within certain time, notice to be filed, or other formality, may be imposed. But these are strictly construed and may not apply to actions ex delicto.

A serious question arose under the Brooklyn charter which read, "The city of Brooklyn shall not be liable in damages for any misfeasance or nonfeasance of the officers... ..but the remedy shall be against the officers personally if at all." (1) J. Barnard in *Gray v Brooklyn* (2) in deciding that this charter provision was constitutional, said "The city exists only by force of the law creating it, this law is subject by the constitution to alteration and repeal. I am unable to see why the same legislature may not create a city and limit its liability." But a remedy must be available against the city and if not against its officers. The primary duty to keep its streets in repair, rests upon the city and unless that duty is plainly devolved upon some officer or

(1) *Harrigan v Brooklyn*, 119 N.Y. 158. *Hunt v Oswego*, 107 N.Y. 629. Laws of 1873, Ch. 27.

(2) 50 Barb. 365.

officers of the city, against whom an action can be had, the remedy is against the city.(1) This and subsequent cases limit any shifting liability to such cases, where the duty is clearly thrown upon some officer or officers, But where the absolute duty rests ^{solely} upon the corporation, it can be primarily held under the strongest limitations, (2) a contrary conclusion would give municipal corporations a great stretch of power.

(1) Fitzpatrick v Slocum, 89 N.Y. 365.;

(2) Hardy v Brooklyn, 90 N.Y. 455.

Vincent v Brooklyn, 51 Hun 132, 516.

CHAPTER V.

MINISTERIAL DUTIES.

---000---

Sec. 1. Distinguished from Discretionary Duties. The imposed duties whether express or implied, when perfect duties, as distinguished from discretionary duties must be carried out with due care and diligence, and for negligence in such performance is liable to the injured individual.(1) The ministerial duties of municipal corporations are various. The classes which give rise to most litigation grow out of the exercise of the judicial and discretionary powers in a negligent manner, making public improvement, repairs etc.(2) in the improper management and control of its property they must not invade private property rights; and in the control of streets, bridges, walks, sewers etc.

Sec. 2. As property owner. A municipal corporation is in its private capacity, as the owner or lessee of lands, chattels etc. to be regarded in the same light and liable to the same extent for its negligence as individuals are.(3) It is not necessary to allege title in the city, for although it has legal title but not ordinary control and enjoyment as

(1) Thompson on Negligence, 731; Disbrow v Kingston, 102 N.Y. 219
Jenny v N.Y. 120 N.Y. 164.

(2) Thompson on Negligence, 733.

(3) Dillon, 985.

owners it will not be responsible.(1) Public highways are not to be considered private property of the city strictly, although diligent use and management is required;(2) sewers, water pipes, gas pipes and plant may be owned as private property by the city.(3)

A corporation owning and receiving revenue for a public building or part of it, although not liable for its use in a public capacity, is liable the same as a private landlord for an injury to one, by reason of its neglect to keep a competent janitor.(4) A farm supervised by a city, a market or water plant owned by a city are all subject to the same principle.(5) A city cannot maintain immigration sheds causing contagious to spread in the neighborhood; nor maintain a water reservoir which percolates through the neighboring land; nor neglect to keep its wharves, dikes, and piers in repair.(6)

(1) Terry v Mayor, 71 N.Y. 580.

(2) Robert v Sadler, 104 N.Y. 229.

(3) Detroit v Corey, 9 Mich. 165.

(4) Worden v New Bedford, 131 Mass.-

(5) Mayor v Cullen, 38 Ga. 346. Rowland v Kalamazoo, 49 Mich. 553

(6) Rading v Briggs, 37 N.Y. 256. Baily v N.Y. 3 Hill 531.

Mercy Dock Co. 11 H. of L. 715; Northern Co. v Chicago, 99 U.S. 635.

CHAPTER VI.

SEWERS.

---000---

Sec. 1. Liability. A municipal corporation is regarded as the owner of its sewers. It is liable to the persons connected with the main sewer for any neglect to keep the sewer in repair; or by so negligently constructing it as to become a trespasser on private property.(1) Although the city is not liable for omitting to build a sewer or drain, yet, having exercised its power the duty is not discretionary but becomes ministerial..

They are held liable,(1) where the agents or servants in constructing the sewer do the work negligently or unskillfully whereby unnecessary damages happen to adjacent walls, cellars etc,(2) where the sewer is so constructed or maintained as to constitute a nuisance,(3) where the direct result of the manner in which the sewer is constructed, is the flooding of a person's premises, it is thus liable for trespass to the freehold, (4) where in digging a sewer in a public street, a dangerous excavation is left open and unguarded, whereby a traveller without fault on his part is injured.(2)

(1) Shearman & Redfield, 287;

(2) Thompson on Negligence, 750.

In the latter case the liability may arise even if done by an independent contractor, when it had notice of the dangerous defect express or implied, so that the city could by reasonable diligence have repaired or averted the defect.(1)

Sec. 2. Degree of Care. The duty devolves upon the corporation to exercise a reasonable degree of care and watchfulness in ascertaining the condition of the sewers, from time to time, and prevent them from becoming delapidated or obstructed. The omission to make such an examination and to keep them clear is a neglect of duty which renders the city liable.(2) Where no negligence, either in plan or control is alleged, the plaintiff cannot recover where the damages are caused by a want of judgment, Not after extraordinary rains or the like from which the injury resulted.(3)

The plans, methods and location of sewers is a more difficult question. This is generally a legislative power—a question resting in the sound discretion of the City Council. The courts cannot review such decisions, thus a court of equity cannot compel a city to construct a new sewer, where the existing one is of insufficient capacity to carry off the

(1) Fort v Dewitt, 47 Ind. 397. Darlon v Brooklyn, 46 Barb. 604.

(2) Mc Carty v Syracuse, 46 N.Y. 194.

(3) Collins v Philadelphia, 13 Pa. St. 272. Smith v Mayor, 4 Hun 637. Barry v Lowell, 8 Allen 127.

sewage, (1) nor enjoin the construction of a sewer because of the inadequacy of the size.(2)

If a public sewer becomes incapable of discharging the volume of water for which it was designed, either by a change of surface drainage in consequence of the drainage of streets or by the natural growth of the city, the corporation will not be liable for damages by reason of not enlarging it.(3) But there are many leading cases, deciding that the skill and care, which is incumbent upon the city relates as well to the capacity of the sewer when built as to the mere mechanism in its construction; as well to its plans as to its execution.(4)

J. Cooley in *Detroit v Beckman*, limits such liability in defective plans to a direct invasion of private property. A municipal charter never could give authority to appropriate the freehold of a citizen without compensation, whether it be done by an actual taking of it for streets or by flooding it, so as to interfere with the owner's possession. The decision rebukes the general theory as "so vicious that it cannot possibly be omitted".(5) Another exception to the general rule is where the city is guilty of gross intrinsic negligence in the plans and specifications.(6)

(1) *Horton v Mayor*, 4 Lea. 39 (2) *Thompson*, 752.

(3) *Indianapolis v Huffer*, 30 Ind. 235; (4) *Mum v Pittsburg*, 40

Pa. St. 364.(5) *Wood on Nuisances*, 752; *Seifert b Brooklyn*, 101 N.Y. 342.

CHAPTER VII.

SURFACE WATERS.

---000---

Sec. 1. Natural Streams. Cities having the power to grade and repair their highways, must in such improvements for the public discommode the property of the adjacent owners. Such injuries usually from surface water, diverted by the grade onto the lower proprietors land is *damnum absque injuria*. It is well settled that a city cannot construct an insufficient bridge, culvert or any other obstruction to interfere with a natural stream. It must have the unobstructed and uncontaminated flow for the enjoyment of the contiguous property owners.(1)

Sec. 2. Surface Drainage. A city like an individual is not liable for consequential damages resulting from surface water in grading and improving public streets, although increased quantities is ^{thrown} increased thereon.(2) The city must provide for and dispose of, the surface water which falls upon its streets, and in the discharge of that duty neither the city or its agents can be proceeded against for damages sustained by an individual. We noted before that there is

(1) Gardner v Newburg, 2 Johnsons Ch. 162;

(2) Goodale v Tuttle, 29 N.Y. 459. Weis v Madison, 75 Ind. 241.

Radcliffe v Brooklyn, 4 N.Y. 195.

no liability on the part of the city for omission to construct drains, sewers or make improvements. This is discretionary and when undertaken good faith and diligence are required.(1)

Although the injured property owner has no remedy, generally, he can recover for negligence in the plans themselves in making improvement. In determining the size of culverts or the grade of highways, reasonable skill must be exercised or an action lies for damages to an injured individual, but New York seems to deny such liability.(2) So where the drainage is collected in a common channel and thrown upon or carried over the land of a private owner, the injured owner has a remedy. In grading a street, a city is liable if it turns a stream of water upon the grounds and into the cellar of one of its citizens. It can relieve itself by improvements, but, not by positively throwing the drainage upon private land.(3) Such consequential damages are not taking property for public use unless the constitution, as many constitutions do, include such taking in their eminent domain.(4) The New York constitutional provision is not broad enough to include such compensation.

(1) Siefert v Brooklyn, 101 N.Y. 361.

(2) Van Pelt v Davenport, 42 Iowa 308; Dillon, 1041.

(3) Rice v Evansville, 108 Ind. 12.

(4) Dillon, 990; Foot v Brunson, 4 Lansing 47.

CHAPTER VIII.

HIGHWAYS AND SIDEWALKS.

---000---

Sec. 1. Rules of Liability. Municipalities have general control of their streets whether the fee be in them, as owners or trustees or in the property owners. They must make the necessary repairs and improvements, by grading, draining, building sidewalks and crosswalks as the circumstances and growth of the city may require. The general rule is that the cities are liable for damages caused to travellers from defective and unsafe streets under their control. In repairing or constructing highways the corporation is required to use ordinary care and foresight, for a lack of which it is liable in damages to the party injured.(1) It is always the duty of the city to keep the streets free from obstructions and nuisances; sufficiently level and guarded by rails; or lights when necessary to enable safe and convenient travel.(2) Such protection extends upwards to awnings, signs and walks, as well as the ground and sidewalk.(3) Highways and sidewalks in a populous city must be kept clear and unobstructed in its full width; while in a town this may not be necessary.

(1) Hume v N.Y. 47 N.Y. 639. Dillon on Municipal Corpor. p.999

(2) Buffalo v Holloway, 7 N.Y. 493.

(3) Hubbel v Yonkers, 104 N.Y. 434.

to such an extent.

This liability arises from the common^{law} or ~~is~~ implied by the acceptance of the charter. But the English, Canadian and New England^{courts} do not apply such implied liability.(1) Some states as Wisconsin and Michigan, have statutes exempting their cities from their common law liability, no suit can be brought against such cities unless the liability is created by statute.(2) Those courts reason, that the city in controlling its streets does so in a governmental or public capacity, as a branch of the state, and should be exempt from civil litigation and only subject to penal punishment. This argument is approved by Judge Dillon, but the iron-clad precedents hinders such inclinations of the courts in other jurisdictions.

Sec. 2. Sidewalks. Sidewalks and street crossings are comprehended in the terms streets and highways.(3) The duty in respect to carriage ways, cross walks, sidewalks and bridges is to maintain them with reasonable safety for the travelling public.(4) Ice and snow must be cleared with due diligence; nuisances and obstructions must be removed, whether

(1) King v Broughton, 5 Bur. 210.

(2) Dillon on. Mun. Cor., 1000.

(3) Wilson v Watertown, 3 Hun 503.

(4) Hines v Lockport, 60 Barb. 378.

on the ground or overhead; railings must be attached when necessary and all other precaution which prudence requires to protect the travelling public.(1) A violation of a city ordinance is not negligence per se between the parties.

Sec. 3. Ice and Snow. The mere slipperiness of a sidewalk occasioned by ice or snow, not accumulated so as to constitute an abstruction is not ordinarily such a defect as will make the city liable for damages to one injured thereby. But where the snow and ice exists upon a street in such shape as to form an abstruction, being heaped up or having a rough surface the city is liable.(2) This distinction is held by many courts, but the New York courts have never made such a fallacious distinction. It matters not whether the ice is in ridges or smooth, the question is, does it form an obstruction. The municipal authorities are called upon to observe and see that the public streets are reasonably cleared of snow and ice in winter. In such cases the law only requires what is feasible and reasonable.

If from any artificial cause an existing nuisance, as spouting hydrants, adjacent leaders etc., the ice is primarily caused or the danger increased the city is always

(1) Moore v Gadsen, 87 N.Y. 34.

(2) Kinney v Troy, 108 N.Y. 567.

liable.(1) But the question of negligence in protecting streets is one for the jury. They must consider all the facts and circumstances and determine whether the city was negligent. The contributory negligence is always a good defense on the part of the city. In order to recover from the city the plaintiff must be free from any element in causing the injury complained of.

*Benjamin Levy.
Elmira, N.Y.*

(1) Todd v Troy, 61 N.Y. 506.
Landolt v Norwich, 37 Conn. 615.

BIBLIOGRAPHY.

---ooo---

- Dillon's Municipal Corporation, 4th Ed. 1890.
- Beach's Public Corporation, 1893.
- Murphy's Municipal Corporation, 1891 (Pa.)
- Peck's Municipal Corporation, 1892 (Ohio)
- Richard's Municipal Corporation, 1890 (Pa.)
- Tiedeman's Municipal Corporation, 1893.
- Morril's City Negligence.
- Ray's Imposed Duties, 1894.
- Shearman and Redfield on Negligence, Chapters 12-17.
- Thompson on Negligence, Vol. 2.
- Wood's Law of Nuisances, 2nd Ed.
- American and English Corporation Cases.
- American and English Ency. of Law, Vols. 15, 24, 16.
- Thompson's Commentaries on Corporation Law, 1895.