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GOVERNMENTAL RESPONSIBILITY FOR TORTS IN MINNESOTA*

By Orville C. Peterson†

I. BASIC COMMON LAW PRINCIPLES OF GOVERNMENTAL TORT LIABILITY

A. THE PROBLEM

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformably to the laws."1

A has a suit of clothes ruined without fault of his own when the driver of a municipal street sprinkler negligently douses him with water in the process of filling the tank of his sprinkler. Next day his friend B meets the same fate at the hands of the careless driver of a street flusher. A finds he can recover from the city for his damage; B has no such remedy.

B, driving carefully and obeying all the laws, is injured when his car is struck by a cruising municipal police car whose driver has just made a left turn without warning. A suffers the same misfortune through the negligence of the driver of a street maintenance truck. B learns that the city cannot be made to pay for his damage; A collects from the city without difficulty.

A, while walking into the office of the water department in the city hall to pay his monthly water bill, falls because of a defective step which the city had failed to repair. B, living in a small village which operates no utilities at all, has the same kind of an accident when he goes to the village hall to pay a license

*Views expressed in this study are the author’s and not those of the League of Minnesota Municipalities, with which he is associated.
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‡Minnesota Constitution, art. I. sec. 8.
fee. A may reasonably expect to recover from the city for the damage he suffered by his fall; B's damages go unrecompensed.

A's car is badly damaged through no fault of his own when he strikes a long-existent hole near the curb on the right hand side of a city street traversed by a trunk highway. B's car is similarly damaged but the defect that caused his accident is in the center of the street designated as a trunk highway. A gets a judgment against the city for the damage; B finds the city is not liable in his case and that he has no remedy against the state in the courts.

It is small wonder that the average layman, pondering the foregoing anomalies in the law, feels that the constitutional guarantee of a remedy for every wrong has gone unobserved in the four illustrative cases in which governments have been held immune from liability for the torts of their agents.2 At any rate, it would be difficult to convince him that there can be any rational basis for the distinctions made by the courts in the four sets of cases.

And with that conviction many lawyers will agree. The rational basis for the judicial distinction between governmental and proprietary functions,3 the general immunity of the state from suit,4 and a host of other problems of tort liability of the state

2This is not to suggest that the constitutional provision is violated in the eyes of the law by a holding that the state or its subdivisions are not liable for the torts of their agents in some cases. The Minnesota court has uniformly held that the constitutional provision does not create a liability where none existed before, but simply provides for redress in the courts for wrongs which are recognized as such in the law. In other words art. I, sec. 8 of the constitution creates no substantive rights. It is but declarative of the common law. See Allen v. Pioneer Press Co., (1889) 40 Minn. 117, 4 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532. See the annotation on the effect of such a constitutional provision on municipal tort liability, 57 A. L. R. 419.


and its subdivisions have increasingly engaged the attention of legal scholars. With a few exceptions, they have generally criticized the existing doctrines and have proposed statutory reforms.

In addition to a number of general surveys, the law of several states recently has received special study. This study embraces a similar survey of the law in Minnesota as it applies to all units of government.

B. The General Principles of Governmental Tort Liability

1. The Doctrine of Governmental Immunity and the Distinction between Governmental and Proprietary Functions

The doctrine that the state as the sovereign cannot be sued for its torts is so firmly imbedded in the law that the cases have

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5 For a more comprehensive list of articles, see (1934) 20 A. B. A. J. 747, 748.

6 See for example McCash, Ex Delicto Liability of Counties in Iowa, (1924) 10 Iowa L. B. 16.

7 See especially the exhaustive studies by Professor Borchard on governmental tort liability appearing in (1924) 34 Yale L. J. 1, 129, 229; (1926) 36 Yale L. J. 1, 757, 1039; (1928) 28 Col. L. Rev. 577, 734.


10 See Lane v. Minnesota State Agricultural Society, (1895) 62 Minn. 175, 64 N. W. 382; George v. University of Minnesota Athletic Ass'n, (1909) 107 Minn. 424, 120 N. W. 750; State by Benson v. Stanley, (1933) 188 Minn. 390, 247 N. W. 509; Westerson v. State, (1940) 207 Minn. 412, 291 N. W. 900.
generally taken it for granted without discussion.\textsuperscript{11} Yet the immunity of the state has never been extended fully to subordinate units of government; and common law exceptions to the rule of complete irresponsibility have been applied in Minnesota ever since the earliest decisions.\textsuperscript{12} Cities and villages\textsuperscript{18} are as immune from liability as the state for damages resulting from the negligence of their servants in carrying on "governmental" functions,\textsuperscript{14} but for torts committed in their "corporate" or "proprietary" capacity, they are just as liable as private corporations.\textsuperscript{15} Counties, towns, and school districts, treated in the law as quasi-corporations, generally have shared the state's immunity for their negligent torts;\textsuperscript{16} but recently the court has refused to extend this immunity to such a quasi-corporation engaging in a purely "proprietary" venture,\textsuperscript{17} and to that extent has broken down the distinction between quasi-corporations and true municipal corporations in the field of tort liability.

2. \textsc{The Distinction between Discretionary and Ministerial Acts}

In seeking to find a rational basis for determining the liability of local governments for their torts, the court in some cases has seized on another distinction—that between discretionary and ministerial acts. Governments are not liable for the torts of their agents when they are committed in the exercise of "discretionary" powers of a legislative or judicial nature, but they are liable for

\textsuperscript{11} The question has not been directly raised because the courts refuse to entertain jurisdiction over the state as a prospective defendant.


\textsuperscript{13} The one borough in the state, Belle Plaine, is, for purposes of tort liability, in exactly the same category as a village, and is included with villages in this study.

\textsuperscript{14} Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763.

\textsuperscript{15} Keever v. City of Mankato, (1910) 113 Minn. 55, 129 N. W. 158, 775.

\textsuperscript{16} Altnow v. Town of Sibley, (1883) 30 Minn. 186, 14 N. W. 877; Thompson v. County of Polk, (1888) 38 Minn. 130, 36 N. W. 267; Bank v. Brainerd School District, (1892) 49 Minn. 106, 51 N. W. 814. There are, however, exceptions to this rule. For example, for positive invasions of private property, both counties and towns are liable. Peters v. Town of Fergus Falls, (1886) 35 Minn. 549, 29 N. W. 586; Newman v. County of St. Louis, (1920) 145 Minn. 129, 176 N. W. 191. See infra, text at footnotes 685-764.

\textsuperscript{17} Storti v. Town of Fayal, (1935) 194 Minn. 628, 261 N. W. 463.
similar torts when purely "ministerial" duties are being performed.\(^8\)

Just what the distinction between the two types of acts is has never been clearly determined by the cases, as the court has pointed out.\(^9\) Its relation to the governmental-proprietary dichotomy is particularly obscure. Most of the cases in Minnesota in which the distinction between discretionary and ministerial acts has figured are explainable on the basis of a four-fold rather than a dual distinction, so that the conditions under which liability may or may not be present in the case of negligent torts might be charted as follows:

<table>
<thead>
<tr>
<th>Type of Function</th>
<th>Propositional</th>
<th>Streets</th>
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<tbody>
<tr>
<td><strong>Discretionary</strong></td>
<td>Not Liable</td>
<td>Not Liable</td>
</tr>
<tr>
<td><strong>Ministerial</strong></td>
<td>Not Liable</td>
<td>Liable</td>
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\(^{18}\)Lee v. City of Minneapolis, (1875) 22 Minn. 13; Kobs v. City of Minneapolis, (1875) 22 Minn. 159; Alden v. City of Minneapolis, (1877) 24 Minn. 254; Thompson v. County of Polk, (1888) 38 Minn. 130; Tate v. City of St. Paul, (1894) 56 Minn. 527; White, Negligence of Municipal Corporations, (1920) sec. 105.

\(^{19}\)Tate v. City of St. Paul, (1894) 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501. The distinction has been elaborated somewhat more fully in the decisions relating to the liability of public officers for their torts. Since the officer enjoys no special immunity in the sphere of his "governmental" activities, the distinction between discretionary and ministerial acts is more often decisive than in the case of their employers, but the distinction seems to be the same in both cases. The principle is explained in one fairly recent case as follows: "The liability of public officers ... attaches when a duty is ministerial, that is, when it is in obedience to mandate of legal authority and the act is to be performed in a prescribed manner, without exercise of the officers' judgment upon the propriety of the act, and failure to perform it is the proximate cause of the injury sustained. ... Where a public officer is charged with duties which call for the exercise of his judgment or discretion, as to its propriety or the manner in which it is to be performed, he is not liable to an individual for damages unless guilty of willful wrong." Stevens v. North States Motor, Inc., (1925) 161 Minn. 345, 348, 201 N. W. 135. The general rule imposing liability on public officers for negligence in ministerial actions but not in discretionary ones is well settled. Cases include Tholkes v. Decock, (1914) 125 Minn. 507, 147 N. W. 648; Bolland v. Gihlstorf, (1916) 134 Minn. 41, 158 N. W. 725; Nelson v. Backcock, (1933) 188 Minn. 584, 248 N. W. 49. The distinction is now recognized in determining whether mandamus will lie to compel the performance of a duty by a state executive officer, Cooke v. Iverson, (1909) 108 Minn. 388, 122 N. W. 251, although for a time mandamus was refused even where a ministerial duty was involved, State v. Braden, (1889) 40
Unfortunately, however, all the cases do not fit into so simple a pattern, and, at best, the diagram affords only a rough rule-of-thumb in determining liability in any particular instance. In some cases, the court seems to have used “discretionary” as if the term were synonymous with “governmental,” or the two concepts have been otherwise confused. On the whole, however, the few Minnesota cases in which the distinction between discretionary and ministerial acts has been an important factor in determining liability for governmental torts seem to bear out the correctness of the diagram on page 297 as a rough explanation of the general principles. In the case of governmental functions, the classification of discretionary and ministerial acts is academic and unimportant, since liability is precluded in all cases of negligence when it is established that a governmental function is involved. When the exercise of a proprietary function has occasioned the tortious injury, however, the distinction may be of some importance, since its application may result in immunity here if the tortious act is found to be discretionary in character. It has been crucial, however, almost only in situations involving defective plans for public works, where the court has frequently applied the rule, based on the distinction between discretionary and ministerial acts, that a municipal corporation is not liable for defects in a plan although it may be subject to liability for defects in the execution of the plan. But even here, as is pointed out later, the fact that a defect is in the plan itself is not always conclusive of immunity. What

Minn. 174, 41 N. W. 817. The liability of public officers, except as it indirectly affects governments, as where the latter underwrite judgments obtained against their officers, is beyond the scope of this study. See, however, Jennings, Tort Liability of Administrative Officers, (1937) 21 MINNESOTA LAW REVIEW 263; David, Tort Liability of Public Officers, (1939).

Thus in Claussen v. City of Luverne, (1908) 103 Minn. 491, 115 N. W. 643, where a municipal corporation was held not responsible for damages resulting from the unlawful revocation of a liquor license, the court stated that cities will not be held liable in damages for the manner in which they exercise in good faith their discretionary powers of a public or legislative or quasi-judicial character, a statement which seems to indicate that “discretionary” acts are the same as “governmental” ones or that exemption from liability for discretionary acts extends only to those which are performed in connection with governmental functions. And in Lamont v. Stavanaugh, (1915) 129 Minn. 321, 152 N. W. 720, involving an action resulting from an assault by a policeman known at the time of his appointment to be violent, the city was held not liable since it acted in its governmental and not in its proprietary capacity in appointing its officers. See also Simmer v. City of St. Paul, (1877) 23 Minn. 408, where the court spoke of the liability of the city for its negligence in the performance of “a corporate, ministerial duty, such as the duty of constructing sewers,” although the construction of sewers may involve both discretionary and ministerial acts as those terms are usually applied by the courts.

See infra, text at footnotes 638-646.
seems to have been done, although not articulately, has been to substitute a rule of reasonableness for the distinction between discretionary and ministerial acts; the municipality is subjected to liability when, and only when, its action is unreasonable.

And this, it is submitted, is as it should be. The difference between discretionary and ministerial action is largely one of degree. In a democratic government no action involves absolutely uncontrolled discretion, and none is so “ministerial” that some element of judgment is not involved. A court in applying the traditional distinction between discretionary and ministerial action simply draws a line at some intermediate point between the extremes marking the boundary between the two fields, holding everything that seems to be on one side to be “discretionary” and all on the other side to be “ministerial;” but this line of division fluctuates with the time and with different judges. What the court necessarily does is to inject into its opinions a test of reasonableness, which in general could be applied to the exclusion of its discretionary-ministerial distinction. To be sure, the latter test has merit to the extent that the formulation of certain decisions—for example, whether or not to pass an ordinance or to construct a sewer system—as distinct from acting upon and executing that determination is legislation. This is “hardly an operative fact imposing legal duties, and for the exertion of power in determining policies it would therefore be inappropriate to predicate tort liability.” This is, however, the only extent to which the distinction need be applied. Probably in practice this is all that it means in this state. Elsewhere the distinction has been qualified in some jurisdictions and wholly repudiated in others.

3. Other General Considerations in Determining Liability

a. Liability for Ultra Vires Acts

It is an established principle of agency law that, subject to certain exceptions, a principal is not responsible for the torts of his agent committed entirely outside the scope of the latter's authority. Since the doctrine of respondeat superior, under which


23This point is developed with reference to public officers in a scholarly article by Professor Jennings, Tort Liability of Administrative Officers, (1937) 21 Minnesota Law Review 263.


26Restatement of Agency, sec. 219. The subject is treated extensively in ch. 7 of the Restatement.
political subdivisions of the state are held accountable in tort for certain wrongful actions of their officers and employees, is but an application of the law of agency to public bodies, it is not surprising that there should have developed in municipal law a similar doctrine. The leading case in Minnesota is *Boye v. City of Albert Lea*, which involved an action for damages for flooding the plaintiff's land, the flooding being caused by defendant's dam across the Shell Rock River. The city demurred on the ground that the act of damming the river was ultra vires. According to its charter, the city had power "to regulate and control the flowage of the waters of Fountain Lake in said city" the lake being a part of the Shell Rock River. In holding that the complaint stated a cause of action, the court announced the following principle:

"Municipal corporations, in the execution of their corporate powers, fall within the rule of respondeat superior when the requisite elements of liability co-exist. To create such liability it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by the charter; in other words, it must not be ultra vires in the sense that it is not within the powers or authority of the corporation to act in reference to it under any circumstances. If the act complained of lies wholly outside of the general or special powers of the corporation as conferred by its charter, the corporation can, in no event, be liable for the acts of its officers, for a corporation cannot be impliedly liable to a greater extent than it could make itself liable by express corporate vote or action. But if the wrongful act be not, in this sense, ultra vires, but is within the scope of the powers of the municipality, and was so done in the execution of corporate powers of a ministerial nature, but in an improper and unlawful manner, as to injure others, it may be the foundation of an action in tort against the corporation."

Since the act of damming the waters of the river was found to be within the corporate powers of the city of Albert Lea, it followed that the demurrer should have been overruled.

The rule thus stated is well established in American jurisprudence and has its counterpart in the law of private corporations. It has been applied only a few times in Minnesota, but the few cases in which it has been important have been sufficient
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to illustrate the difficulty of determining when an act is primarily ultra vires and when it is only secondarily so. In *Sacks v. City of Minneapolis* the plaintiff sued for damages for trespass when the city, without his consent or knowledge, condemned for street purposes his burial lot in a Minneapolis cemetery in which five of his children were buried, removed their bodies and buried them in one grave in another part of the cemetery. The city had power by charter to condemn ground in cemeteries, but the charter provision required the consent of the owner. The court held the complaint was not demurrable; the condemnation proceedings were within the general scope of the city’s corporate powers, but as it did not obtain the consent of the lot owner, its acts were unauthorized and tortious. *Boye v. City of Albert Lea* was cited for the proposition that to be ultra vires in the sense that the act was not within the power or authority of the corporation, the city must not have had power to act in reference to the matter under any circumstances. Yet that rule, if applied, should have resulted in a different conclusion from that reached by the court in the earlier case of *Kreger v. Bismarck Township*, where the complaint alleged that supervisors of a town in attempting to drain and improve a highway dug ditches which resulted in collecting large quantities of surface water and discharging it on the plaintiff’s land. The complaint was held not to state a cause of action because it failed to allege or show that the acts complained of were performed by the supervisors within the scope of their authority. The ditches may have been dug on private property for all the complaint indicated; a town is without authority to do that except by following the procedure of the statutes. It appears therefore that there was authority to do the act complained of, but the power was irregularly exercised. Apparently under the rule established later in the *Boye Case*, this should have resulted in liability, but it did not.

*Peterson v. City of Jordan* involved an action for wrongful death alleged to have resulted from the city’s negligence in failing to provide lights and warning on approaches to a ferry which it operated over the Minnesota River outside its boundaries. The court examined the city’s charter and determined that the city was without authority to maintain the ferryboat at the time and place in question and therefore, owing no duty to the plaintiff’s intestate,

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31(1898) 75 Minn. 30, 77 N. W. 563.
32(1894) 59 Minn. 3, 60 N. W. 675.
33(1917) 135 Minn. 384, 160 N. W. 1026.
it could not be held liable in the wrongful death action. This seems inconsistent with the doctrine of Boye v. Albert Lea.

An early decision antedating the Boye Case represents another application of the general principle. It was held in Peters v. Town of Fergus Falls\(^3\) that if the drainage work which occasioned the action was done as a means of improving the town highway, it was within the general scope of powers of the town and of the authority of the supervisors to act in its behalf. If, on the other hand, it was merely for a private purpose—e.g. to drain private land—it would be without the general scope of such powers, and the supervisors and not the town would be liable.\(^5\)

One somewhat anomalous result of the ultra vires doctrine is that an injured individual may be worse off if the wrong committed is flagrant than if it is not. To put it specifically: if Minneapolis had had no authority under its charter to condemn cemetery property and dig up graves but the council had nevertheless ordered the action taken which was taken in Sacks v. City of Minneapolis,\(^3\) the city would not have been liable at all under the doctrine of Boye v. City of Albert Lea, although the employees who actually committed the tort proceeded on directions of the city council; on the other hand, if the city acted simply irregularly (as it actually did in the Sack Case) pursuant to charter power, the injured person would have the right to recover of the city. And in the Boye Case, if the city council had proceeded to build a dam without any authority whatever, the city would have been relieved from liability.

It may have been a recognition of this situation which prompted the court to introduce some modification into the doctrine in a series of cases which are difficult to reconcile with the others on any logical ground.\(^3\) In the earliest of these cases, Schussler v.

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\(^3\)\((1886)\) 35 Minn. 549, 29 N. W. 586.

\(^5\)\(Two\) fairly recent attorney general's opinions involved ultra vires torts. In Op. A. G. 1936, No. 61, the attorney general ruled that a city was not liable for damages resulting from the negligent operation of its snow plow in clearing a trunk highway within the city limits because a municipality is not liable for torts committed outside the scope of its power and authority. A previous attorney general had ruled that if the city undertook to keep clear of snow and ice the sidewalk on an interstate bridge which the highway department and not the city was under obligation to maintain, it would not be liable for the results of its negligence because it had no duty to keep the sidewalk clear, but it would be liable if the condition causing an injury was the result of an affirmative act on the part of the city. Op. A. G. 1932, No. 20. If the action of the city was ultra vires in the primary sense, as the 1936 opinion seemed to indicate, the distinction between nonfeasance and misfeasance which the earlier opinion made has no foundation in the Minnesota cases. If the action were ultra vires in the secondary sense, there would be liability, whether the tort was the result of mere neglect or positive action.
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Board of County Commissioners of Hennepin County, the county board, under authority of a special act of the legislature, had constructed a dam across the outlet of Lake Minnetonka at Minnehaha Creek to maintain the lake level. The plaintiff, who owned a grist mill below the dam, sued for damages. The defendant's county attorney conceded that the special law which gave the county its only authority to construct the dam was unconstitutional. In holding the county liable, the court said:

"We may concede the general rule to be that the defendant would not be responsible for the unauthorized and unlawful acts of its officers, done colore officii; but when the defendant itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing, it is liable in damages. . . . This is . . . not a mere act of negligence of the board of county commissioners in the performance of an official duty, but an active and affirmative tort, done under claim of statutory authority and duty, and justified upon such ground by defendant, and that it was performed within the scope of the board's official duty."

In Viebahn v. Board of County Commissioners of Crow Wing County an action was brought for damages to plaintiff's steamboat business caused by a bridge constructed over the Mississippi River in violation of an Act of Congress prohibiting such structures over navigable rivers. While the bridge was constructed without the express authority of the county, the county did not repudiate the action of its officers in building it. The court permitted the plaintiff to recover on the ground that the bridge was a public nuisance and the plaintiff suffered special damage enabling him to maintain the action. After pointing out that "it is elementary that a municipality is not liable for the torts of its officers committed outside the scope of their authority," the court followed the Schussler Case to the effect that a county, not having repudiated the ultra vires acts of its commissioners, is liable for resulting damages to the same extent as though originally authorized by it. The court said:

"The law is well settled that a municipal corporation, not being liable for the ultra vires acts of its officers cannot make itself liable by ratification, except where it had power in the first instance

38(1898) 75 Minn. 30, 77 N. W. 563.
39Schussler v. Board of Commissioners of Hennepin County, (1897) 67 Minn. 412, 70 N. W. 6, 39 L. R. A. 75, 64 Am. St. Rep. 424; Viebahn v. Board of County Commissioners of Crow Wing County, (1905) 96 Minn. 276, 104 N. W. 1089; Erickson v. County of Stearns, (1934) 190 Minn. 433, 252 N. W. 219.
38Decided the year before the leading case of Boye v. Albert Lea.
39(1905) 96 Minn. 276, 104 N. W. 1089.
or at the time of the ratification to authorize the acts. But in the [Schussler] Case . . . the court apparently applied the doctrine of ratification to the facts in that case, although it was clear that the county could not have authorized the facts there complained of. Without stopping to inquire whether that decision is in variance with the authorities, we adopt it as the law of this state in such cases."40

Erickson v. County of Stearns,41 the last of this series of somewhat similar cases, like the Schussler Case, involved a dam built to maintain lake levels. In the Erickson Case, the major portion of the lake dammed was in Todd County. The statute authorizing county boards to build dams and maintain uniform lake levels42 granted such power in the case of lakes in two or more counties only to the county in which the larger portion of the lake was located. Hence Stearns County was without power to construct the dam. After it had passed a resolution fixing the lake level and authorizing the sharing of the expense of the dam with the game and fish division of the state conservation department, the county board learned that the higher lake level inundated plaintiff's farm, so it had the dam cut down and eventually blown out. In the action against the county for damages, the defendant denied that it caused construction or that it maintained the dam. The lower court took the view, shared by the supreme court, that whatever the county board did in fixing the lake level and having the dam built was ultra vires in the primary sense, and the county might plead this fact in defense. The two earlier cases were distinguished, the Schussler Case because there the county board in its answer asserted its right to maintain the dam, and the Viebahn Case on the ground that there the court held that by its demurrer the county had placed itself in the same position. Here the county board had repudiated the agreement to share the cost and denied in its answer that it constructed and maintained the dam. The court held that in the absence of the doctrine of the Schussler and Viebahn Cases, the complaint would have been demurrable and therefore the defendant did not need to go further than it did in its answer.

Thus far the doctrine of these three cases has extended only to the fact situations there involved, all of which involved obstructions of navigable waters. It is difficult to say whether the  

40 (1905) 96 Minn. 276, 279, 104 N. W. 1089. Italics are not in the original.  
41 (1934) 190 Minn. 433, 252 N. W. 219.  
42 Mason's 1927 Minn. Stats., sec. 6588.
principle is of more general application. If it is, it means that the doctrine that municipalities are not liable for torts which are ultra vires in the primary sense has no significance when the tortious action is taken at the express direction of the legislative body of the municipality or is later ratified by it. There is, of course, no logical reason for limiting the principle to the tortious obstruction of watercourses by dams or bridges. Ratification or express authorization by the legislative authorities of the municipality should have no greater effect than in other cases of ultra vires action. Perhaps the doctrine should not be considered to be so limited. Furthermore, there seems to be no sound reason for applying it to cases of positive action and refusing to apply it to negligence in the performance of an ultra vires act—like the failure to maintain the ferry approaches in good condition in Peterson v. City of Jordan.\textsuperscript{43} If applied to all these cases, the principle of the Schussler Case results in virtual abrogation of the rule of Boye v. City of Albert Lea. The establishment of the principle in the Boye Case would have been unnecessary since the ultra vires action was officially taken by the city and never repudiated.

If the municipality is not liable for the ultra vires torts of its officers and employees, it is because they are acting as individuals and not as agents of the municipality. Consequently, the wrong is theirs and they are liable for any damages flowing from it.\textsuperscript{44} In Nelson v. Babcock\textsuperscript{45} the commissioner of highways was held liable for depositing rock on private land while building a trunk highway. The court said that when he deposited rock on the part of the plaintiff’s land not intended to be acquired by the state, he clearly departed from the scope of his authority and was therefore responsible for the trespass. It may be argued that every trespass is beyond the scope of an agent’s authority, since he has no authority to commit torts, and the decision was criticized for that reason by the dissenting judges.\textsuperscript{46}

If the doctrine of Schussler v. Board of County Commis-

\textsuperscript{43}(1917) 135 Minn. 384, 160 N. W. 1026.
\textsuperscript{44}See Nelson v. Babcock, (1933) 188 Minn. 584, 248 N. W. 49; see also Peters v. Town of Fergus Falls, (1886) 35 Minn. 549, 29 N. W. 586.
\textsuperscript{45}(1933) 188 Minn. 584, 248 N. W. 49.
\textsuperscript{46}“It was plaintiff’s counsels’ position, and it seems to be that of the majority, that the defendant is liable for the acts of his properly selected subordinates if they commit some tortious act outside the right of way and hence outside of defendant’s authority. There is no legal basis for such theory. If there were, it would upset the entire exemption of public officers from liability for the acts of their subordinates, because of course such officers are never authorized to commit torts.”
sioners\textsuperscript{47} represents an exception to the rule of immunity for acts ultra vires in the primary sense, as shortly afterward established in Boye \textit{v. City of Albert Lea},\textsuperscript{48} which made no reference to it, it is to be hoped that the principle will be broadened to make a municipality liable for every ultra vires act committed under authority of those empowered to act for it or ratified by them. It seems only just that the municipality and not the person who suffers innocently from such a tort should be compelled to assume the resulting burden. On the other hand the distinction between personal and official acts should be preserved.\textsuperscript{49}

b. Servants to Whom Doctrine of Respondeat Superior Is Applicable

1. \textit{In General.} Since the doctrine of respondeat superior is predicated on principles of agency, it is essential that before it can be applied to charge a municipality with liability for tortious acts, the relation of principal and agent must exist between the municipality and the person who has committed the tort. Every public corporation "must act through its agents, whether in the performance of lawful or unlawful acts, and whether it possesses limited or the most enlarged powers."\textsuperscript{50} The responsibility of the municipality for the torts of its agents extends, where applicable at all, not only to appointed officers, but to elected ones.\textsuperscript{51} Furthermore, the distinction between officers and employees seems to have no relevance in the law of tort liability of municipalities; where the doctrine of respondeat superior applies, it applies to officers as well as to employees.\textsuperscript{52}

A municipality does not escape liability simply because its agents are not appointed by it. Thus it has been held that the legislature has the power to appoint officers to perform certain specific duties for a city, such as laying out a street, and the acts of such officers are the acts of the city in the same manner and to the same extent as if performed by the regularly constituted

\textsuperscript{47}(1897) 67 Minn. 412, 70 N. W. 6, 39 L. R. A. 75, 64 Am. St. Rep. 424.

\textsuperscript{48}(1898) 74 Minn. 230, 76 N. W. 1131.

\textsuperscript{49}See Borchard, Government Liability in Tort, (1925) 34 Yale L. J. 229, 256.

\textsuperscript{50}Gould \textit{v. Eagle Creek School District}, (1862) 7 Minn. 145. Professor Barnett in his well-documented article, The Distinction Between Public and Private Functions in Tort Liability of Municipal Corporations in Oregon, (1932) 11 Ore. L. Rev. 123, used this quotation from the Gould Case in refutation of the "heretical compromise" adopted by the New York court of appeals in Herman \textit{v. Board of Education}, (1922) 234 N. Y. 196, 137 N. E. 24, 25, 24 A. L. R. 1065, 1068, which held that a public corporation is liable for its own negligence though not for that of its agents.
municipal authorities. There has been some suggestion that a city may be immune from liability if the tort is committed by an official agency, like a board of health, which is independent of the council; but it is difficult to see any merit in this point unless the independent agency constitutes an entirely separate corporation with powers of its own to sue and be sued. Liability in the operation of a municipal utility, for example, certainly should not be made to depend upon whether it is operated under the direction of the council or is managed by an independent commission.

Some duties—notably the duty to keep streets in repair—may be violated by a mere failure to act. Liability in such cases is not affected by the fact that the necessity for taking action has been caused by some third person rather than agents of the municipality itself.

2. Independent Contractors. In general if public work is contracted for by a municipality and the contractor does the work independently of municipal control, the negligent acts of the independent contractor will not subject the municipality to liability if they were not contemplated by the terms of the contract. In such cases, the negligence of the contractor or his servants is the negligence of the contractor alone and is not imputed to the municipality. The test of what constitutes an independent con-

50Furnell v. City of St. Paul, (1873) 20 Minn. 117 (Gil. 101), where the court held the city liable for the neglect of the street commissioner, charged under the charter with the duty of keeping the streets in repair, notwithstanding he was an elected officer.

While the court appears not to have made this specific point, numerous cases involving both types of agents can be found. All the cases where the tortious act is that of the council involve officers. In the numerous decisions involving nonfeasance, such as failure to make street or sidewalk repairs, it usually does not appear who was responsible for the defect since that is considered wholly immaterial. The duty to repair is on the municipal corporation and a long-existent defect shows a neglect of that duty on which liability may be predicated.

52Daley v. City of St. Paul, (1862) 7 Minn. 390. See also Bryant v. City of St. Paul, (1885) 33 Minn. 289, 23 N. W. 220.

54Bryant v. City of St. Paul, (1885) 33 Minn. 289, 23 N. W. 220.

55A number of examples are given in the section on streets and sidewalks, infra, text at footnotes 621-626. For illustrative purposes, see the earliest case of this kind, City of St. Paul v. Sietz, (1859) 3 Minn. 297 (Gil. 205). In improving a city street under contract with the city, a contractor left an obstruction in the street as a result of which the plaintiff was injured. The city was held liable, though the damage was caused by an independent contractor.

56Shute v. Princeton Township, (1894) 58 Minn. 337, 59 N. W. 1050; Thompson v. County of Polk, (1888) 38 Minn. 130, 36 N. W. 267.

tractor has been frequently stated, but as with so many rules, it has often been difficult to apply.\textsuperscript{58}

The doctrine that a municipality is not liable for the negligence of its independent contractor must be sharply limited in view of a number of other cases. If the damage is occasioned, not by the negligence of the contractor but by the performance of the work in the manner required by the contract, the contractor is the agent of the city in such circumstances, and the city is liable for injuries resulting from the work.\textsuperscript{59} In other words, while the municipality may not be liable for an independent wrong, such as negligence or trespass, it is liable for damages resulting from the carrying out of the contract in the only manner in which it can be performed.\textsuperscript{60}

3. Work Relief Projects. Only one significant case has reached the supreme court involving the liability of a city for damages to third persons because of negligence of relief workers engaged on a municipal project.\textsuperscript{61} Under the Emergency Relief

\textsuperscript{58}"The essential element of an independent contractor is that he may do the work according to his own methods and without being subject to the control of his employment except as to the result of the work and not the means by which it is accomplished. . . . The degree to which direction and control is exercised is not so important as the manifest right to direct and control where controversy may arise." Herron v. Coolsact Bros., (1924) 158 Minn. 522, 526-527, 198 N. W. 134. Most of the cases involving tortious injuries to third persons are collected in 4 Dunnell's Minn. Dig. (1927) sec. 5835. The question has most frequently arisen in connection with liability for injuries to the servants of the contractor. If the relationship is that of independent contract, the municipality is not responsible for injuries to the workmen of the contractor; otherwise it may be. See cases cited in 6 Dunnell's Minn. Dig. (1927) sec. 10395.


\textsuperscript{60}See Nelson v. McKenzie-Hayne Co., (1934) 192 Minn. 180, 256 N. W. 96. In that case, a contractor building a trunk highway was held not liable for nuisance in blasting, it being conceded that the contract could not be performed without this blasting. The court said, "Our state highways are built by the state itself, in its capacity as a sovereign. Their construction is not merely authorized; it is directed. The highway commissioner is the agent of the state for that purpose. . . . Once he has contracted for their construction, it is the legal duty of the contractor to perform his contract. Such a contract makes the contractor the agent of the state. . . . How then, so long as he is guilty of no negligence or trespass, does he commit a legal wrong in performing, in the only way it can be performed, the affirmative duty he owes the state? . . . That does not exclude liability for an independent wrong such as negligence or trespass." Two justices dissented on the ground that the action constituted a private nuisance for which authorization by the state was no bar to suit.

\textsuperscript{61}Hughes v. City of Duluth, (1938) 204 Minn. 1, 281 N. W. 871.
Act of 1933, the city of Duluth was granted an allotment of funds from the federal government for the improvement of its streets. The contribution of the federal government to the general project was to be in excess of $200,000 and that of the city of Duluth slightly over $200. The work was supervised by the Duluth superintendent of maintenance, and the contributions to be available for the prosecution of the project were paid as needed to the deputy auditor of the city of Duluth. Upon request of the city's superintendent of maintenance, the WPA sent men to the street job, which was part of the project for which federal funds were contributed. While no one could work on the job except men sent by WPA, everyone sent did not have to be accepted or might later be rejected by those in charge of the work.

As part of the project, some blasting had to be done, in the course of which a near-by house was damaged and one of its occupants injured because of the negligence of the WPA workers. On appeal in the resulting action, the supreme court affirmed a decision for the plaintiff.62

The main question on appeal was whether the negligent acts of the WPA workmen made the city liable. After reviewing the evidence summarized here, the court held that the jury was justified in finding that the work was being conducted by the city and that the men sent there to perform labor were so far under its control as to be considered, for the time being at least, as employees of the city.

"Indeed," the court added, "the evidence would have justified that conclusion as a matter of law. Even if these men were to be considered as employees of the government, a conclusion which the record wholly fails to justify, they were in the status of servants lent by their general employer to the city with their consent, and the city was for the time being their master, for it had the power to control which is the test of liability."63

The case does not decide definitely the status of WPA employees in all circumstances. In smaller municipalities throughout the state it appears to be the practice in many cases for the WPA to supervise the work and carry it out without any control by municipal officials. In some of the larger places the work itself is superintended by the appropriate municipal officer and some discretion in accepting WPA personnel is exercised. There is less likelihood in the former case that the municipality would be

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62 Hughes v. City of Duluth, (1938) 204 Minn. 1, 281 N. W. 871.
63 (1938) 204 Minn. 1, 3, 281 N. W. 871.
liable for injuries to third persons suffered as a result of negligence by WPA workers on projects for which the municipal corporation acts as sponsor. Even in such cases the question of relationship between the WPA workers and the city or village will probably be determined as a fact question by the jury. The Hughes Case indicates that it cannot be said as a matter of law that the municipal corporation is or is not the employer of the WPA workers for purposes of determining liability to third persons.

Furthermore, in view of the fact that the federal government is never liable for tortious acts of its employees, there may be some tendency on the part of the court to extend the doctrine of the Hughes Case in future cases so as to afford innocent third persons a remedy for damages resulting from those acts. Just how far this decision is intended to go may not be evident until other cases involving more recent WPA projects, carried on with less control by the sponsor, reach the supreme court.\textsuperscript{64} Decisions in other states seem to show that whether a municipality is to be charged with the negligence of WPA workers depends upon whether the worker is under the direction and control of the municipal officials.\textsuperscript{65}

\textsuperscript{64}There have been only two other Minnesota cases involving municipal tort liability in connection with WPA projects. In Bushnell v. City of Duluth, (Minn. 1940) 295 N. W. 73, Duluth was held liable under the workmen's compensation act for injuries to a truck driver working under direction of a WPA foreman on a boulevard improvement project. However, the sole question involved was whether the injury occurred while the driver, who was substituting for his brother at the time, was sufficiently under the control and management of the WPA foreman to charge the city with liability under the workmen's compensation act. In Wagner v. City of Duluth, (Minn. 1941) 300 N. W. 820, the court held that dependents of a deceased WPA worker, fatally injured in his work, who accept compensation for his death under federal law are not precluded by provisions of the workmen's compensation act from bringing action against a third party (here the city) whose negligence was claimed to have caused decedent's death. The status of the WPA worker as an employee of the city was not involved in the Wagner Case.

c. The Application of General Rules of Negligence to Municipalities

In so far as the doctrine of respondeat superior applies to municipal corporations, the same rules of negligence apply to them as apply to private persons. Since these rules are not peculiar to municipal law, there is no necessity for any extensive review of them here. Perhaps a few brief statements will suffice.

A municipality, in carrying on functions in the performance of which it enjoys no immunity from suit, must exercise reasonable care in view of all the circumstances.\(^6^6\) Since the care required is care commensurate with the situation, the amount necessary may vary with the circumstances, though the standard—that of reasonable care—remains the same. Thus emergency vehicles, such as fire departments responding to an alarm, are not required to exercise the same care as other municipal vehicles.\(^6^7\) A municipality is not an insurer of safety in its ordinary activities;\(^6^8\) consequently, it is not required to guard against purely negligible risks, or against improbable dangers.\(^6^9\) It need not guard against an act of God; but it may be liable if its negligence combines with an act of God to produce damage.\(^7^0\) If it keeps on its property equipment which is likely to attract children, it must guard against injury to those children even though the children must be trespassers in order to be injured; in other words, the doctrine of the turntable cases applies to it.\(^7^1\) Furthermore, the concept of negligence "is composite and correlative, involving not only conduct with respect to some subject matter but also a duty to the person injured, or some class to which he belongs, of which the conduct constitutes a violation."\(^7^2\)

1. Proximate Cause. The test of proximate cause, which


\(^{67}\)See Warren v. Mendenhall, (1899) 77 Minn. 145, 79 N. W. 661.

\(^{68}\)See, for example, Netzer v. Crookston City, (1894) 59 Minn. 244, 61 N. W. 21.

\(^{69}\)See, for example, O'Keefe v. Dietz & City of St. Paul, (1919) 142 Minn. 445, 172 N. W. 695; Spiering v. City of Hutchinson, (1921) 150 Minn. 305, 185 N. W. 375; Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241 N. W. 390.

\(^{70}\)See, for example, National Weeklies, Inc. v. Jensen, (1931) 183 Minn. 150, 235 N. W. 905.

\(^{71}\)See, for example, Vills v. City of Cloquet, (1912) 119 Minn. 277, 138 N. W. 33.

\(^{72}\)Boyd v. City of Duluth, (1914) 126 Minn, 33, 37, 147 N. W. 710.
applies to municipal corporations as well as persons, is not whether the particular injury or any injury should or could have been anticipated but is whether there was direct causal connection between the alleged negligent act or omission and the resulting injury.\textsuperscript{73} Otherwise put, the test of proximate cause is whether the result followed in unbroken sequence from the original wrong.\textsuperscript{74} Where several concurring acts or conditions of things contribute to an accident, one of them being a wrongful act or omission, that factor is to be regarded as the proximate cause of the injury if the accident might reasonably have been anticipated from such act or omission and would not have occurred without it.\textsuperscript{75}

2. Joint and Several Responsibility. In determining liability for negligence, there is, of course, no reason for applying any different rules with respect to the commission of a tort in which the negligence of a municipality contributes with the negligence of another from those applied where two individuals are involved. If the two tort feasors did not jointly conduce to the injury by any acts either of omission or commission, a joint action is not maintainable.\textsuperscript{76} Thus if a city and another act as independent, not joint tort feasors, producing divisible injuries, they may not be joined.\textsuperscript{77} If there is an improper joinder, any defendant may

\textsuperscript{73}See, for example, Hamilton v. Vare, (1931) 184 Minn. 580, 239 N. W. 659.
\textsuperscript{74}National Weeklies, Inc. v. Jensen, (1931) 183 Minn. 150, 235 N. W. 905; Duhnnell's Minn. Dig. (1927) sec. 7002 and cases there cited. Among the cases involving municipal corporations in which the question of proximate cause was involved are Pottner v. City of Minneapolis, (1889) 41 Minn. 73, 42 N. W. 784; Moore v. Townsend, (1899) 76 Minn. 64, 78 N. W. 880; Neidhardt v. City of Minneapolis, (1910) 112 Minn. 149, 127 N. W. 484; Korpi v. Oliver Iron Mining Co., (1911) 114 Minn. 525, 131 N. W. 372; Sivertson v. City of Moorhead, (1912) 119 Minn. 467, 138 N. W. 674; McDonough v. City of St. Paul, (1930) 179 Minn. 553, 230 N. W. 89; Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241 N. W. 390. Voluminous and confused, the cases are gathered in Prosser, The Minnesota Court on Proximate Cause, (1936) 21 MINNESOTA LAW REVIEW 19, discussing the "substantial factor" test proposed in these words in Peterson v. Fulton, (1934) 192 Minn. 360, 256 N. W. 901: "The best manner in which to determine whether a given act is the proximate cause of a given result is to determine whether that act is a material element or a substantial factor in the happening of that result."
\textsuperscript{76}McDowell v. Village of Preston, (1908) 104 Minn. 263, 116 N. W. 470, where the principle was applied to make the village liable for damages sustained when a horse took fright without fault of the driver at something for which the village was not responsible, ran away, and came in contact with an obstruction in the street which was there by the negligence of the village.
\textsuperscript{77}Trowbridge v. Forepaugh, (1869) 14 Minn. 133.
\textsuperscript{77}Johnson v. City of Fairmont, (1933) 188 Minn. 451, 247 N. W. 572; Shuster v. City of Chisholm, (1938) 203 Minn. 518, 282 N. W. 135.
demur alone. However, the fact that a municipal corporation and others do not by their joint act contribute to the plaintiff's injury does not prevent their joinder as defendants upon a cause of action for which each is liable because the several acts of the defendants concur in causing the injury. Thus where a contractor leaves an obstruction in a street with the express or implied knowledge of a city, both the contractor and the city may be joined in an action as defendants by one injured as a result of the obstruction.

3. Contributory Negligence. It is, of course, incumbent on the plaintiff to use ordinary or reasonable care for his own safety under the circumstances—the same degree of care required of the municipal corporation. Where there is no statute or rule of law defining more fully the degree of care required in a given case, it is ordinarily a question for the jury to determine whether a person injured exercised ordinary care under the circumstances shown. The rule cannot be more exactly stated; most of the cases in which the question of contributory negligence has been involved are largely concerned with the application of this very flexible yardstick to the facts. A number of those cases are discussed later in this survey, particularly in the treatment of street and sidewalk cases.

The doctrine that there can be no recovery if the plaintiff's own action contributed to the injury requires, of course, that those acts be negligent. The mere fact that the plaintiff contributed to the injury will not prevent recovery.

4. Res Ipsa Loquitur. There are occasions when the very fact that an accident happens suggests that the city must have been negligent. In such cases, the negligence of the city need not be proved because "the thing speaks for itself" (res ipsa loquitur). The doctrine appears to have been applied only a very few times to municipal corporations in Minnesota. In Goar v. Village of Stephen where the plaintiff sued for damages caused

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78 Trowbridge v. Forepaugh, (1869) 14 Minn. 133.
82 Holm v. Village of Carver, (1893) 55 Minn. 199, 56 N. W. 826.
83 The res ipsa loquitur doctrine should not be confused with the principle that a municipal corporation is liable irrespective of negligence when a dangerous instrumentality kept on its premises escapes and damages private property. This kind of case is discussed, infra, text at footnotes 721-723.
84 (1923) 157 Minn. 228, 196 N. W. 171.
when she was burned by a 2,300 volt current of the village's electric distribution system while ironing, the iron being connected with ordinary 110-volt house current, the court held that the rule of res ipsa loquitur applied and that even if plaintiff's proof had stopped with the circumstances of the injury, there still would have been an issue for the jury. In *City Water Power Co. v. City of Fergus Falls* the doctrine was held applicable to the bursting of defendant's dam.

One of the elements necessary for the application of the rule is that the instrumentality causing the injury must be exclusively and wholly under the control of the city. Hence it has no application to an accident occurring when the wooden cornice of a building fell to the sidewalk and injured the plaintiff. The rule also cannot be invoked where the damage is caused by some extraordinary occurrence which could not reasonably be anticipated or guarded against and which the instrumentality was not designed or intended to meet. Thus res ipsa loquitur has no application to the flooding of plaintiff's premises when a municipal sewer backed up during an almost unprecedented rainfall of 5.12 inches in less than four hours.

C. A General Survey of the Common Law Tort Liability of the Various Levels of Government in Minnesota

1. The State

The doctrine of immunity of the sovereign from suit at the instance of an individual is so firmly imbedded in Anglo-American jurisprudence that as a principle it needs no discussion here. The injustice of the doctrine to injured individuals in this era of rapidly expanding governmental services and centralization of governmental functions is apparent; it is reflected in the fact that the problem of immunity of the sovereign has been considered frequently by legal scholars.

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85(1910) 113 Minn. 33, 128 N. W. 817.
88This section is designed to give a brief over-all view of the liability of the state and each type of its political subdivisions. To some extent it overlaps material in Part II, which embraces a functional rather than a political division.
90Freund, Private Claims Against the State, (1893) 8 Pol. Sci. Q. 625; State Liability for Tort. (1916) 30 Harv. L. Rev. 20; Borchard, Tort Liability of the State, (1930) 12 J. Comp. Leg. (3rd ser.) 1; Waterman,
Since the courts refuse to entertain jurisdiction in cases in which the state is sought to be made defendant, it is impossible to find Minnesota decisions in which the doctrine of state immunity from tort suits has been thoroughly discussed or even enunciated. However, at least one case has involved the question of whether or not the defendant was a state agency, it being conceded by the court without argument that if an arm of the state were involved, the action should be dismissed. The plaintiff had been injured when a stand collapsed at a football game at the University of Minnesota which he paid to attend. The Board of Regents of the University had formed a university council authorized to appoint a committee on athletics. The council was composed of the deans of all the faculties together with representatives of the students and one representative of the alumni association. The athletic committee of five members was given supervision over Northrop field and the grandstand and entire control over university athletics, subject to constant revision and ratification of the University council. There was also an athletic board of control, composed of faculty members and representatives of the students and alumni association, which was to recommend all proposed expenditures, subject to approval by the athletic committee. Action of the board of control was supervised by the council committee, this in turn by the University Council, and the latter by the Board of Regents. Members of the association could not share in receipts, the association had no stockholders, and the sole source of revenue was from gate receipts. The treasurer of the University was its treasurer.

In this situation the court concluded that the association and its board was a mere agency of the University Board of Regents.

"It follows that the defendant was neither a partnership nor a corporation or a voluntary association of individuals transacting business. It was a branch of the University and was not a proper party defendant."

One Hundred Years of a State's Immunity from Suit, (1936) 14 Tex. L. Rev. 135; Responsibility of the State on Contract and in Tort, (1934) 20 Va. L. Rev. 444; West, Suits Against the State or Agencies Thereof, (1935) 3 Geo. Wash. L. Rev. 371; Angell, Sovereign Immunity—The Modern Trend, (1925) 35 Yale L. J. 150; Barry, The King Can Do No Wrong, (1925) 11 Va. L. Rev. 349.

George v. University of Minnesota Athletic Ass'n, (1909) 107 Minn. 424, 120 N. W. 750.

However, two justices dissented on the ground that the defendant was an association within the meaning of the statute, Rev. Laws 1905, sec. 4067, permitting suits against associations. In their opinion, the University council and the athletic association were two entirely independent organizations.
In *Lane v. Minnesota State Agricultural Society* the court had no difficulty in overruling defendant's demurrer, which was based on the argument that the agricultural society was a public corporation created by the state solely for public purposes, and was therefore entitled to share the state's immunity. The plaintiff was suing to recover for injuries sustained allegedly through defendant's negligence when she rode a horse under agreement with the defendant in a horse race promoted and controlled by it. The rule of immunity applying to state-created public corporations was thus stated:

"... When the state creates public corporations solely for governmental purposes, such corporations, while engaged in the discharge of the duties imposed upon them for the sole benefit of the public and from the performance of which they derive no compensation or benefit in their corporate capacity, are clothed with the immunities and privileges of the state; and no private action, in the absence of an express statute to that effect, can be maintained against them for negligence in the discharge of such duties."  

Since the state cannot be sued without its consent, a private landowner who finds his land taken by the state without compensation has no action at law for damages against the state even though the constitution specifically forbids the taking or damaging of property for public use without compensation. Two recent cases reveal one technique evolved by the court to give the aggrieved landowner an indirect right of action for damages in a limited class of condemnation cases.

*State, by Benson v. Erickson* involved a petition by the state to condemn property for highway purposes. The respondent had no interest in the land covered by the proceedings, but she claimed that certain of her lots in the village of Blackduck were

That surplus funds were used in improving the state's property was considered immaterial, as was the fact that the Board of Regents had authority to abolish athletics entirely. The case involves mainly the interpretation of various facts, but the dissenting opinion is interesting because it illustrates the frequent effort of the court, or some of its members, to mitigate the rigor of the sovereign immunity doctrine wherever its application can be avoided without undermining the principle itself.

93 (1895) 62 Minn. 175, 64 N. W. 382.

94 (1895) 62 Minn. 175, 177, 64 N. W. 382. It is mainly on the ground that counties, towns and school districts, are held to be involuntarily-created branches of the state discharging purely public functions that these quasi-corporations have shared the state's immunity in large degree. See infra, pp. 323-330.

95 See *State by Benson v. Stanley*, (1933) 188 Minn. 390, 247 N. W. 509.

96 Minnesota, Constitution, art. 1, sec. 13.

97 (1931) 185 Minn. 60, 239 N. W. 908.
adversely affected by the change of grade ordered as part of the project. The lower court, over objection, granted her application to be made a party respondent and on appeal after the commissioners had awarded her no damages, gave her $2,000. The supreme court on appeal reversed the judgment. It said: 98

"The commissioner's order rerouting a highway is merely a preliminary step which establishes public authority and determines the necessity of acquisition by condemnation or otherwise. It forms no more a part of the condemnation proceedings than it would if a definite final designation of location had been written into the constitution. It justifies condemnation proceedings in case the easements designated are not acquired by purchase, but it did not authorize or justify an enlargement by the court of the subsequent proceedings to include the respondent's lots.

"If the highway commissioner's determination is conclusive on the necessity of taking, his determination is likewise conclusive on what property he will not take or damage and on what property he will not cause to be included in the condemnation; and the court may not enter his province for the purpose of compelling him to include in condemnation proceedings lands or interests which he has determined not to condemn. It must leave property owners to their legal or equitable remedies to protect invaded rights."

Three justices dissented on the ground that the determination of damages in condemnation cases is not a legislative question, and that under the constitutional guaranty against taking or damaging property for public use without compensation

"neither the legislature nor any branch of the government under legislative authority can arbitrarily take or damage private property for public use without compensation nor arbitrarily fix compensation or deny compensation." 99

Less than fifteen months later, the court was faced with a similar situation. The state had laid out a portion of Trunk Highway No. 7 in Waseca County. Part of one man's land was included in the condemnation proceedings, but he had one forty which was flooded by the carrying out of the highway plan. This forty was not covered by the proceedings. Claiming he should have damages for the flooding, he moved to have this land included in the condemnation proceedings. At first the lower court granted his motion, but when its attention was called to the Erickson Case, the order was reversed. On appeal, however, the supreme court decided that the landowner's motion should have been

98 (1931) 185 Minn. 60, 63, 239 N. W. 908.
99 (1931) 185 Minn. 60, 67, 239 N. W. 908.
granted, and the conflicting portion of the Erickson decision was overruled. In the course of the opinion, the court said,

"The showing at the present time is that the state planned and constructed a trunk highway west from Waseca 15 miles and included in the condemnation proceedings lands which it thought necessary, and is making use of defendant's 40, for which it made no compensation. It was proper to include this 40 and to award damages. The state invoked the jurisdiction of the district court to acquire the right of way for the general road project. If the condemnor had been a railroad or a municipality the defendant would have had a remedy by suit for damages or by injunction. Here he has no remedy by suit for damage. . . . Since the state has chosen to invoke the jurisdiction of the court in the establishment of a comprehensive trunk highway and has chosen to use and damage the defendant's 40 without condemning it, we hold that the landowner may intervene by motion in the condemnation proceeding and that the court may say to the state that it must bring the land of the defendant, concededly taken and damaged, into the proceeding for the assessment of compensation. And this seems almost a necessary result of the constitutional provisions mentioned. The state cannot, with decent regard for the due process of law provision, and the provision giving everybody a remedy for wrong done his property, and the special provision against the taking of property for public use without compensation, leave out property which it uses or damages in a public project and prevent the owner from having compensation, all because it cannot be sued. If in going west from Waseca the state had left a mile gap in the highway uncompensated but used and then resisted the powers of the court to decree compensation to its owner, its position would be more startling but little different."

In spite of such occasional efforts to give an injured person a

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100 State, by Benson, v. Stanley, (1933) 188 Minn. 390, 247 N. W. 509. There had been no change in court personnel in the fifteen month interval. One wonders how much the earlier decision was influenced by the fact, alluded to by the court, that the aggrieved landowner in that case had a cause of action against the village for damages for change of grade if the village assented to the change as required by the statute. In the Stanley Case, the trunk highway involved was outside municipal limits, where the element of county consent to the highway plan, and consequently the basis for liability against the county, was absent.

101 (1933) 188 Minn. 390, 393, 247 N. W. 509.

102 The court had cited art. 1, sec. 7, the due process clause, art. 1, sec. 8, the clause giving every person a remedy for injuries or wrongs, and art. 1, sec. 13, forbidding the taking of private property for public use without compensation. To what extent art. 1, sec. 8 figured in the decision is conjectural, though it is probable that the court would have reached the same result without it. If the court intended to construe it as requiring the giving of a remedy here where there would have been no remedy otherwise, the construction is at odds with other decisions. So construed, the provision might require the court to allow a landowner whose land has been damaged by the state to maintain an action for damages independently of the condemnation proceedings. This the Stanley Case itself recognizes cannot be done.
remedy against the state, and except for the right to invoke the use of equity writs and to bring suits against state officers for their wrongful actions, the rule that the state cannot be made amenable to suit in the courts for torts committed by its agents remains undisturbed and unchallenged.

In fields where state action is taken concurrently with or impinges upon action by its subdivisions, the contrasting rules of immunity applying to the state and municipal corporations may result in peculiar situations. This is most striking, perhaps, in the case of trunk highways within municipal limits. The Babcock highway amendment to the Minnesota constitution\(^{103}\) omits all reference to streets within municipal corporations, and it states nothing about the width of trunk highways or the portion of municipal streets designated as trunk highways which the state is obligated to maintain. At first, trunk highways did not extend into the limits of the three first class cities,\(^{104}\) but in 1933 the legislature extended them through these municipalities.\(^{105}\) Trunk highways within municipalities are now all constructed and maintained by the state except in Minneapolis, St. Paul and Duluth, where the cities maintain them and receive an agreed sum per mile from the state as partial reimbursement.\(^{106}\) But the statutes are indefinite as to the portion of trunk highway streets which the state must maintain.\(^{107}\) Customarily the highway department maintains the highways within municipalities to the same width as its highways just outside (usually 18 or 20 feet), the width being designated in a "width order" when the trunk highway is designated.\(^{108}\) Obviously this dual nature of a municipal street as a trunk highway and a local street has created many problems of jurisdiction and responsibility; few of these have been settled by statute or judicial decision. It has been determined that the local communities are not responsible for maintenance of the center portion, the trunk highway proper, and consequently are not liable for accidents resulting from a defective condition of this part of the street.\(^{109}\) The result is that it may be of crucial importance to the driver of an automobile

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103 Art. XVI.
104 Minnesota constitution art. XVI, sec. 1.
105 Laws 1933, ch. 440.
106 Mason's 1927 Minn. Stats., 1940 Supp., sec. 2557.
107 See 1 Mason's 1927 Minn. Stats., sec. 2554, subdivs. 3, 4, sec. 2557.
108 See 1 Mason's 1927 Minn. Stats., sec. 2554, subdivs. 3, 4.
injured because of the defective condition of a trunk highway street whether the defect is in the center portion or within a lane the duty to maintain which devolves on the city. If the accident happens in the trunk highway proper, the driver has no judicial remedy because the state cannot be sued and the municipality owes no legal duty to maintain it; if the accident happens outside the 18 or 20 foot strip in the center, the driver may sue the city or village, unless the state has designated the whole width between curbs as a trunk highway.110 Thus the state has taken over the municipality's maintenance responsibilities as to the trunk highway, and has virtually monopolized the taxation of motor vehicles and the sale of gasoline to support it and the rural portions of the trunk highway system,111 but has never assumed the municipality's liability to travelers for failure properly to discharge its duties of maintenance.112

In one field of trunk highway construction, a municipality may be liable though its only responsibility is the approval of highway department plans. Under the statutes113 the consent of the city or village is necessary before the highway commissioner may proceed to make a change of grade on a trunk highway within a municipality. When this consent is given the municipality is liable for resulting damages.114 The only way the city or village can protect itself is by withholding consent until the commissioner of highways agrees to reimburse it for the damages, or to have the damages determined in a proceeding brought by the state.115

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111 Constitution art. 9, sec. 5; art. 16, sec. 3.
112 Incidentally, the highway department's powers over traffic problems on trunk highways within municipal limits appear to be broader than its maintenance duties. Laws 1937, ch. 464, as amended by Laws 1939, ch. 430.
113 Mason's 1927 Minn. Stats., sec. 2554, subdiv. 3.
114 Maguire v. Village of Crosby, (1929) 178 Minn. 144, 226 N. W. 398; Foss v. City of Montevideo, (1929) 178 Minn. 430, 227 N. W. 357. In the Maguire Case the court said, "... the wrong which gives the right of action was in authorizing the same when no provision was first made to pay or secure compensation for the damages plaintiff's property sustained. If it was a wrong to appropriate plaintiff's property or damage the same for public use, all who participated in the wrong are liable." Maguire v. Village of Crosby, (1929) 178 Minn. 144, 146, 226 N. W. 398. Of course, the last sentence should not be construed broadly enough to permit suit against the state; on the contrary the court expressly stated, "We know of no way by which the property owner injured could sue the state direct." Idem, p. 149.

115 The Maguire Case suggests this possibility. The court pointed out that the legislature may have contemplated that both parties might be so interested in the project that agreements between them could be made in connection with claims such as this one. 1 Mason's 1927 Minn. Stats., sec. 2557, providing for construction and maintenance agreements with reference to trunk highways in cities, was believed to look in that direction.
GOVERNMENTAL RESPONSIBILITY FOR TORTS

It does not necessarily follow that because a wronged individual has no cause of action against the state, he is without a remedy. He may have a remedy against the officer or employee who commits the tort. The liability of a public officer who fails to perform a duty imposed on him by law is well settled in this state. It attaches when the duty is ministerial and when the act is one designed for the benefit of the individual injured and to whom the performance of the duty is due. There is no liability, however, for mere nonfeasance as distinguished from misfeasance, hence this remedy would not be available for injuries due to the negligent state of repair of trunk highways, although street defects probably still occasion the largest number of injuries in the case of municipalities.

It has been recognized that such state officers as the commissioner of highways are not personally liable for the consequences of their official acts done within the scope of their authority at least unless they were not only unnecessary but were done corruptly or maliciously. Some distinction appears to have been made, however, between such acts and positive invasions of private property made in connection with official acts such as the building of highways. In such cases the officer is held liable on the theory that the trespass is outside the scope of his authority. But this appears to be a somewhat tenuous argument since all torts—at least all wilful torts—committed by public officers are in the same sense outside the scope of their authority.

Not only is the highway commissioner not liable in the construction and maintenance of a trunk highway to those injured by defects in the highway due to his negligence or the negligence of his subordinates or employees, but he is also not liable for consequential damages to adjacent landowners due to faulty or negligent plans of construction. Furthermore, he is liable for

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8. The legislature evidently regarded the decision in Nelson v. Babcock as unjust, for it reimbursed the highway commissioner for the amount of the judgment plus attorney's fees. Laws 1933, ch. 390, sec. 6.
the acts of his subordinates in cases where he would be liable for his own acts only where he is sufficiently connected with the action so that it can be considered his.\textsuperscript{124}

For state officials who are required to furnish a bond to insure the faithful performance of their duties, such as the highway commissioner and his immediate subordinates,\textsuperscript{125} the right to sue the officer may be a fairly adequate substitute for the right to sue the state itself in the limited cases where the officer is liable for his official acts. In most cases, however, the financial irresponsibility of the individual concerned makes the right to sue the officer of dubious value.\textsuperscript{126}

The harshness of the rule forbidding suit against the state or its agencies is also somewhat tempered by permitting some measure of judicial control over official actions by mandamus and injunction. It is well recognized that even state officials may be required by mandamus to perform strictly ministerial duties definitely prescribed by law\textsuperscript{127} and may be prevented by injunction.

\textsuperscript{124}See Nelson v. Babcock, (1933) 188 Minn. 584, 248 N. W. 49.
\textsuperscript{125}\textsuperscript{1} Mason's 1927 Minn. Stats., sec. 2553, Subdivs. 3, 4. "The state, the several governmental subdivisions thereof, or any person damaged by any wrongful act or omission of said commissioner of highways in the performance of his official duties may maintain an action on such bond for the recovery of damages so sustained." See also 3 Mason's 1927 Minn. Stats., 1940 Supp., secs. 9677-1, 9677-2, providing for fidelity bonds of other officials and employees. The latter statute does not state the condition of the bonds other than that they be for the faithful discharge of the officer's duties.
\textsuperscript{126}The foregoing brief analysis of the liability of the officers of the state for their official torts does not purport to be exhaustive or critical. The liability of officers for their acts is a tremendous field in itself and is beyond the scope of this study except through incidental treatment. Consult Jennings, Tort Liability of Administrative Officers, (1937) 21 MINNESOTA LAW REVIEW 263; David, Tort Liability of Public Officers, (1939) 12 So. Cal. L. Rev. 127-154, reprinted with other material in 1940 as Publication No. Sp. 16 of the Public Administration Service, Chicago.
\textsuperscript{127}\textsuperscript{1} Cooke v. Iverson, (1909) 108 Minn. 388, 122 N. W. 251, where the earlier cases are reviewed. Of course, mandamus will not lie to control administrative officers in the performance of discretionary acts. See, in addition to the cases cited in the Iverson Case, State ex rel. Burnquist v. District Court, (1918) 141 Minn. 1, 168 N. W. 634; State ex rel. Early v. Wunderlich, (1920) 144 Minn. 368, 175 N. W. 677; State ex rel. Security State Bank v. District Court, (1921) 150 Minn. 498, 185 N. W. 1019; and Cook v. Trovatten, (1937) 200 Minn. 221, 274 N. W. 165, which while not involving mandamus actions, suggest the general principle applicable. The distinction between discretionary and ministerial acts in mandamus cases involving executive officers was first mentioned in Chamberlain v. Sibley, (1860) 4 Minn. 228 (Gil. 309); but it was later disapproved in Rice v. Austin, (1872) 19 Minn. 74 (Gil. 103), 118 Am. Rep. 330, where it was held that the judicial department could not control the executive even as to ministerial acts. The distinction was reestablished in Cooke v. Iverson, (1909) 108 Minn. 388, 122 N. W. 251. In the application of this principle there is no substantial difference between the governor and other members.
in a limited class of cases from performing wrongful or negligent ministerial acts under color of official position or authority.\textsuperscript{128} It has been conceded that this remedy is available to prevent a change of grade without compensation first being paid or secured,\textsuperscript{129} though on another occasion the court seemed to think there might be a question about the right of a landowner to an injunction when his land was being damaged by the highway commissioner without its having been joined in a condemnation proceeding.\textsuperscript{130} It has been held, too, that one whose home is being damaged by blasting in connection with highway construction cannot enjoin the public work which occasions it so long as the consequential damage caused by the blasting cannot be avoided.\textsuperscript{131}

In that case the plaintiff, over the vigorous protest of two dissenting judges, was left without judicial remedy in spite of the constitutional prohibition against damaging property for public use without compensation.\textsuperscript{132} Even in cases where injunction will lie, the remedy may not be a practicable one because in most cases the person injured by a tort committed by a state officer has no way of knowing it will be committed. In other ways injunction has a limited use. It would hardly lie, for example, to prevent continuance of a state of disrepair on a public highway.

Taking everything into consideration, it is evident that the immunity of the sovereign from suit still operates effectively to prevent any real redress to an individual for torts committed by agents of the state in the performance of their official duties. Remedies by injunction or mandamus, or by suit against the officer concerned, have only limited availability, and even where the courts permit their use, they may be impracticable.

\section*{2. COUNTIES, TOWNS, AND SCHOOL DISTRICTS}

In determining tort liability, the courts frequently have made a distinction between true municipal corporations (i.e. cities, vil-
lages, and boroughs) and quasi corporations (i.e. counties, towns, and school districts). The latter receive no charter from the state; they are involuntary agencies formed for purely public purpose, and therefore they are not liable for their torts unless expressly provided by statute. The basis for the immunity of quasi municipal corporations from suit was stated in Altnow v. Town of Sibley which involved an action for damages resulting from a defective condition of a town road:

“The ground upon which the exemption from liability is usually placed is substantially this: A town is a quasi and public corporation only, and, as such, a part of the government of the state. The duties enjoined upon it by law are enjoined upon it as a part of government, and not otherwise. They are, therefore, public in nature; that is to say, they are duties to the state, and not to private persons. Hence, a breach of one of them creates a liability to the state only,—a public liability,—on account of which an offending town may be amenable to a public action by indictment. This is the general rule. Exceptions may, of course, be made by statute, so that, in addition to or in place of the public liability, a town may be subjected to a private action for damages.”

Similar quotations may be found in a number of other Minnesota cases. From them it would appear to be the established

133 Dosdall v. County of Olmsted, (1882) 30 Minn. 96, 14 N. W. 458; Bank v. Brainerd School District, (1892) 49 Minn. 106, 51 N. W. 814; Altnow v. Town of Sibley, (1883) 30 Minn. 186, 14 N. W. 877; and numerous other cases. See Kneier, Legal Nature and Status of the American County, (1930) 14 MINNESOTA LAW REVIEW 141, 148-155. Professor Kneier states that from the principle that cities are not liable in tort where the officers are engaged in governmental functions, courts reason that since the county performs, as an agent of the state, only governmental functions, there can be no liability on its part; but historically the development has been in the other direction. See Barnett, The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations, (1937) 16 Ore. L. Rev. 250.

134 (1883) 30 Minn. 186, 189, 14 N. W. 877.

135 Compare the statement of the distinction between municipal and quasi-municipal corporations given in Commissioners of Hamilton County v. Mighels, (1857) 7 Ohio St. 109 and quoted extensively in Kneier, Legal Nature and Status of the American County, (1930) 14 MINNESOTA LAW REVIEW 141, 142. In that case the court emphasized the fact that “municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them.” However, quasi corporations like counties are “local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will without the particular solicitation, consent or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county is created almost exclusively with a view of the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military or-
rule that quasi corporations are not liable for their torts except as liability is expressly imposed by statute. This is, however, too broad a statement; rather the cases seem to support the proposition that except for negligence in the maintenance of highways, quasi corporations are subject to the same rules of tort liability as are cities and villages.

Almost as soon as the relatively complete immunity of quasi corporations for their torts had been established in *Altnow v. Town of Sibley*, an exception was introduced. In *Peters v. Town of Fergus Falls* it was held that the duty to keep highways in repair puts the town in the possession and control of them for this purpose and gives it a qualified or special property in the land over which they run.

"It stands, so far as respects adjacent property, in the position of owner. . . . The right to cause damage to adjacent lands in the town's management and control of the highway, beyond that which a private owner may, without liability, cause to the lands of others by acts done on his own land, must be acquired through the right of eminent domain."

That a quasi-municipal corporation is liable as an owner of property for tortious damage to abutting property is now settled law in this state, not only with respect to towns, but also with respect to counties and school districts. Since quasi corporations are liable for damage caused to adjacent lands for which a private owner would likewise be liable if caused by acts done by him on his own land, they have been held answerable for damages caused by surface water, and by sand and dirt placed in a

organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

References to quasi corporations throughout this study are meant to include counties, towns, and school districts. As appears subsequently in the text, the same principles apply to all three in this state.

*Township of Blakely v. Devine*, (1886) 36 Minn. 549, 29 N. W. 342; *Oftelie v. Town of Hammond*, (1899) 78 Minn. 275, 80 N. W. 1123; *Gunnerus v. Town of Spring Prairie*, (1904) 91 Minn. 473, 98 N. W. 349, 974; *Koeper v. Town of Louisville*, (1908) 106 Minn. 269, 118 N. W. 1025; *Dynes v. Town of Kilkenny*, (1922) 153 Minn. 11, 189 N. W. 439; *Sandmeier v. Town of St. James*, (1925) 165 Minn. 34, 205 N. W. 634.

*Lindstrom v. County of Ramsey*, (1917) 136 Minn. 46, 161 N. W. 222; *Newman v. County of St. Louis*, (1920) 145 Minn. 129, 176 N. W. 191.


*Peters v. Town of Fergus Falls*, (1886) 35 Minn. 549, 29 N. W. 586; *Township of Blakely v. Devine*, (1886) 36 Minn. 53, 29 N. W. 342; *Oftelie
natural water way and washed onto private land. A town has been held liable for damages from quack grass cast upon private land in the course of improving a town road and a county for damages from fire started in burning brush on the highway and spread to adjacent land.

It is difficult to see any real basis for a distinction between this type of case and other torts where quasi-municipal corporations have been held not liable. If the reason for the exemption in the latter cases is that the counties, towns, and school districts perform purely public functions, acting as agents of the state, the reason applies as well to liability for torts of nuisance and trespass committed against property adjoining their highways or other property. The fact is that the Minnesota court, like the courts of other jurisdictions, has been much more prone to protect private property from invasion by municipal and quasi corporations than it has to protect persons from injuries.

Notwithstanding this liability where the county or town is in the position of a landowner in its duties to adjacent property, it has always been the rule that such municipal quasi corporations are not liable to the public for damages sustained as a result of their failure properly to maintain their highways. In this

v. Town of Hammond, (1899) 78 Minn. 275, 80 N. W. 1123; Gunnerus v. Town of Spring Prairie, (1904) 91 Minn. 473, 98 N. W. 340, 974; Koeper v. Town of Louisville, (1908) 106 Minn. 269, 118 N. W. 1025; Lindstrom v. County of Ramsey, (1917) 136 Minn. 46, 161 N. W. 222; Sandmeier v. Town of St. James, (1925) 165 Minn. 34, 205 N. W. 634; see Felepe v. Towns of America and Cedarbend, (1928) 174 Minn. 317, 219 N. W. 158. However, a county board has no proprietary interest in the land over which a drainage ditch is laid and it therefore is not liable for damages caused by surface water diverted by a county ditch. Defiel v. County of Clay, (1926) 169 Minn. 79, 210 N. W. 626. However, a county board has no proprietary interest in the land over which a drainage ditch is laid and it therefore is not liable for damages caused by surface water diverted by a county ditch. Defiel v. County of Clay, (1926) 169 Minn. 79, 210 N. W. 626.

Dynes v. Town of Kilkenny, (1922) 153 Minn. 11, 189 N. W. 439.

Newman v. County of St. Louis, (1920) 145 Minn. 129, 176 N. W. 191.

This criticism of the cases imposing liability on quasi corporations as landowners has been occasionally made by other courts. Thus in O'Brien v. Rockingham County, (1923) 80 N. H. 522, 120 Atl. 254, decisions like those in Minnesota were questioned on the ground that if counties and other quasi corporations were liable in such cases, it established liability of the state itself. "But the state can no more be sued for injuries caused by its own negligence or that of its servants or agents or for the results of a nuisance maintained on its land than it can be for a breach of its promise to pay for service rendered or money loaned."

respect, they are different from cities and villages, which have always been held liable for damages resulting from their negligence in the maintenance of streets.\textsuperscript{148} This may be the only field of tort liability in which quasi corporations enjoy an immunity not shared by municipal corporations, but the difference is highly important, because street and sidewalk defects have given rise to the largest number of cases against cities and villages.

The authorities of the various states are in conflict on the proposition of liability of town officers for negligence in the discharge of their function of keeping town roads in repair. The Minnesota court has adopted the proposition that town officers are exempt from liability for failure to repair roads.\textsuperscript{149} However, they apparently may be liable for damages resulting from their positive misfeasance in making repairs.\textsuperscript{150} Even in the latter case, liability extends only to the negligent discharge of ministerial functions.\textsuperscript{151}

Before the recent significant case of \textit{Storti v. Town of Fayal},\textsuperscript{152} it could not have been said that except for street maintenance there was little difference between the tort liability of municipal corporations and counties, towns, and school districts. That case, however, went a long way in erasing any differences (aside from the exception just mentioned) between the two types of political subdivisions of the state.

The town of Fayal operated a telephone system for the benefit of its inhabitants as authorized by statute.\textsuperscript{153} The plaintiff was injured by one of the telephone wires which was lying across a trunk highway, and he brought action against the town for damages. On appeal the order overruling the town's demurrer was sustained.

Before this time the governmental-proprietary criterion had no appreciable application to towns, but if it had been understood that towns were not liable for damages resulting from negligence in the exercise of proprietary functions, that idea was

\textsuperscript{148}Infra, text at footnote 375 et seq.
\textsuperscript{149}Bolland v. Gihlstorf, (1916) 134 Minn. 41, 158 N. W. 725; Stevens v. North States Motor, Inc., (1925) 161 Minn. 345, 201 N. W. 435.
\textsuperscript{150}Tholkes v. Decock, (1914) 125 Minn. 507, 147 N. W. 648.
\textsuperscript{151}Tholkes v. Decock, (1914) 125 Minn. 507, 147 N. W. 648; see also Stevens v. North States Motor, Inc., (1925) 161 Minn. 345, 201 N. W. 435.
\textsuperscript{152}Minn. Laws 1921, ch. 439, 1 Mason's 1927 Minn. Stats. secs. 5312-5316.
dispelled by the *Storti* decision. Previously no case had reached the supreme court in which a county, school district, or town had been engaged in a function which the court would call proprietary were it being performed by a strictly municipal corporation. Whether or not the *Storti Case* intended any real change in the law, it does make it clear that towns, like cities, operate in a dual capacity so far as tort liability is concerned. To put the ruling in the court's own words,164

"... there is no logical or sound reason, under our statutes and decisions, to apply any different test to towns than to other municipal corporations as to liability for negligence in the performance of permissive nongovernmental functions."

It is likely that with the expansion of services which counties and towns are permitted to render, other cases will arise where the distinction between proprietary and governmental functions will be applied to quasi municipal corporations. Counties are now permitted to build and maintain hospitals155 and airports.156 Certain counties may construct and maintain sewers;157 others, public bathing beaches.158 Towns may operate airports159 and certain towns may build sewerage systems160 and a waterworks.157 Counties, towns, and school districts now may operate recreational programs independently or in conjunction with other units.162 In Minnesota the operation of parks and recreational activities is considered a governmental function;163 but if Minnesota were in line with a number of other states holding to the contrary, towns and school districts carrying on recreational programs under the statutory enabling authority soon might find themselves in another field in which liability was imposed for their negligence. In at least one other state the criterion of determining the liability of municipal corporations has been extended in this way. The New York court of appeals has held that a town, having been granted power by the legislature to maintain parks, should be held liable on the same principle as a city to one who sustains

154*Storti v. Town of Fayal*, (1935) 194 Minn. 628, 634, 261 N. W. 463.
1551 Mason's 1927 Minn. Stats., secs. 677-682; 4588.
1563 Mason's 1927 Minn. Stats., 1940 Supp., secs. 5494-38 to 5494-45.
1573 Mason's 1927 Minn. Stats., 1940 Supp., sec. 669-19 et seq.
158Idem, sec. 10278-3 et seq.; 1 Mason's 1927 Minn. Stats., secs. 756-5, 756-6.
160Idem, sec. 1108-31 et seq.
161Idem, sec. 1027-6.
162Laws 1937, ch. 233, 3 Mason's 1927 Minn. Stats., 1940 Supp., sec. 1933-9a et seq.
163Infra, text at footnote 281.
injuries because of the negligent maintenance of a swimming pool, and that the town in assuming any duty of a proprietary nature must be held also to assume the burdens that go with it.\(^{164}\)

As a matter of fact, some of the language of earlier Minnesota cases indicates that counties, towns, and school districts had escaped liability generally until the *Storti Case* only because the functions in which they were engaging were those which even when performed by municipal corporations are considered governmental. Thus in *Weltsch v. Town of Stark*,\(^{165}\) where the court held a town not liable for injuries due to a defective highway, it was stated to be the rule that

"no private action, unless given by statute, lies against a town or other municipal or quasi-municipal corporation for either the nonperformance or negligent performance of any public duty imposed on it by general statute as a governmental agent, without its request, and from performance of which it derives no profit."

And in *Bang v. Independent School District*,\(^{166}\) the court held a school district not liable for its negligence as a result of which one of its teachers contracted tuberculosis. The court said that the district in maintaining a school building, conducting a school, and supervising the teaching force "exercises governmental as distinguished from proprietary functions." In another case\(^{167}\) the court pointed out that a school district "is an agency for the public good. Its function is to administer public education and [it] is a quasi governmental agency. It is an arm of the state and its functions are governmental."

This view that the rule of *Storti v. Town of Fayal* is not a new one is supported by the fact that in the cases in which counties, towns, and school districts have escaped liability, except in the maintenance of roads where the liability of municipal corporations has been admitted to be an exception to the usual criterion of immunity,\(^{168}\) a municipal corporation performing the same function also would have been held immune from liability. Thus a county is not liable for damages resulting from the negligent maintenance of its court house;\(^{169}\) neither is a city in main-

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\(^{165}\) (1896) 65 Minn. 5, 67 N. W. 648.

\(^{166}\) (1929) 177 Minn. 454, 225 N. W. 449.


\(^{168}\) See infra, text at footnotes, 390-400.

\(^{169}\) Dosdall v. County of Olmsted, (1882) 30 Minn. 96, 14 N. W. 458.
taining its municipal hall. A school district is not liable for injuries sustained on a school playground; neither is a city for similar injuries in its parks. A school district is not responsible for tuberculosis contracted by a teacher as a result of its negligent failure to fumigate. Almost certainly a city would not be liable under similar circumstances. The school function is most like that of a municipal library, for negligence in the operation of which a city is probably not liable. A school district is not liable for injuries suffered as a result of negligence of a school bus driver; there probably is no real parallel in city government, but no reason is evident why a city would be held liable were it to carry on the same function. By statute the school district's immunity has been preserved if it organizes school safety patrols, but the statute clearly adds nothing to what would have been the rule in its absence; and even if the school safety patrol is organized under the city police department by ordinance, as has been done in a few municipalities, such as St. Paul, the immunity granted to cities and villages in their police work would doubtless extend to work of this character.

3. CITIES, VILLAGES, AND BOROUGHS

It is apparent from what has been said that there have been relatively few cases in which the tort liability of quasi-municipal corporations in Minnesota has been before our high court, and consequently there are many gaps in the law still to be filled. The court has far oftener been called on to determine the responsibility of strictly municipal corporations for their torts. As a result the principles applying to them can be filled in in considerably greater detail than in the case of quasi-municipal corporations, where a summary of the law amounts to hardly more than a rough sketch. It is not difficult to understand why this should be true. In the first place, as has already been indicated, quasi-municipal corporations are concerned almost entirely with functions which are so clearly "governmental" or "public" in character that their performance would not produce liability even if they had been entrusted to cities and villages. Schools discharge only one func-

\[170^{170}\text{Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763.} \]

\[171^{171}\text{Bank v. Brainerd School District, (1892) 49 Minn. 106, 51 N. W. 814.} \]

\[172^{172}\text{Emmons v. City of Virginia, (1922) 152 Minn. 295, 188 N. W. 561.} \]

\[173^{173}\text{Bang v. Independent School District, (1929) 177 Minn. 454, 225 N. W. 449.} \]

\[174^{174}\text{Allen v. Independent School District No. 17, (1927) 173 Minn. 5, 216 N. W. 533.} \]

\[175^{175}\text{Mason's 1927 Minn. Stats., 1940 Supp., sec. 2883-5.} \]
tion, education; counties are concerned with law enforcement, the administration of justice, road construction and maintenance, and welfare activities; towns occupy themselves largely with highway work and, in about 27 counties in the state, with the relief of the poor. To the extent that municipal corporations engage in similar work they, too, are exempt from liability—with one exception. That exception—the maintenance of streets—accounts for far more litigation than all the other tort cases combined. In the second place, cities and villages are empowered to carry on many more activities than are quasi-municipal corporations, and some of these functions are carried on for profit. Since the basic distinction between governmental and proprietary functions seems always to have existed in this state, there has always been a possibility for recovery in a particular case until there had been a judicial determination of the fact that the function involved was a governmental one.

It is of course in the field of municipal corporations that the traditional distinction between governmental and proprietary functions has had its fullest sway. In line with the courts of nearly every other state, the Minnesota court has held cities and villages immune from suit for negligence when they are engaged in discharging governmental functions and subject to liability for similar negligence when a proprietary function is involved. The maintenance of streets is a governmental function, but in this case liability has been imposed since the earliest decisions, although the failure to extend immunity in this case is admittedly anomalous. In addition, liability is imposed in all other instances where counties, towns, and school districts are liable, namely where the municipal corporation violates a duty as landlord owed to adjacent property.

176 South Carolina has refused to make the distinction and has held municipal corporations in the absence of statute immune from suit even in the case of proprietary functions. Irvine v. City of Greenwood, (1911) 89 S. C. 511, 72 S. E. 228. Florida has held commission cities liable even for negligence in the performance of what are ordinarily classed as governmental activities. Kaufman v. City of Tallahassee, (1922) 84 Fla. 634, 94 So. 697. Ohio once made a significant departure from the immunity doctrine in the case of fire departments, Fowler v. City of Cleveland, (1919) 100 Ohio St. 158, 126 N. E. 72; but the case was later overruled. Aldrich v. City of Youngstown, (1922) 106 Ohio St. 342, 140 N. E. 164.

177 Shartley v. City of Minneapolis, (1871) 17 Minn. 308 (Gil. 284); see City of St. Paul v. Ruby, (1863) 8 Minn. 154 (Gil. 123).


179 O'Brien v. City of St. Paul, (1878) 25 Minn. 331; Dyer v. City of St. Paul, (1881) 27 Minn. 457, 8 N. W. 272. The numerous surface water cases are discussed, infra, text at footnotes 724-764.
4. Special Districts

Minnesota has not had the experience with independent governmental subdivisions formed for special purposes that many states have had. There has been for a long time authority to establish drainage districts, but these are without corporate existence; they are simply ad hoc districts created solely for the purpose of constructing ditches to drain wet lands. The cost of ditch construction has been paid for by special assessments levied against benefited land, but the district has had no other taxing powers, any permanent government, or any powers save the maintenance of the ditches. Since damages to property incurred because of a diversion of surface water are assessed before the ditch is constructed, there is little occasion for the commission by these "districts" of torts later which give rise to law suits.

In 1933 the legislature established the Minneapolis-St. Paul Sanitary District to construct and maintain a sewage treatment plant for the Twin Cities metropolitan area. The governmental-proprietary test apparently applies to the torts of this district to the same extent as it does to a municipal corporation.

There are numerous statutes authorizing the creation of independent boards in municipalities to administer particular functions like parks and utilities. Generally, however, these boards are not given the status of an independent governmental unit. Like the park board in Minneapolis, they are agencies of the city government and may not be sued separately. Consequently, the exercising of a function by an independent board creates the same liability on the part of the city as if it were performed by a department more amenable to council control. At least one law, however, authorizes cities of the fourth class after vote of the people to create a park district with quite independent powers, in-

1801 Mason's 1927 Minn. Stats., ch. 44.
181 There are apparently no existing "drainage and conservancy districts" or "drainage and flood control districts" as authorized by statute. Anderson, Local Government and Finance in Minnesota, (1935) 332.
182As to the liability of drainage districts to actions for damages generally, see a note in 11 Va. L. Rev. 564 (1925).
182b See Barmel v. Minneapolis-St. Paul Sanitary District, (1938) 201 Minn. 622, 277 N. W. 208. The district does not share the immunity of the state. Jones v. Al Johnson Construction Co., (Minn. 1941) 300 N. W. 447.
183 Mason's 1927 Minn. Stats., secs. 1255-1262; 1731-1734; 1868-1873.
184 Mason's 1927 Minn. Stats., secs. 1852 to 1860.
185 Webber v. Board of Park Commissioners of City of Minneapolis, (1900) 80 Minn. 55, 82 N. W. 1119.
cluding the power to sue and be sued and to hold title to park property. The statute contains this interesting language: "All claims against the park district arising out of negligence shall be in writing and verified by the claimant, and shall obtain [sic] a full, clear and concise statement of the transaction out of which it is alleged to arise, giving time, place, extent of injury or damage, and shall be filed within thirty days from the date thereof with the clerk of the board. No action shall be maintained unless begun after thirty days and within six months from the date of the filing of the claim."

The law may nowhere have been put into operation, but if it has, the court has never been called upon to construe it. It is not likely that the provision relating to claims "arising out of negligence" would be interpreted as creating any liability where none would otherwise exist. It has been determined that parkways in parks, if negligently maintained, may give rise to a cause of action for damages in the same manner as ordinary city streets.

The application of the statutory provision would probably be restricted to such cases and, following the analogy of the cases construing the statute allowing suits against school districts "for injuries to the rights of the plaintiff," would not permit recovery for negligence in the operation of parks.

One unique statute, which may not be in use, provides for the creation of a private corporation for the purpose of acquiring and managing parks, playgrounds and other recreational facilities in any city of the second, third, or fourth class. The city is authorized to transfer park, playgrounds or pleasure drives to the corporation and a reconveyance may be made at any time.

The law is interesting for present purposes because it specifically exempts the corporation from all liability for want of repair in the park or playground property. The corporation thus escapes a liability for negligence in the maintenance of parkways which the city has to assume when they are under its jurisdiction.

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1861 Mason's 1927 Minn. Stats., sec. 1740.
1871 Mason's 1927 Minn. Stats., sec. 1743. The language is comparable to that used in the general statute, 1 Mason's 1927 Minn. Stats., sec. 1831, requiring the service of notice of tort claims before suit.
188Kleopfert v. City of Minneapolis, (1903) 90 Minn. 158, 95 N. W. 908.
192Idem, sec. 7902-11 requires the placing of signs on pleasure drives reading, "Any person using this drive does so at his own risk as to defects therein."
II. THE APPLICATION OF THE PRINCIPLES TO SPECIFIC TORTS AND SPECIFIC FUNCTIONS

D. THE DISTINCTION BETWEEN GOVERNMENTAL AND PROPRIETARY FUNCTIONS

The ordinary rules of negligence—what constitutes negligence, proximate cause, contributory negligence, res ipsa loquitur and the like—have no distinctive manifestations in the field of municipal liability for negligence, but one rule for determining tort liability is peculiar to municipal law: the doctrine that municipal corporations are not liable for negligence in the discharge of governmental functions but are liable for such negligence if incidental to the performance of proprietary functions. This test is still the touchstone of liability in the municipal field; and if a city is found to be exercising a governmental duty when a negligent tort occurs, questions of proximate cause and contributory negligence need not be considered. As will appear later, the governmental-proprietary test is somewhat limited in its application to other torts; but in the case of negligence, its sway is almost complete. This test, while simple of statement, has been exceedingly difficult to apply; and it has been severely criticized both on theoretical and practical grounds. The limits of each type of functions are vague and uncertain; and confusion has been worse confounded by a loose use of terminology. The term "governmental" has been used in the decisions interchangeably with

103 The municipality is liable for positive invasions of private property and for maintaining a nuisance of certain kinds, apparently whether performed in a public or private capacity. Infra, section I. In other fields than torts, the distinction between the governmental and proprietary capacity of a municipal corporation is not so generally observed. Seasongood, Municipal Corporations—Objections to the Governmental or Proprietary Test, (1936) 22 Va. L. Rev. 910-944. It has no application, for example, to the field of public contracts, except in determining the period for which a contract may be validly made, see Reed v. City of Anoka, (1902) 85 Minn. 294, 88 N. W. 981; and it does not apply to the determination of exemption of municipal-own property from property taxation. See Anoka County v. City of St. Paul, (1935) 194 Minn. 554, 261 N. W. 588; but see In re Delinquent Taxes of Polk County, (1931) 182 Minn. 437, 234 N. W. 691.

104 The functions of sewer and street maintenance are always treated for purposes of tort liability as if they were proprietary and are sometimes called such. See McLeod v. City of Duluth, (1928) 174 Minn. 184; 218 N. W. 892.

105 Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763; Miller v. City of Minneapolis, (1898) 75 Minn. 131, 77 N. W. 788; Hoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577; McLeod v. City of Duluth, (1928) 174 Minn. 184, 218 N. W. 892; Borwege v. City of Owatonna, (1933) 190 Minn. 394, 251 N. W. 915.
"public,"197 "police,"198 and even "administrative;"199 "proprietary" has been used synonymously with "corporate,"200 "private,"202 "corporate ministerial,"203 "corporate proprietary,"204 and "nongovernmental."205 The term "municipal" has been used to mean not only proprietary206 but governmental.207

The development of the doctrine of immunity of municipal corporations from liability for negligence in the performance of governmental functions and the maintenance of streets is difficult to trace, and scholars have differed somewhat in their explanations.208 The doctrine is generally understood to have its roots in old English cases, notably Russell v. Men of Devon.209 It was adopted first as an American principle in Mower v. Inhabitants of Leicester,210 and has been subsequently followed, usually without any attempt at critical analysis. So far as its adoption in this country is concerned, the rule appears to be based on a misconception. The basis of the decision in Russell v. Men of Devon was that the inhabitants of the county were not a corporation, and had no corporate fund out of which a judgment could be satisfied. This was true. An English county was not a corporation and had no power of taxation. Its inhabitants had no

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197 Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763; Miller v. City of Minneapolis, (1898) 75 Minn. 131, 77 N. W. 788.
200 Hoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577; Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763.
201 Grube v. City of St. Paul, (1886) 34 Minn. 402, 26 N. W. 228; Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763; Ihk v. Duluth City, (1894) 58 Minn. 182, 59 N. W. 960; McLeod v. City of Duluth, (1928) 174 Minn. 184, 218 N. W. 892. The term "corporate" has frequently been used in a broader sense to refer to any power granted by charter. In this sense, the word designates both governmental and proprietary functions.
202 Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763; McLeod v. City of Duluth, (1928) 174 Minn. 184, 218 N. W. 892.
203 Simmer v. City of St. Paul, (1877) 23 Minn. 408.
204 Borwege v. City of Owatonna, (1933) 190 Minn. 394, 251 N. W. 915.
205 Storti v. Town of Fayal, (1935) 194 Minn. 628, 261 N. W. 463.
206 Grube v. City of St. Paul, (1886) 34 Minn. 402, 26 N. W. 228; Thompson v. County of Polk, (1888) 38 Minn. 130, 36 N. W. 267; Ihk v. Duluth City, (1894) 58 Minn. 182, 59 N. W. 960; Hoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577.
207 Kleopfert v. City of Minneapolis, (1904) 93 Minn. 118, 100 N. W. 669.
209 (1788) 2 Durn. & E. 667.
210 (1812) 9 Mass. 247.
authority to repair the bridge whose defective condition caused the injuries which gave rise to the suit or to raise money with which to do it. Those reasons, of course, do not exist in this country. Counties, towns, school districts, cities, and villages all have the power to sue and be sued in this state and to levy taxes including taxes to pay judgments. As a matter of fact, the first American case in which the English doctrine was applied involved a county; but the principle was later extended on the authority of Mower v. Inhabitants of Leicester to cities and villages without question.

Whatever the origin of the distinction, it has from the first been accepted as part of American jurisprudence by the Minnesota court, which has made no attempt to trace its development or investigate its soundness. It is now far too well accepted to be changed drastically except through legislation.

While the court has not attempted a critical analysis of the doctrine, it has stated it on innumerable occasions. The general idea underlying the decisions is that in carrying on certain duties—termed governmental—a municipality acts as an agency of the state. Since it discharges these duties for the benefit of all, it shares the immunity of the state, for which it is acting.

211Mason's 1927 Minn. Stats., secs. 638, 999, 1117, 3098.
212Mason's 1927 Minn. Stats., sec. 2060 et seq.
213Mason's 1927 Minn. Stats., sec. 1108, 1836, 3100. Any of these units may issue bonds to pay judgments. Idem, sec. 1942.
214Barnett, The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations, (1937) 16 Ore. L. Rev. 250. A note in (1920) 34 Harv. L. Rev. 66 entitled, Should We Abandon the Distinction Between Governmental and Proprietary Functions, explains the basis for the doctrine in the rules applying to early common law actions. "No action on the case lay by a private individual against a town for the omission to perform a public duty, but the proper procedure was by way of indictment. [Cf. Altnow v. Town of Sibley, (1896) 65 Minn. 5, 67 N. W. 648.] The lack of private action was later placed upon the ground that towns were usually not corporate and so could not be sued. And still later recovery was denied because of the long-established common-law rule."

215Cf. 6 McQuillin, Municipal Corporations (2d ed. rev. 1936), sec. 2772, p. 1010; "There seems to have been no time when such [cities and villages] . . . were wholly free from responsibility for torts, or civil wrongs, by the common law. In the present condition of this special branch of the law, the liability or non-liability rests not so much on principle as from the life and development of the law of municipal corporations which, as frequently appears, is more or less complex and abstruse. Furthermore, such liability is either created, or modified to a great extent, by written law, either constitutional or statutory, and hence, oftentimes the liability or non-liability turns upon the true interpretation of the applicable written law."

216Lane v. Minnesota State Agricultural Society, (1895) 62 Minn. 175, 64 N. W. 382; Hall v. City of Austin, (1898) 73 Minn. 134, 75 N. W. 1121; Hoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577; Allen v. Independent School District No. 17, (1927) 173 Minn. 5, 216 N. W. 533.
duties are imposed on municipal corporations by the state for public good and they, as corporations, receive no benefit from them.\textsuperscript{217} Conversely, to be "proprietary," a duty must relate to the local or special interests of the municipality.\textsuperscript{218}

The argument that in discharging governmental functions, a municipal corporation is virtually an arm of the state and is therefore entitled to share the state's immunity from suit is open to criticism. The state is immune because it cannot be sued. Municipal corporations in this state and elsewhere usually can be sued and are amenable to process. Courts have adequate jurisdiction over municipal corporations; they have no jurisdiction over the state.\textsuperscript{219}

As has been stated by the United States Supreme Court, however correct it is to say that the state is sovereign and therefore cannot be sued without its consent, "the subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations—do not make these bodies sovereign."\textsuperscript{220}

Blended with the notion that the municipality is an instrumentality of the sovereign when performing duties for the benefit of all is the idea that the officers and employees of the municipality when so acting are not agents of the municipality and therefore the doctrine of respondeat superior does not apply.\textsuperscript{221} But this argument is not reconcilable with the principle of agency law that the character of the service performed is immaterial, the important factors being the extent of control which the employer has over the

\textsuperscript{217}Thompson v. County of Polk, (1888) 38 Minn. 130, 36 N. W. 267; Snider v. City of St. Paul, (1892) 51 Minn. 466, 53 N. W. 763; McDevitt v. City of St. Paul, (1896) 66 Minn. 14, 68 N. W. 178; Roerig v. Houghton, (1919) 144 Minn. 231, 175 N. W. 542; Storti v. Town of Faylor, (1933) 194 Minn. 628, 261 N. W. 463.

\textsuperscript{218}Ith v. Duluth City, (1894) 58 Minn. 182, 59 N. W. 960. The court called this "the most reasonable and satisfactory test," but it is doubtful whether it is of any real help in determining the character of a particular function. One has said virtually as much when he has said "proprietary."


\textsuperscript{220}Metropolitan Railroad Co. v. District of Columbia, (1889) 132 U. S. 1, 9, 10 Sup. Ct. 19, 33 L. ed 231. The United States Supreme Court has laid down the rule in admiralty that a city is responsible for the negligence of its agents in the operation of a fireboat on its way to aid in extinguishing a fire. Workman v. New York City, (1900) 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. The function of fire fighting has almost uniformly been held to be governmental.

\textsuperscript{221}Cf. Ith v. Duluth City, (1894) 58 Minn. 182, 59 N. W. 960; Hall v. City of Austin, (1898) 73 Minn. 134, 75 N. W. 1121. This idea has been stated more fully by other courts. See Freedman, Liability in Tort of Municipal Corporations in Missouri, (1938) 3 Mo. L. Rev. 275, 277; Clarke, Municipal Responsibility in Tort in Maryland, (1939) 3 Md. L. Rev. 159, 162.
employee in the matter of wages, duration of employment, manner of execution of the work, and the like.\textsuperscript{222} So far as these matters are concerned there seems to be no substantial difference between governmental and proprietary powers.

As a corollary or as a concomitant of the general idea that the municipality is but an agent of the state in discharging governmental duties, it is argued that in performing functions of this character, the municipality and its officers and employees owe a duty to the state only and not to private individuals; therefore, in case of negligence there is no breach of duty on which a private individual can base his action.\textsuperscript{223} On the other hand when it goes into a proprietary venture, it assumes such a duty to private individuals.\textsuperscript{224} It is difficult to tell from the cases whether the function is public because no duty is owed to private individuals or whether no duty is owed to private individuals because the function is public. That there is an obligation to the public alone apparently does not provide an additional test to determine the governmental nature of the function.\textsuperscript{225}

In \textit{Storti v. Town of Fayal},\textsuperscript{226} the court applied another test, though the rest of the opinion indicated that the same result would have been reached had this additional criterion been ignored. The rule there applied is that where a mandatory duty is imposed on a municipality, the performance of that duty is a governmental function. The function involved was found to be permissive and not mandatory.\textsuperscript{227} The same distinction appears to have been in

\textsuperscript{222}Restatement of Agency, secs. 12-14; 2 Mechem, Agency (2d ed. 1914) sec. 1863. See Woodruff v. Town of Glendale, (1877) 23 Minn. 537; "It is true that, by our statute, the power spoken of is conferred upon the supervisors; but this fact only goes to establish the liability of their town for their official acts, for the supervisors are town supervisors—officers and agents of a town. What they do as supervisors they do for their town; and, upon general principles of the law of agency, the town is responsible for their official acts."

\textsuperscript{223}Altnow v. Town of Sibley, (1883) 30 Minn. 186, 14 N. W. 877; Welsch v. Town of Stark, (1896) 65 Minn. 5, 67 N. W. 648; Claussen v. City of Luverne, (1908) 103 Minn. 491, 115 N. W. 643; cf. Stevens v. North States Motor, Inc., (1925) 161 Minn. 345, 201 N. W. 435. For the elements of a cause of action for negligence, see Restatement of Torts, sec. 281. In the Claussen Case the Court said, "The exemption is based upon the sovereign character of the state and its agencies, and upon the absence of obligations, and not on the ground that no remedy has been provided."

\textsuperscript{224}Brantman v. City of Canby, (1912) 119 Minn. 396, 138 N. W. 671. See Borchard, Government Liability in Tort, (1924) 34 Yale L. J. 129, 136: "The fact is that all functions performed by a municipality are for the public benefit, otherwise they could hardly be undertaken with public funds or by public officers."

\textsuperscript{225}(1935) 194 Minn. 828, 261 N. W. 463.

\textsuperscript{226}(1935) 194 Minn. 628, 261 N. W. 463. The function spoken of was a town telephone system.
the court's mind in several other cases. The mandatory character of governmental functions is evident in their being "imposed" and in the references to quasi municipal corporations as "involuntary corporations." Such functions are given to a town "without its request."  

If the question of whether a particular duty is mandatory or permissive is important in determining the governmental or proprietary character of a particular function, that test has never been consistently applied. It is clear that a municipality may function governmentally in matters left optional to it as well as in those imposed by law. Numerous small villages have no fire department as a municipal enterprise; yet if one is established, the municipality is not responsible for its negligence. Furthermore, it has been held that there is no distinction in Minnesota between mandatory and permissive functions of school districts and though the case of Storti v. Town of Fayal made such a distinction in the case of towns, it found no inconsistency with the school district case. Thus, while mandatory duties have generally been held to be governmental, far from all permissive functions have been held to be proprietary. One case, Miller v. City of St. Paul, in holding that a city is under no obligation to light its streets and that mere neglect to do so is not a ground of liability unless the charter expressly imposes the duty seems to be completely at variance with the mandatory-permissive test as often applied, if the italicized portion is an essential part of the statement.

That duties have been imposed by law rather than assumed has generally been considered evidence of their governmental character. But the voluntary assumption of a duty is not generally
the basis of tort liability; and because the distinction seems so illogical it has been abandoned in some jurisdictions.

The more closely functions performed by municipalities have approximated those usually performed by private business, the easier it has been for the courts to apply the vague and shadowy distinction between governmental and proprietary functions. Consequently, the courts have searched for the attributes of private business when confronted with a negligence case involving municipal corporations. In particular, they have looked to see whether or not the activity in which the municipality was engaging when the injury occurred was being operated for profit. Frequent statements of the distinction between governmental and proprietary functions have coupled the absence of profit or pecuniary benefit and the idea of benefit to the public as a whole as being indicative of the governmental character of a function. The fact that a particular activity produces a net profit has been consistently held to be conclusive of the proprietary character of the enterprise; and it now appears that the test is to be applied as much to quasi municipal corporations as to municipal corporations proper. The charging of a small fee is not sufficient to produce liability where the activity is otherwise governmental in character. While the absence of profit is not necessarily determinative,

Burdick, Law of Torts (4th ed. 1926) 131-2; (1920) 34 Harv. L. Rev. 66, 68.

Tindley v. Salem, (1884) 137 Mass. 171, 175, 50 Am. Rep. 289, 293; Bolster, Admr., v. City of Lawrence, (1917) 225 Mass. 387, 114 N. E. 722. See Moulton v. City of Fargo, (1918) 39 N. D. 502, 510, 167 N. W. 717: "There is no good reason why a liability to a private action should be imposed when a municipality voluntarily entered upon such a beneficial work and to withhold it when it performs the service under the request of an imperative law." See also 6 McQuillin, Municipal Corporations (2d ed. rev. 1936) 777-778; Borchard, Government Liability in Tort, (1924) 34 Yale L. J. 135.


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

the fact that a service is furnished free to all citizens is indicative of its governmental character.\textsuperscript{243}

The profit test is stated in the leading case of \textit{Keener v. City of Mankato},\textsuperscript{244} where the court held a city liable for a death from polluted city water. The court said:

"The city operates the waterworks for profit in the sense that it is voluntarily engaged in the same business which, when conducted by private persons, is operated for profit. The city itself makes a reasonable and varying charge. The undertaking is partly commercial. It is enough that the city is in a profit making business. The city is exercising a special privilege for its own benefit and advantage, notwithstanding a portion of the water is used by the city for protection against fire and in promoting the public health."\textsuperscript{245}

Like all the other tests used by the courts to determine whether an activity is proprietary or governmental, the existence or non-existence of the profit motive is not an entirely satisfactory criterion, but it has provided a better yardstick than most and has been more consistently applied. It is, however, open to objection on theoretical grounds.\textsuperscript{246} Tort responsibility is seldom tested by the benefit derived from the act by the tortfeasor.\textsuperscript{247} Furthermore municipal utility charges or the prices imposed on liquor sold in a municipal liquor dispensary are, like taxes, used as a part of the general scheme of raising revenues with which to carry on municipal services. If there is any net profit, it goes to benefit the general taxpayer by lessening the burden of taxation. It is regular practice for a number of Minnesota cities which operate their own electric generating or distribution system to transfer a portion of the earnings of the systems to the general fund of the city for municipal use.\textsuperscript{248} In the 170 villages

\textsuperscript{243}This point is stressed in \textit{Emmons v. City of Virginia}, (1922) 152 Minn. 295, 188 N. W. 561; but the fact that the same conclusion was reached later with respect to the same function (parks) where a fee was charged, \textit{St. John v. City of St. Paul}, (1929) 179 Minn. 12, 228 N. W. 170, indicates that it is not to be considered decisive.

\textsuperscript{244}(1910) 113 Minn. 55, 129 N. W. 158, 775.

\textsuperscript{245}(1910) 113 Minn. 54, 62, 129 N. W. 158, 775.


\textsuperscript{247}One example is the liability in tort that may go with the negligent performance of gratuitous service for another. See \textit{Restatement of Torts}, sec. 323.

\textsuperscript{248}Borak and Blakey, \textit{Fees and Other Non-Tax Revenues}, pp. 62-68; Borak, \textit{Public Contribution of Municipally Owned Electric Utilities Com-
and cities which operate their own liquor dispensaries, profit and
a use of at least a portion of the net revenues for general munici-
pal purposes appear to be all but universal. 249

It is apparent from what has been said that no single test will
satisfactorily explain the cases, even ignoring those relating to
liability for defective streets and sewers. The results are some-
what explainable by applying a historical test—is the activity one
which governments usually have performed? If it is, it should
be classed as governmental; if it is not, it is proprietary. 250
Obvi-
ously this cannot be carried too far. It was not until 1819 that the
first municipal police force was established in London, but police
protection has almost uniformly been held to be governmental in
color. Streets have been from ancient times the responsibility
governments; but their maintenance has been classed in this
state and many others as if they were proprietary. Swimming
pools have been, at least until recently, as frequently private as
public; but they have been classed in this state as governmental.

It is not difficult to apply the tenuous distinction between gov-
ernmental and proprietary functions to such clearly defined func-
tions as utility operation and health activities, but in the twilight
zone of parks, hospitals and similar activities in which the general
welfare is involved, the courts have found consistency a jewel
beyond their reach. It is not difficult to understand why this is so.
When a new activity is before a court for classification, it finds
itself motivated by conflicting forces. On the one hand is the
increasing recognition that certain functions, like health, formerly
considered local in character, are of vital interest to the state as
a whole; on the other is the growing realization, in the face of
rapidly expanding governmental services, of the need for extend-
ing municipal tort liability. 251 Both these forces have had to
struggle with precedents already established. Sometimes a court
has had to make refined distinctions between what are essentially
pared with Taxes of Private Utilities in Minnesota, (1937) 22 Minnesota
Municipalities 267-278.

249 Recently, the following sample municipalities reported these earnings
through their newspapers or annual financial statement: Baudette (1939),
$6,600; Bemidji, (1940), $35,978; Columbia Heights, (1939), $10,102.72;
Detroit Lakes (1939), $16,756.74; Mahnomen (1940), $8,220.

250See Keever v. City of Mankato, (1910) 113 Minn. 55, 129 N. W. 158, 775; Borwege v. City of Owatonna, (1933) 190 Minn. 394, 251 N. W. 915: "When a city engages in activities which are of a nature ordinarily
engaged in by private persons and which subject private persons to liability for
negligence, the city is likewise liable for negligence."

251 See Tooke, The Extension of Municipal Liability in Tort, (1932)
19 Va. L. Rev. 97, 102.
similar activities in order to give effect to its consciousness of the desirability of extending liability. The distinction of our court between street sprinkling and street flushing\textsuperscript{252} is a striking example.

In spite of the fact that the application of the governmental-proprietary test is difficult to explain and harder to justify,\textsuperscript{253} the cases leave no doubt of the fact that the distinction is so firmly imbedded in precedent that it cannot be pried loose except by legislation. There will undoubtedly be a tendency to expand the classification of proprietary functions whenever hitherto unclassified activities are before the court for classification. On the other hand, there is very little likelihood that much change will be made in the existing classification. Our court has not yet shifted a single function from one group to the other, although its desire to limit immunity has led to the adoption of such refinements as the highly technical distinction between street sprinkling and street flushing previously mentioned.

In the foregoing discussion no effort has been made to tell what the Minnesota court has done with particular functions. The detailed classification adopted by the Minnesota court is discussed in the following chapters.

E. THE MINNESOTA CLASSIFICATION OF FUNCTIONS:
   GOVERNMENTAL
   
   1. POLICE

   In operating its police department a municipal corporation acts in its governmental capacity. Consequently it is not liable for the wrongful acts of its police officers in making arrests or detaining prisoners,\textsuperscript{254} or for an assault by the officer.\textsuperscript{255} Courts throughout the country almost uniformly take this view.\textsuperscript{256}

   2. JAILS

   Since lockups and prisons are maintained as part of the function of law enforcement, it is clear that the same immunity should attach to the keeping of jails as does to the preservation of the

\textsuperscript{252}McLeod v. City of Duluth, (1928) 174 Minn. 184, 218 N. W. 892.
\textsuperscript{253}One writer in despair has said that if there is a guide it must be the one of—she loves me, she loves me not! Freedman, Liability in Tort of Municipal Corporations in Missouri, (1938) 3 Mo. L. Rev. 275, 297.
\textsuperscript{254}Gullikson v. McDonald, (1895) 62 Minn. 278, 64 N. W. 812.
\textsuperscript{255}Lamont v. Stavanaugh, (1915) 129 Minn. 321, 152 N. W. 720.
public peace. Thus a municipal corporation is not liable for negligently maintaining its lockup in an unfit condition as a result of which a prisoner is injured. This is in line with the general view.

3. Fire Protection

The service required of a fire department "is a public service for the general welfare of the public" and the city or village is therefore not liable for the acts or misconduct of the department. Municipal corporations are now authorized to send their fire departments outside their corporate limits to fight fires. It would appear that in doing so they impose no additional liability on the municipal corporation for their torts; but this matter has never been determined by our court. Some argument may be made to the contrary, particularly if a fee is charged for the service; but the immunity of the city for torts of its fire department is so well established that the court is not likely to depart from the general rule even in such a case.

It has been held that the firemen of a city fire department are not the servants or agents of the person whose property they attempt to save from fire. Hence their negligence in failing to take the proper course in the extinguishment of the fire is not imputed to the property owner to defeat his suit for damages resulting when a railway locomotive went over the fire hose and

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257Gullikson v. McDonald, (1895) 62 Minn. 278, 64 N. W. 812.
259Grube v. City of St. Paul, (1886) 34 Minn. 402, 26 N. W. 228.
2613 Mason's 1927 Minn. Stats., 1940 Supp., secs. 1919-1 to 1919-3. Sec. 1919-3 provides that firemen serving outside the municipal limits as authorized are to be considered as serving in the regular line of duties just as if serving within the municipality. See Grym v. City of Virginia, (1934) 193 Minn. 62, 257 N. W. 661, holding that a fireman was protected under the workmen's compensation act in attempting a rescue of a man asphyxiated in a well outside the city limits.
GOVERNMENTAL RESPONSIBILITY FOR TORTS

as a matter of fact, since fire fighting is a governmental function and the doctrine of respondeat superior does not apply, it would seem that if a fire truck is in a collision with another car and both drivers are negligent, the municipal corporation should be able to sue the other driver, since the firemen's negligence cannot be imputed to the city. This has been held in another jurisdiction.\textsuperscript{264}

4. EXERCISE OF POLICE POWER

no rule is more consistently applied in the field of tort liability of political subdivisions of the state than the principle that municipal corporations (and quasi municipal corporations as well, although cases of this kind have not arisen as frequently in which they were defendants) are not liable for failure to exercise or a mistake in exercising their police power and other “governmental” powers of a similar nature. As a reason for this view, the immunity of municipalities in the performance of governmental as distinct from proprietary duties or powers is blended with the notion that there is no liability for the failure to exercise discretionary powers.\textsuperscript{265}

In holding municipalities not liable for a failure to exercise their police power or for a mistaken exercise of that power, the court has applied the familiar distinction between governmental and proprietary powers. The exercise of the police power is obviously governmental in character if anything is. Hence there can be no liability on the municipality in such cases.\textsuperscript{266} This principle has been applied to the wrongful revocation of a liquor license,\textsuperscript{267} the rescission of a permit to move a house,\textsuperscript{268} and the wrongful denial of a building permit.\textsuperscript{269} It will be noted that in the last case, the decision could not possibly have been made on

\textsuperscript{263}Erickson v. Great Northern Ry. Co., (1912) 117 Minn. 348, 135 N. W. 1129.
\textsuperscript{264}Paterson v. Erie R. R., (1910) 78 N. J. L. 592, 75 A. 922. As to the standard of care applied to the driver of a fire truck, see Warren v. Mendenhall, (1899) 77 Minn. 145, 79 N. W. 661.
\textsuperscript{265}See Ihk v. Duluth City, (1894) 58 Minn. 182, 59 N. W. 960; Lerch v. City of Duluth, (1903) 88 Minn. 295, 92 N. W. 1116; Claussen v. City of Luverne, (1908) 103 Minn. 491, 115 Minn. 643, 15 L. R. A. (N.S.) 698; Roerig v. Houghton, (1919) 144 Minn. 231, 175 N. W. 542.
\textsuperscript{267}Claussen v. City of Luverne, (1908) 103 Minn. 491, 115 N. W. 643, 15 L. R. A. (N.S.) 698.
\textsuperscript{268}Lerch v. City of Duluth, (1903) 88 Minn. 295, 92 N. W. 1116.
\textsuperscript{269}Roerig v. Houghton, (1919) 144 Minn. 231, 175 N. W. 542.
the basis of the discretionary-ministerial distinction since the issuance of a building permit, when legal requirements have been complied with, is a ministerial act. On the same principle, the failure to require a contractor to give a bond for the protection of materialmen and laborers as required by charter has been held to give no cause of action against the city. Likewise, in *Lerch v. City of Duluth*, the court held that a person who leased a lot on the strength of a permit he had secured from the city council allowing him to move a frame barn from one place to another could not recover damages from the city for its void revocation, the only adequate and appropriate relief being by injunction to restrain enforcement of the revocation. Here, however, the basis for the decision was at least in part the distinction between discretionary and ministerial acts. The court said:

"This principle is based upon the dictates of sound public policy, for within the scope of its proper municipal functions the governing body of the municipality has committed to it the performance of certain duties which require the exercise of judgment and discretion, and the city should not be held liable directly as a guarantor that no injury would follow from its acts in such cases."

It has been stated in dictum that a municipal corporation is not liable

"for consequential injuries arising from the bona fide exercise of, or omission to exercise, those powers which are conferred on its council or legislative body, and the exercise of which as to the time, extent, and manner is left to the discretion or judgment of such body."

Thus the failure to pass a regulatory ordinance can give rise to no municipal liability. The same is true of a failure to enforce

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270 Therefore, mandamus, which does not lie to compel the performance of a discretionary act in a particular way, will lie to compel the issuance of a building permit. Meyers v. Houghton, (1917) 137 Minn. 481, 163 N. W. 754.

271 *Ihle v. Duluth City*, (1894) 58 Minn. 182, 59 N. W. 960.


273 Curran v. Chicago, Great Western Co., (1916) 134 Minn. 392, 159 N. W. 955. This is to be distinguished from cases where liability has been imposed when the city has failed to pass an ordinance against street defects and an accident occurs as the result of such defects. In *Bohen v. City of Waseca*, (1884) 32 Minn. 176, 19 N. W. 730, 50 Am. R. 564, the defendant urged as a reason for immunity the fact that it had not passed an ordinance for the removal of nuisances such as unsafe awnings over the sidewalk. The court held, however, that the basis for the liability was the failure of the city to perform its duty of keeping the streets safe for travel, and that the authority to pass ordinances of the kind referred to did not limit the power of the council to exercise control of the streets.
Failure to require a bond of a police officer is another example. No liability on the part of the municipal corporation is occasioned in such a case.\(^{277}\)

In *McDonald v. City of Red Wing*,\(^{278}\) the city was held not liable for damages sustained by the plaintiff when his house was destroyed to prevent the spreading of a fire. However, the act complained of is justifiable even when committed by private citizens when necessary to prevent spread of a fire and hence cannot be considered a tort.\(^{279}\) In spite of this fact a number of cities have written the rule of *McDonald v. City of Red Wing* into their charters by providing for exemption of the city from liability for destruction of buildings under the direction of designated municipal officials to prevent the spread of fire.\(^{280}\)

\(^{277}\)See *Cook v. Trovatten*, (1927) 200 Minn. 221, 274 N. W. 165, an action based on the alleged failure of the commissioner of agriculture to enforce the law against unlicensed dealers in produce. While the action was against the individual officer (which was the only remedy worth considering since he was employed by the state), the same principle would seem to prevent the successful prosecution of such an action against a municipality for failure to enforce a local ordinance or resolution. The decisive test of plaintiff's test was considered to be whether or not she would have been entitled to mandamus to compel the commissioner to take positive action. "Certainly not," said the court, "because the generality of the language imposing on the commissioner the duty of enforcing the law, to say nothing of its specific provisions concerning other officers and the law generally concerning their duties, is such as to leave to the commissioner a large discretion as to the manner in which, and the agencies by which, the law is to be enforced against offenders." Idem, p. 224. A municipality has the same broad discretion in enforcing its ordinances. Hence it has been almost uniformly held elsewhere that a municipal corporation is not liable for failure to enforce ordinances which have been enacted. 6 McQuillin, Municipal Corporations (2d ed. rev. 1936) sec. 2802, p. 1073 and cases cited in note 29.

\(^{278}\)Lamont v. Stavanaugh, (1915) 129 Minn. 321, 152 N. W. 720.

\(^{279}\)13 Minn. 38 (Gil. 25).

\(^{280}\)Restatement of Torts, sec. 196; Hall and Wigmore, Compensation for Property Destroyed to Prevent Spread of a Conflagration, (1906) 1 Ill. L. Rev. 501, 502. Believing that the sacrificed party should have a claim against the community for contribution in such a case, Hall and Wigmore proposed a statute based on the common law principle which they stated thus (p. 515): "Wherever, by reason of a physical danger of loss impending upon the community or a definable portion thereof, the plaintiff has been forced to sacrifice his property, and by means of the sacrifice the impending loss is averted or diminished, the plaintiff is entitled to be reimbursed by the community or portion thereof, to the amount of his compulsory sacrifice, less the ratable proportion which would fall upon him as a member of the community or portion thereof."

\(^{280}\)Ada, (1908) sec. 124; Alexandria (1909) sec. 101; Barnesville, (1898) ch. VIII, sec. 6; Bemidji (1905) ch. V, sec. 19; Breckenridge, (1907) sec. 122; Cannon Falls, (1905) ch. XI, sec. 7; Dawson, (1911) ch. 13, sec. 6; Detroit Lakes, (1903) sec. 113; Fergus Falls, (1903) sec. 116; Glencoe, (1909) ch. VIII, sec. 7; Granite Falls, (1936) sec. 66; Hutchinson, (1913) ch. IX, sec. 7; International Falls, (1910) ch. IX, sec. 7; Jackson, (1920) sec. 105; Lake City, (1909) ch. VI, sec. 5; Montevideo, (1930) sec.
5. Parks and Recreation

Courts have experienced considerable difficulty in classifying parks and recreational activities for purposes of determining liability in tort. Decisions have been sharply divided, with the majority of the courts in favor of immunity. The Minnesota court has consistently held that a city maintains its parks in its governmental capacity and is therefore not subject to liability for damages from its negligence in maintaining them. For this purpose the term "parks" includes such recreational facilities as slides, bathing beaches, and hockey rinks. A school district is likewise exempt from liability for negligence in maintaining its playgrounds and operating its recreational program. It makes no difference that a charge is made for attendance at football games conducted by a school district or for a bathing suit and other facilities at a municipal bathing beach. There is no indication in the latter cases whether the amount of the charge would have any effect on liability; but if it were large enough to insure operation of the activity at a profit, there is reason to believe from cases applying the profit test that the immunity would be lost. It could hardly be said then to be operated for the good of all without corporate advantage.

In St. John v. City of St. Paul, the court implies that had

56; Moorhead, (1900) sec. 122; Ortonville, (1928) sec. 152; Red Wing, (1902) ch. VI, sec. 16; Renville, (1906) ch. VIII, sec. 7; St. James, (1918) sec. 100; Staples, (1908) sec. 110; Two Harbors, (1907) ch. IX, sec. 7; Virginia, (1909) sec. 184; Warren, (1914) ch. VI, sec. 6; Willmar, (1901) sec. 119; Windom, (1920) sec. 117; Winthrop (1907) ch. 10, sec. 7; Worthington, (1909) sec. 108. Cf. White Bear Lake, (1922) sec. 131.


285 Emmons v. City of Virginia, (1922) 152 Minn. 295, 188 N. W. 561.


287 Howard v. Village of Chisholm, (1934) 191 Minn. 245, 253 N. W. 766.


281 (1929) 177 Minn. 446, 225 N. W. 292.


280 Supra, note 240.

281 (1922) 179 Minn. 12, 228 N. W. 170. A recent case note on this case may be found in (1930) 5 Notre Dame Lawyer 342; see also (1936) 34 Mich. L. Rev. 1250.
the plaintiff received injury from the rented bathing suit or towel because the city had negligently allowed them to become carriers of disease rather than from a diving tower, allegedly maintained, as was the case, the city would have been liable on the analogy of the cases holding a municipal corporation liable for torts committed in the operation of a utility being operated for profit. The implication of the dictum seems to be that one function may be proprietary and governmental as to the same person. If that is true, the principle applied in negligence cases in connection with park injuries must be restated somewhat as follows: There is no liability for negligence in the maintenance of parks and playgrounds by a municipality unless a charge is made for any of the services. If such a charge is made, the municipality is liable for all negligence directly associated with the service charged for, but not for negligence in the maintenance of other facilities which are furnished regardless of payment of the fee. Thus if a man pays for the rental of a bathing suit, he may recover from the municipality furnishing it if he suffers damage from the unsanitary condition of the suit; but he may not recover if he is injured in such a case by the defective condition of a diving tower. If this dictum were to be followed, it might be the first step toward complete abrogation of the immunity doctrine in park cases, which is clearly the trend of recent decisions elsewhere.

All municipal corporations in Minnesota are authorized by statute to acquire and maintain tourist camps. Whether or not this function would be classed for purposes of tort liability along with parks and recreation is an open question in this state, as it is generally throughout the country.

6. Health

In performing its duties for the care and preservation of public health, a city is acting in its governmental character. Hence


293McQuillin ventures the prediction that "the rule will ultimately prevail that in maintaining parks, playgrounds and like recreations, the city is performing a local function for its people and it should be held liable on the same basis as a private person or corporation." 6 McQuillin, Municipal Corporations (2d ed. rev. 1936) sec. 2850, p. 1192.

294Cf. Kennedy v. Nevada, (1926) 222 Mo. App. 459, 281 S. W. 56, holding the city not liable where the acquisition of a tourist park was ultra vires.

295Cf. Kennedy v. Nevada, (1926) 222 Mo. App. 459, 281 S. W. 56, holding the city not liable where the acquisition of a tourist park was ultra vires.
it is not liable for its negligence in this regard.\textsuperscript{290} This conception of health as a governmental function is responsible for the immunity of municipal corporations from the consequences of their negligence in sprinkling streets\textsuperscript{297} and maintaining a garbage dump ground.\textsuperscript{298} There has been no suggestion of what would be the effect in the latter case if a service charge were imposed to cover the cost of refuse removal, not an unusual practice. Other courts have been divided on these propositions, the majority holding that street sprinkling and garbage removal are governmental functions.\textsuperscript{299}

7. City Hall

\textit{Snider v. City of St. Paul}\textsuperscript{300} presented the court with an opportunity to decide whether a city was answerable for its negligence in maintaining a city hall. The plaintiff had been injured through the alleged negligent operation of a city hall elevator. The court held, however, that she could not recover because the maintenance of a city hall is a governmental purpose and the city derives no revenue from it. The same rule had previously been applied to counties.\textsuperscript{301}

The question of the effect on the application of this rule of the fact that the city operates utilities whose offices are housed in the city hall has never been presented to the Minnesota court. As is shown later,\textsuperscript{302} this problem has proved puzzling in some jurisdictions.

8. Street Lighting

In view of the fact that a municipal corporation is not ordinarily liable for the failure to undertake an authorized activity, the court has several times held that a city is under no obligation to light its streets. Its mere neglect to do so is not a ground of liability, unless the charter expressly imposes the duty.\textsuperscript{303} How-

\textsuperscript{290}Bryant \textit{v. City of St. Paul}, (1885) 33 Minn. 289, 23 N. W. 220.
\textsuperscript{291}Cf. McLeod \textit{v. City of Duluth}, (1928) 174 Minn. 184, 218 N. W. 892.
\textsuperscript{292}Delanitz \textit{v. City of St. Paul}, (1898) 73 Minn. 385, 76 N. W. 48.
\textsuperscript{293}McQuillin, \textit{Municipal Corporations} (2d ed. 1928, rev. 1936) sec. 2807; see annotations in 14 A. L. R. 1473, 32 A. L. R. 988; 52 A. L. R. 187, 60 A. L. R. 101. This is also true as to the maintenance of rubbish dumps. See annotation in 63 A. L. R. 332.
\textsuperscript{300}(1892) 51 Minn. 466, 53 N. W. 763.
\textsuperscript{301}Dosdall \textit{v. County of Olmsted}, (1882) 30 Minn. 96, 14 N. W. 458.
\textsuperscript{302}Infra, text at footnotes 676-682.
\textsuperscript{303}Miller \textit{v. City of St. Paul}, (1888) 38 Minn. 134, 36 N. W. 271; McHugh \textit{v. City of St. Paul}, (1897) 67 Minn. 441, 70 N. W. 5; Freeman \textit{v. Village of Hibbing}, (1926) 169 Minn. 353, 211 N. W. 819.
ever, this rule need not rest on any classification of street lighting as a governmental function, but on the principle that a municipal corporation is not liable for a failure to exercise a discretionary power. After that principle was established, the question still remained whether a municipal corporation was liable for negligence in lighting its streets, once it undertook to perform the service. The problem was presented to the court in Bojko v. City of Minneapolis, where the plaintiff claimed damages for an assault alleged to have been traceable to the city’s inadequate street lighting system. Without discussing the relation of the poor street lighting to the injury, the court held flatly that illumination of streets involved the exercise of a governmental power and that consequently the city could not be held liable for negligence in performing this function.

9. LIBRARIES

Every city and village in the state has statutory authority to establish and maintain a library and to levy a tax for its support. Liability of a municipality for the operation of such a library has never been determined in Minnesota, but it seems likely that the maintenance of a library would be held to be governmental in character. Whether its objective is considered the furnishing of education, recreation, or both, the analogies point to immunity, since the carrying on of recreational programs by municipal corporations and educational programs by school districts have both been held to result in no liability to the municipality furnishing them. Libraries uniformly provide free services to all residents of the municipality. Hence if the profit test is to be applied there should be no liability; and the fact that incidental charges are made for overdue books and for other delinquencies

304 See supra, p. 296.
305 (1923) 154 Minn. 167, 191 N. W. 399.
306 Inadequate street lighting does not necessarily involve a breach of the duty to keep streets in good repair; but evidently if a street partially out of repair may be reasonably safe for travel if lighted but dangerous if unlighted, the fact that it was or was not lighted may be material upon the question of negligence in maintaining the street. Miller v. City of St. Paul, (1888) 38 Minn. 134, 36 N. W. 271.
307 Mason’s 1927 Minn. Stats., secs. 5661 to 5669.
308 In one case the Minneapolis library board was held liable for loss of a rare coin exhibit lent to it. Smith v. Library Board of Minneapolis, (1894) 58 Minn. 108, 59 N. W. 979; 25 L. R. A. 280. The case is not, however, a precedent on the question of tort liability.
should have no effect on liability if the activity is otherwise to be classified as governmental.\textsuperscript{310}

School districts also maintain libraries. While there have been no cases involving the liability of school districts for negligence in the maintenance of their libraries, the implication of the many general statements in the cases\textsuperscript{311} to the effect that school districts perform only governmental functions is that the general immunity of school districts from liability for their negligence extends to this activity. With the school district not liable for negligence in the operation of its library facilities, difficult questions might arise were the court to hold that municipal corporations carry on proprietary functions in operating their libraries. The statutes appear to contemplate agreements between cities and villages on the one hand and school districts on the other for the maintenance of joint libraries.\textsuperscript{312} If a joint library were established, would there be liability for negligence in its operation? Or would liability depend on whether the library was maintained in the school building or the municipal hall?

10. Education

The function of education, entrusted in this state almost entirely to school districts constituted independently of municipal government, is clearly governmental in character. Hence its negligent performance will occasion no liability to the school district.\textsuperscript{313} Since the immunity seems to rest more on the character of the duty of education than on the quasi-corporate status of the agency which performs that duty, it seems clear that this freedom from liability extends to a municipal corporation,\textsuperscript{314} which performs for its community the function of education. For purposes of tort liability, the transporting of pupils to and from school in busses is part of the function of education.\textsuperscript{315}

\textsuperscript{310}Mokovich v. Independent School District No. 22, (1929) 177 Minn. 446, 225 N. W. 292; St. John v. City of St. Paul, (1929) 179 Minn. 12, 228 N. W. 170.

\textsuperscript{311}See the section on school district liability, supra, p. 323.

\textsuperscript{312}Mason's 1927 Minn. Stats., sec. 3020.


\textsuperscript{314}St. Paul, for example.

\textsuperscript{315}Allen v. Independent School District, (1927) 173 Minn. 5, 216 N. W. 533.
F. THE MINNESOTA CLASSIFICATION OF FUNCTIONS: PROPRIETARY

1. UTILITIES

Perhaps there is no municipal function more uniformly classified for purposes of tort liability than municipally-operated utilities. Practically without exception courts have considered these enterprises proprietary. In Minnesota this principle has been established as to electric and gas plants, water works, and telephone systems. Liability has frequently been imposed upon municipalities for their torts committed in the operation of publicly-owned utilities without mention of the principle involved.

The underlying reason for classifying these ventures as proprietary appears to be that they are commercial, ordinarily being performed by private agencies for profit. In Brantman v. City of Canby, the test adopted for determining liability is whether or not the municipality has authority to grant a franchise to anyone to perform a function which it may perform itself.

"In this state a city in maintaining a board of health, a police or fire department, discharges a governmental function pure and simple; and we believe as to these or similar functions, it has no power to escape the burden imposed by granting a franchise to anyone to perform in its place. But as to furnishing water, light, etc., for private consumers and public purposes combined, the furnishing of which is not imposed by law as a governmental duty, the city, if it undertakes to do so assumes a position to

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317 Brantman v. City of Canby, (1912) 119 Minn. 396, 138 Minn. 671.

318 Keever v. City of Mankato, (1910) 113 Minn. 55, 129 N. W. 158, 775. See also Wiltse v. City of Red Wing, (1906) 99 Minn. 255, 109 N. W. 114. The case of Keever v. City of Mankato involved injury from polluted water. Generally it is not held, however, that there is an implied warranty of purity when a city distributes water to its inhabitants, but there is authority to the contrary. See (1919) 4 Minnesota Law Review 74, (1921) 5 Minnesota Law Review 326.

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


321 (1912) 119 Minn. 396, 138 N. W. 671.
those injured through its negligence therein which is not different from what would be the position of one to whom it had granted the right to furnish water or light.\textsuperscript{3}\textsuperscript{2}\textsuperscript{2}

While emphasis has been placed on the fact that a city in conducting a utility is in a profit-making business,\textsuperscript{3}\textsuperscript{2}\textsuperscript{3} there is nothing to suggest that the utility must actually make a profit before liability is imposed. Many of the cities and villages of the state operate their waterworks at cost and in a number of cases subsidize these enterprises by tax levies.\textsuperscript{3}\textsuperscript{2}\textsuperscript{4} This fact does not militate against liability. It is enough that the utility is furnished only to those who have the necessary facilities installed in their homes or places of business and pay the prescribed rates.\textsuperscript{3}\textsuperscript{2}\textsuperscript{5}  

2. Hospitals  

Only one Minnesota case,\textit{ Borwege v. City of Owatonna},\textsuperscript{3}\textsuperscript{2}\textsuperscript{6} has involved the liability of a municipal corporation for negligence in the operation of a publicly-owned hospital. The plaintiff had been burned by a hot water bottle negligently left in his bed after an appendectomy. Judgment for him was affirmed, but it is not clear from the opinion that all municipally-owned hospitals would be subjected to similar liability for their negligence. The court strongly emphasized the fact that the practice was to charge for services rendered. Nonpay patients were not knowingly received; charity patients of the county were paid for by the county board. The plaintiff was a pay patient. Thus "under the circumstances," the city was exercising its proprietary powers in operating the hospital. "It was a general hospital operated for the private advantage and convenience of the inhabitants of the city."\textsuperscript{3}\textsuperscript{2}\textsuperscript{7}

The court was not impressed with the defendant's argument that the hospital was for the preservation of health, an established governmental function. The main purpose of the hospital  

"was to care for and cure individual cases, which is the function of any hospital, whether it be a city hospital or a private


\textsuperscript{3}\textsuperscript{2}\textsuperscript{3}Keever \textit{v. City of Mankato}, (1910) 113 Minn. 55, 129 N. W. 158, 775. See also \textit{Storti v. Town of Fayal}, (1935) 194 Minn. 628, 261 N. W. 463.

\textsuperscript{3}\textsuperscript{2}\textsuperscript{4}Specific statutory authority is given to every village with a utility commission to levy a special five-mill tax for the support of the utilities. I Mason's 1927 Minn. Stats. sec. 1245.

\textsuperscript{3}\textsuperscript{2}\textsuperscript{5}\textit{Storti v. Town of Fayal}, (1935) 194 Minn. 628, 261 N. W. 463.

\textsuperscript{3}\textsuperscript{2}\textsuperscript{6}(1933) 190 Minn. 394, 251 N. W. 915.

\textsuperscript{3}\textsuperscript{2}\textsuperscript{7}(1933) 190 Minn. 394, 395, 251 N. W. 915.
hospital. When a city engages in activities which are of a nature ordinarily engaged in by private persons and which subject private persons to liability for negligence, the city is likewise liable for negligence.\textsuperscript{328}

The clear implication of the decision appears to be that a municipality would not be liable for the negligence of hospital employees if the hospital were maintained solely for the protection of society from disease. It would probably be engaging in a governmental function if it operated a sanatorium for consumptives, for example. On the other hand, the fact that a municipally-operated hospital took only charity patients presumably would not relieve it from liability. It would be subject to the same responsibility for negligence as a private hospital; and in this state owners of such hospitals are liable for the negligence of their servants whether the hospital be maintained for profit of the owners or for charitable purposes.\textsuperscript{329}

3. Liquor Dispensaries

The state liquor law\textsuperscript{330} authorizes cities of the fourth class and villages, in lieu of licensing private sales, to sell intoxicating liquor through municipal stores.\textsuperscript{331} Pursuant to this authorization, 170 cities and villages have established and are now operating municipal liquor dispensaries.\textsuperscript{332} However, no case has yet reached the supreme court involving the liability of municipal corporations for damages from negligence in the operation of this new municipal activity. Since there appears to be little authority elsewhere for cities and villages to go into the liquor business, the question has not arisen in other states either.

It seems likely, however, that the court will hold that a municipal corporation is carrying on a proprietary function in operating a liquor dispensary and therefore is liable for damages resulting from the negligence of its employees in conducting the business. With the stores almost without exception making a profit, the test

\textsuperscript{328}(1933) 190 Minn. 394, 396, 251 N. W. 915. See recent case notes, (1924) 24 Col. L. Rev. 679.
\textsuperscript{329}Mullinek v. Evangelischer Diakonissengehebei (1924) 144 Minn. 392, 175 N. W. 699. Cf. the recent case of Volk v. City of New York, (1940) 284 N. Y. 279, 30 N. E. 596, drawing a distinction between charity and pay patients with respect to municipal tort liability.
\textsuperscript{330}Minnesota, Laws Ex. Sess. 1933-34, ch. 46; 3 Mason's 1927 Minn. Stats., 1940 Supp., sec. 3200-21 ff.
\textsuperscript{331}Idem. sec. 3200-21, 3200-25. These stores are prohibited in the 25 "dry" counties of the state. Idem sec. 3200-30. Virtually special laws permit their establishment in Ottertail and Norman Counties, otherwise classified as "dry" counties. Minnesota, Laws 1939, ch. 395; 1941, ch. 401.
\textsuperscript{332}The Municipal Liquor Store, July, 1940, p. 9. Several other stores have been established since that date.
of *Keever v. City of Mankato* that an enterprise is proprietary when it is profit-making in the sense that when conducted by private persons it is operated for profit would require such a holding. The court has pointed out that a city may escape the burden of furnishing water and light by granting a franchise to perform in its place. Likewise, a municipality may license the sale of intoxicating liquor in private stores instead of selling it itself.

It is true that the purpose in establishing a liquor store is to control the liquor traffic; but as has been mentioned earlier, the Minnesota court has considered the presence of profit, or profit-making possibilities, so conclusive, of the proprietary nature of an activity, that there can be little doubt that municipalities in operating a liquor dispensary are subject to the same principles as private licensees insofar as liability for negligence is concerned.

Perhaps a more difficult question is whether or not the municipal corporation may be subject to liability in favor of a person injured by the intoxication of a purchaser of liquor from the municipal store. There is no cause of action in such case at common law, but by statute one who sells liquor to a person not entitled to purchase it (a minor, for example) is liable to one "injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person."

This "civil damage statute" applies to the employer as well as to the employee who actually makes the sale. The difficult question, however, is whether or not the "person" to whom the

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333 (1910) 113 Minn. 55, 129 N. W. 158.
335 The cases upholding the constitutionality of state statutes providing for the sale of intoxicating liquors by the state or a state agency proceed generally on the theory that the state in making this provision for the sale of liquor is exercising its police power in behalf of public health, morals, and welfare. See annotation in 121 A. L. R. 300.
337 Sworski v. Colman, (1939) 204 Minn. 474, 283 N. W. 778.
3381 Mason's 1927 Minn. Stats., sec. 3239.
339 The statute is still in force even though it was passed before the eighteenth amendment. It has been applied since repeal. Sworski v. Colman, (1939) 204 Minn. 474, 283 N. W. 778, and during the period of prohibition, Benes v. Campion, (1932) 186 Minn. 578, 244 N. W. 72. It is not necessary that the intoxication be the proximate cause of the injury. Sworski v. Colman, (1940) 208 Minn. 43, 293 N. W. 297.
340 See State v. Sobelman, (1937) 199 Minn. 232, 271 N. W. 484; State v. Holm, (1937) 201 Minn. 53, 275 N. W. 401; Mason's 1927 Minn. Stats., 1940, Supp., sec. 3238-16. It may apply to "off-sales"—sales for consumption off the premises—as well as to "on-sales"—sales for consumption on the premises. State v. Holm, supra, this note.
GOVERNMENTAL RESPONSIBILITY FOR TORTS

statute applies, includes municipal corporations. There is the general rule that statutes are not applicable to the state or its subdivisions unless the intent to make them applicable is clearly indicated. Thus, for example, the word "corporation" ordinarily is construed as not embracing municipal corporations. On the other hand the use of the term "corporation" in the wrongful death statute has been held by the Minnesota court to embrace municipal corporations. Furthermore, the law under which cities and villages are permitted to establish liquor dispensaries includes in the meaning of the term "person" the meaning extended to it by Mason's 1927 Minnesota Statutes, sec. 10933. That section, at paragraph 11, permits the application of the word "person" to "bodies politic and corporate" in addition to partnerships and other unincorporated associations. While it is still an open question in this state, it appears quite possible that a court would hold that a municipal corporation engaging in the retail liquor business would be subject to civil liability to the same extent as private liquor dealers for their wrongful actions, both common law torts and statutory wrongs.

4. Toll Bridges

The city of Winona once built a toll bridge over the Mississippi River. It authorized a power company to string its lines over the bridge from its Wisconsin power plant. Later a painter with whom the city contracted to paint the bridge was killed by a brush discharge due to the negligence of the power company and the city. The city was held liable for wrongful death because "the bridge was the private property of the city, and held, owned, and maintained in its proprietary capacity." While the proprietary nature of the undertaking appeared to be clearly established in the court's mind, it was pointed out that the same result would have been reached had the bridge been considered as a quasi-public highway, in which case, the rule imposing liability upon municipal corporations for defective streets would have been invoked. There is therefore no essential difference in liability between municipal free bridges and toll bridges. Both are portions of the highway.

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84aSee the many cases cited under the title "corporations" in Words and Phrases.
84cMason's 1927 Minn. Stats., 1940 Supp., sec. 3200-21.
84dHowever, the civil damage statute is not a part of the 1934 liquor act.
84eHoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577.
5. AIRPORTS

At least a score of cities and villages in Minnesota own and operate airports, and many of them have done so for a number of years. Yet the airport function has not yet been classified in this state for purposes of tort liability. Elsewhere it has been generally held that a municipality operates an airport in its proprietary capacity and is liable for damages resulting from its negligence in such operation. In view of the virtual unanimity of the courts and considering the judicial tendency to classify previously unclassified activities as proprietary, the likely attitude of the Minnesota court would seem to favor the subjection of municipal corporations to tort liability in their operation of airports.

(To be Continued)