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GOVERNMENTAL RESPONSIBILITY FOR TORTS IN MINNESOTA*

By Orville C. Peterson†

H. Torts Involving Mixed Functions

With the complexity of modern municipal government, there are numerous cases when action by municipal authorities cannot be simply classified as "governmental" or "proprietary." Many actions have a dual nature, and in such instances theoretical difficulties in determining liability for negligence are amplified. For example, a municipal water supply system, classified for purposes of tort liability as a proprietary function, serves the city as well as private consumers. It furnishes water to fight fires, to sprinkle streets, to sprinkle park grass, and to fill municipal swimming pools. A municipal electric distribution system not only furnishes light to domestic consumers, but it lights municipal buildings, streets and recreational fields of the city and furnishes current to operate fire alarm systems and traffic signals.

In these and many other cases, this dual nature of municipal action demonstrates in striking fashion the difficulty of rationalizing and applying the distinction between governmental and proprietary functions in the determination of municipal liability for its torts. Yet the fact that action can be considered both proprietary and governmental has given our court much less difficulty than might have been expected because in such cases the court has exhibited an almost invariable tendency to impose liability. Perhaps this is a reflection of dissatisfaction with the immunity doctrine which, too well settled to permit judicial abrogation, can be mitigated in effect in these cases by leaning heavily on the proprietary nature of the action or non-action which has resulted in injury.

When the court has been able to construe negligence as the failure to keep streets in a safe condition for travel, it has ordinarily done so although other functions might be involved. When a municipal corporation closes off a street with a rope or

*Continued from 26 MINNESOTA LAW REVIEW 358 and 480. 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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similar barrier as a means of controlling traffic, a governmental
function, it may be liable for negligence in the maintenance of
its streets; and it is no defense that the barrier was placed
in the street by a policeman.

"The nature of the act, rather than the official title or charac-
ter of the officer to whom the duty of caring for and attending to
the public streets, or exercising duties thereon conflicting with the
right to use the same determines the liability."

A case which indicates the extreme to which the court some-
times has gone in relying upon a breach of the duty to keep
streets safe for travel as a justification for the imposition of
liability even though the negligence causing injury was an act of
the police department in its effort to regulate traffic, is Fitzgerald
v. Village of Bovey involving a collision with a "dummy
policeman." The village of Bovey had placed a cone-shaped dummy
policeman at the center of an intersection. About eighteen inches
in diameter and six inches high, it extended somewhat more to
one side of the center than to the other. An automobile being
driven at night over the street on which this traffic control
device was placed struck the dummy with its left front wheel and
was diverted into a ditch against a telephone pole. In affirming
judgments for the plaintiffs on the verdicts for the resulting
injuries, the court found ample evidence to support the jury's
conclusion that under the circumstances the defendant was negli-
gent in putting the dummy where it was. The liability was placed
squarely on the fact that the municipality is given exclusive con-
trol of the streets and has the duty of exercising reasonable care
in keeping them in safe condition. Although the defendant con-
tended that as the council determined to install such a marker as
a practical means of assisting the traveling public and that other
municipalities had done the same thing, the court said that what
was proved was not conclusive that the installation of the dummy
policeman was proper since there was no evidence that other
municipalities had installed and maintained such markers or that
such markers were practical, proper or necessary. While there

647 Kleopfert v. City of Minneapolis, (1904) 93 Minn. 118, 100 N. W. 669.
649 Kleopfert v. City of Minneapolis, (1904) 93 Minn. 118, 120. 100 N. W. 669.
(1928) 174 Minn. 450, 219 N. W. 774.
was disagreement on this point of negligence,659 the court seemed agreed that what was involved was an alleged breach of the duty of keeping streets in safe condition for travel. Evidently applying the rule that the nature of the act is the significant thing, the court appeared to find the fact that the dummy was placed in the street in the exercise of the governmental function of traffic regulation of no significance. While, assuming negligence, the court's conclusion is consistent with that reached in most of the cases in which a governmental function has been involved in addition to the exceptionally-considered street function, it differs in its conclusion from a more recent case decided by another court660 under somewhat similar circumstances. The plaintiff in that case had been hit by an automobile which had been deflected from its course because of a collision with an ellipsoidal traffic button about four inches in height, placed in the street by the city as a marker for a safety zone. A decision for the plaintiff was reversed on appeal on the ground that the placing of a button in a street was in performance of a governmental function in connection with the control of traffic.652

The same tendency toward holding the municipal corporation liable is demonstrated in the cases involving a defective condition of the street occasioned by some action of the city in its fire protection services. In the leading case on this point, Hillstrom v. City of St. Paul,655 a pole erected in one of the streets of the city and used solely for supporting wires and an alarm box used as part of the fire alarm system belonging to the city fire department, had fallen because it was rotten. The cross bar struck and killed the plaintiff's son. The rule stated in that case in holding for the plaintiff is the key to most of the dual-capacity cases in which street defects have been involved:

"If the city permits the dangerous condition to continue after it knew, or ought to have known, of its existence and after it has had a reasonable opportunity to protect the public from the danger, the city cannot excuse its failure to perform its duty of keeping

659Justice Stone dissented. "My error, if any, is in my premise that it is a matter of common knowledge that the dummy so-called, ... is substantially the same as those used in cities and villages everywhere for the purposes of guiding traffic. If that be true, defendant could not have been negligent."
655Blackburn v. City of St. Louis, (1938) 343 Mo. 301, 121 S. W. 2d. 727. Other cases on both sides are cited in (1939) 23 Marq. L. Rev. 216; (1939) 11 Rocky Mt. L. Rev. 128.
660For a discussion of the liability of a municipal corporation for a defective traffic signal, see (1937) 21 MINNESOTA LAW REVIEW 459.
652(1916) 134 Minn. 451, 159 N. W. 1076; see (1917) 1 MINNESOTA LAW REVIEW 188.
its streets safe, and relieve itself from liability for such omission, by showing that the dangerous condition of the street resulted from acts done in the performance of another governmental duty, notwithstanding the fact that it is not liable for negligence in the performance of such other governmental duty.\textsuperscript{654}

That rule has led to liability in cases where a defective condition of the street was created from water used in fighting fires.\textsuperscript{655} In one such case the plaintiff was denied recovery,\textsuperscript{656} but that case is readily distinguishable because the alleged defect was a mere slippery condition, which it is clear a city can ordinarily permit to exist without subjecting itself to liability.\textsuperscript{657}

The city has also been held liable where the function of preservation of health and the duty to maintain streets have been concurrently involved in negligence cases. Thus in McLeod \textit{v. City of Duluth,}\textsuperscript{658} where the plaintiff was injured through the negligence of a street flushing crew of the city, the city was held liable. The court drew a distinction between cases where flushing of a street is authorized and done solely for the comfort and health of the general public and where it is not done primarily in the interest and promotion of the public health but in the discharge of the general duty of caring for the street even though it is incidentally beneficial to the public health. Only in the former cases would the municipal corporation be exempt from liability. After examining the Duluth charter provisions, the court concluded that in that case flushing was to keep the street in a safe condition for travel and not primarily for public health.\textsuperscript{659}

\textsuperscript{654}The decision in Hillstrom \textit{v. City of St. Paul} is to be differentiated from that in Howard \textit{v. City of Stillwater}, (1927) 171 Minn. 391, 214 N. W. 656, where the plaintiff was refused recovery for an injury sustained when, with the permission of the chief of the fire department, he climbed a street car company pole to repair a city fire alarm wire which had broken and fallen to the ground because of the city's negligence. Immunity was granted because the city was engaged in a governmental function in maintaining the fire alarm system. It was held that the plaintiff could not charge the city with liability under the rule that the city is bound to use ordinary care to maintain its streets in reasonably safe condition. It is to be noticed here that the unsafe condition of the streets, if any, in having the alarm wire upon it, was not the cause of the accident.

\textsuperscript{655}Nichols \textit{v. City of Minneapolis}, (1885) 33 Minn. 430, 23 N. W. 868; Stoker \textit{v. City of Minneapolis}, (1884) 32 Minn. 478, 21 N. W. 557.

\textsuperscript{656}Henkes \textit{v. City of Minneapolis}, (1890) 42 Minn. 530, 44 N. W. 1026.


\textsuperscript{658} (1928) 174 Minn. 184, 218 N. W. 892.

\textsuperscript{659}It is not likely that the conclusion would be any different under most other home rule charters.
Liability...has also been imposed where a city maintained or permitted the maintenance of a garbage and refuse deposit at the end of a street in such a way that it looked like a prolongation of the street. No attention was given to the fact that the disposal of garbage was a health function, but the conclusion is nevertheless consistent with the rule of *Hillstrom v. City of St. Paul*.

Where parks and street maintenance have been involved, the court has held to the same line. Parkways or other streets in parks have been placed in the same category as other streets, and municipal corporations have been held liable for street defects even where the injury for which redress is sought occurs while the street is being used for play. In *Ackeret v. City of Minneapolis*, the leading case involving parkways, the court recognized the fact that there was no logical distinction, as respects tort liability, between parks and streets but since one had actually been made, it placed parkways within the category of streets rather than parks for purposes of tort liability. It said:

"On examining the grounds upon which liability is imposed for defects in streets, we find that the same grounds exist for imposing liability for defects in the walks and pathways in question. These walks and pathways were used not merely for purposes of pleasure and recreation, but as thoroughfares for passing from one part of the city to another. They differed from other walks provided by the city for the use of pedestrians only in the fact that they were within the limits of a park. We find no substantial distinction between such walks and those located along the public streets."

Conceivably, the rule as to the non-liability of a municipality for damages resulting from its negligence in maintaining a park might be applied to a case of injury sustained on a path which had no connection with the municipal street system or which was not used in passing from one part of a municipality to another. However, this is an extremely unusual situation even if the court were to make a distinction between ordinary parkways and such paths.

In the case of municipal corporations, liability attaches where

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661 Kleopfert v. City of Minneapolis, (1904) 90 Minn. 158, 95 N. W. 908; Ackeret v. City of Minneapolis, (1915), 129 Minn. 190, 151 N. W. 976; Nelson v. City of Duluth, (1927) 172 Minn. 76, 214 N. W. 774.
663 Ackeret v. City of Minneapolis, (1915) 129 Minn. 190, 195, 151 N. W. 976.
the negligence can be associated with the duty to maintain streets in good repair, but it may not be imposed if the negligence occurs only in the discharge of another governmental function. In the case of quasi-municipal corporations, however, the situation is quite different because of the immunity of towns and counties from liability for damages arising out of their failure to keep their roads in good repair. It might be expected that if the tendency is to hold the political subdivision liable for its torts whenever possible, a quasi municipal corporation would be required to answer in damages where negligence in the maintenance of a road is coupled with negligence in carrying on a proprietary function for which liability is imposed. The only case in which this question has been presented seems to indicate that this will be the case in practice. *Storti v. Town of Faya* 664 presented the court with a situation converse to that involved in *Hillstrom v. City of St. Paul* 665. In the *Storti Case* a town telephone wire fell down, and the plaintiff, while a traveler on the state trunk highway, was caught by the wire and injured. As has been seen, neither the town nor the state would have been liable because of the defect in the highway. In the *Hillstrom Case*, the city would not have been liable had the defect been solely in the maintenance of the fire alarm system. The court held the defendant liable in both cases, in the township case on the ground that the defendant was negligent in carrying on a proprietary function, the telephone system, and in the city case on the ground that the defendant was negligent in the maintenance of its streets. The conclusion from these two cases, largely borne out in other cases, seems almost inescapable that if an injury occurs through the acts or omissions of municipal authorities in carrying on two functions, for the negligence of which the municipality is liable in only one case, liability will be imposed if reasonably possible.

In only one situation has the court found no liability in the case of dual functions when it might have given relief to the injured plaintiff by finding that there had been a breach of the duty to keep the streets in a safe condition for travel. It has been pointed out earlier that no liability is incurred by failing to light streets.666 Where that question has been presented the plaintiff

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664 (1935) 194 Minn. 628, 261 N. W. 463.
665 (1916) 134 Minn. 451, 159 N. W. 1076.
has usually urged that a dark street was a street unsafe for travel. A holding to that effect might not have been inconsistent with such decisions as the police and fire cases, as *Hillstrom v. City of St. Paul*, for example, discussed previously in this chapter, but the court has not countenanced the argument. However, the court has pointed out that since a street which is partially out of repair or obstructed may be safe if lighted but dangerous if not, the fact that it was or was not lighted may be material on the question of negligence.\(^667\)

Where a municipal utility and some governmental activity have both been involved in the same act, the same tendency toward liability is apparent as in the street cases, but the conclusions reached have not been uniformly against the municipal corporation. In *Brantman v. City of Canby*\(^668\) the city was held liable for damages due to a gas leak although there was some evidence that the leak was in the pipes furnishing gas for street lighting, a governmental function;\(^669\) and in *Keever v. City of Mankato*,\(^670\) where the city was held liable for damages resulting from the negligent pollution of the water supplied domestic consumers, the court said that the fact that a portion of the water was used by the city for protection against fire and in promoting the public health did not absolve it from liability. The court took the same view in the town telephone case.\(^671\) Liability was imposed in spite of the fact that according to the terms of the enabling statute, the system was authorized for fire prevention, public welfare, health and safety and facilitating the work of public improvements, rentals being permitted incidentally.\(^672\)

\(^{667}\) Miller v. City of St. Paul, (1888) 38 Minn. 134, 36 N. W. 271. However, the Hillstrom Case would undoubtedly be followed where an injury occurred to a pedestrian as a result of a defective pole used solely for street lighting. A recent Michigan case has held the city liable in such a situation. * Rufner v. Traverse City*, (Mich. 1941) 295 N. W. 620.

\(^{668}\) (1912) 119 Minn. 396, 138 N. W. 671.

\(^{669}\) The Wisconsin supreme court has recently taken the same attitude. In *Christian v. City of New London*, (1940) 234 Wis. 123, 290 N. W. 621, it held that a city which operated a municipal electric distribution system which supplied public as well as private needs was not engaged in a governmental function when supplying power for the street lighting system so as to escape liability for the death of a boy who came in contact with a live wire of the street lighting system.

\(^{670}\) (1910) 113 Minn. 55, 129 N. W. 158, 775.

\(^{671}\) Storti v. Town of Faysal, (1935) 194 Minn. 628, 261 N. W. 463.

\(^{672}\) The decision has been criticized: "It would seem that if the dominant purpose was to serve a governmental need, an incidental private purpose, and profit therefrom used in furtherance of the public purpose, should not have destroyed the town's immunity." Seasongood, Objections to the Governmental or Proprietary Test, (1936) 22 Va. L. Rev. 910, 941. Cf. *St. John v. City of St. Paul*, (1929) 179 Minn. 12, 228 N. W. 170.
Apparently the only case which reached a different conclusion is *Miller v. City of Minneapolis* 773. The household goods of the plaintiff were destroyed by fire when the fire department could get no water for an hour because the hydrant was clogged. The court found for the defendant in a suit for the value of the goods on the ground that in so far as the city maintained its water plant for use by its fire department in extinguishing fires, it was performing a governmental function. The case is difficult to differentiate from *Brantman v. City of Canby*.774 In view of the later decisions holding consistently against the municipal corporation in cases involving utility operations of a municipality, the strength of *Miller v. City of Minneapolis* as a precedent is probably now open to question.775 However, it has never been expressly overruled or modified.

Reference has been made earlier in this survey776 to the maintenance of the municipal hall as a governmental activity. Accidents in municipal buildings provide a most striking illustration of the difficulty in which the courts find themselves in trying to apply the capacity test to determine tort liability. The Minnesota court has established the general principle that a municipal corporation operates a city hall in its governmental capacity and is therefore not liable for damages resulting from the negligence of its employees in its maintenance;777 but the effect of housing in the building administrative offices for municipal enterprises of a proprietary character never has been determined. In at least one case elsewhere a distinction has been made between the portion of the hall occupied by these enterprises and those occupied by departments administering governmental functions. In that case778 the building was used as a city hall and an opera

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773 (1898) 75 Minn. 131, 77 N. W. 788.
774 But in *Brantman v. City of Canby*, the court refused to consider *Miller v. City of St. Paul* as controlling.
775 Other courts have been divided on the question of municipal liability due to defective hydrants. See annotation in 113 A. L. R. 661.
776 Supra, (1942) 26 MINNESOTA LAW REVIEW 350.
777 Snider v. City of St. Paul, (1921) 51 Minn. 466, 53 N. W. 763; see also *Dosdall v. County of Olmsted*, (1882) 30 Minn. 96, 14 N. W. 458.
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house, and liability was made to depend upon the use the plaintiff was making of the building at the time of her injury. Since she went in to pay her taxes, there was no liability. Under such a doctrine it is a matter for conjecture as to what liability would be imposed on the municipal corporation if a citizen decided to pay his water bill and his dog's license fee at the same time, and was injured in going from the water department to the office of the city clerk.

In some cases where certain rooms in a city hall or court house are let for hire, liability has been limited to those persons who have paid for privileges enjoyed or services rendered. However, in *Bell v. City of Pittsburgh*, the supreme court of Pennsylvania held that the use of a public building partly for business and partly for governmental purposes charges the municipality with responsibility as though it were maintaining it throughout in its proprietary capacity.

It is common practice, especially in the smaller cities and villages, to lease the auditorium of the municipal hall for meetings, dances, movies, and other entertainments. Some of the halls recently constructed appear to have been built with leasing or attending an entertainment in the hall is injured by a defect, the municipality is liable if it has been negligent. See *Little v. City of Holyoke*, (1900) 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 41; *Buchanan v. Town of Barre*, (1894) 66 Vt. 129, 28 Atl. 878, 23 L. R. A. 488, 44 Am. St. Rep. 829; see *Bennett v. City of Portland*, (1928) 124 Or. 691, 265 Pac. 433. A Georgia court has held, however, that a municipality permitting the use of its auditorium for a discussion of rehabilitation loans to be made by the federal government would not be liable to someone injured while attending the meeting, since the municipality would be making use of its hall in such a case in its governmental capacity. See *Roberts v. Mayor, etc., of Savannah*, (1936) 54 Ga. App. 375, 188 S. E. 39.

It has been held likewise in a jurisdiction where public parks are considered a governmental function that the maintenance of a part of a municipal park for profit will not make a city responsible for accidents in other parts. *Bisbing v. Asbury Park*, (1910) 80 N. J. L. 416, 78 Atl. 196; see note, (1911) 33 L. R. A. (N.S.) 523. The attorney general of Minnesota once ruled that if a municipal corporation receives some income from its hall and invites people or permits them to come to it for purposes other than those connected with the government of the municipality, it would be liable for letting its village hall fall into disrepair. *Minn. Op. Atty. Gen. 1918, No. 51*. Under the latter circumstances, the attorney general said, the municipality is liable "to the same extent and in the same manner as private corporations and natural persons would be." Some years later he avoided the real question by ruling that whether or not municipalities are liable for defects in their buildings depends upon whether or not the buildings are used for proprietary or governmental functions. *Minn. Op. Atty. Gen. 1930, No. 47*.

679 Benton v. Boston City Hospital, (1885) 140 Mass. 13, 1 N. E. 836; see *Boyle v. San Diego Union High School District*, (Cal. 1931) 1 P. (2d) 1037. It has been held likewise in a jurisdiction where public parks are considered a governmental function that the maintenance of a part of a municipal park for profit will not make a city responsible for accidents in other parts. *Bisbing v. Asbury Park*, (1910) 80 N. J. L. 416, 78 Atl. 196; see note, (1911) 33 L. R. A. (N.S.) 523. The attorney general of Minnesota once ruled that if a municipal corporation receives some income from its hall and invites people or permits them to come to it for purposes other than those connected with the government of the municipality, it would be liable for letting its village hall fall into disrepair. *Minn. Op. Atty. Gen. 1918, No. 51*. Under the latter circumstances, the attorney general said, the municipality is liable "to the same extent and in the same manner as private corporations and natural persons would be." Some years later he avoided the real question by ruling that whether or not municipalities are liable for defects in their buildings depends upon whether or not the buildings are used for proprietary or governmental functions. *Minn. Op. Atty. Gen. 1930, No. 47*.

revenue-producing activities specifically in mind. The attitude of the court toward liability for torts in connection with the use of a municipal hall for mixed functions may, therefore, become increasingly important. The more recent precedents in other cases where both governmental and proprietary functions are involved suggest that the principle of Bell v. City of Pittsburgh might be followed here; but if the court were to apply the principle that incidental charges (and thus incidental revenue) will not result in abrogating the rule of immunity, the decision of the Snider Case might be followed even where the hall is used for more than strictly governmental functions.

The discussion of this chapter can be climaxed with a brief mention of City of Winona v. Botzet, for it illustrates excellently the difficulties presented to the courts in applying the capacity test in determining tort liability in cases of negligence. Horses on a bridge had been frightened by the blowing of a steam whistle on a city waterworks building in order to notify union men and city employees that quitting time had come. It was contended that the city was not liable for the resulting injury because in locating and blowing the whistle the city was exercising one of its governmental powers, the establishment and maintenance of its fire department and fire alarm system. However, the court held, first, that if the whistle had been blown in the exercise of the power to protect against fires the city would not be exempt from liability, since the blowing of the whistle was a public nuisance when it was done within 100 feet of a bridge and was unnecessary, and second, that the whistle was not blown by the city in the exercise of its power to protect its inhabitants against fire.

681(1940) 25 Minnesota Municipalities 149 carries a news note to the effect that the New York Mills village hall, then being built, included, in addition to the usual council chambers, municipal court room and jail, quarters for the municipal liquor store, public library and postoffice, a dining hall, dance floor, kitchen, and bowling alley. Similar halls have been built even in the very smallest villages. The recently completed village hall at Storden houses an auditorium, auxiliary room, bowling alleys, movie projection room, library, and dressing room. (1941) 26 Minnesota Municipalities 494.

682Compare Bell v. City of Pittsburgh with Kelley v. City of Boston, (1904) 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429, where the Massachusetts court held that a city is not liable for an injury caused by ice and snow negligently thrown on the roof of its city hall by men employed by its superintendent of public buildings if the whole building is used for municipal purposes, even though a portion is occupied by the water, sewer and other departments.

683(C.C.A. 8th Cir. 1909) 169 Fed. 321.

684For several good illustrations of similar cases, see Seasongood, Objections to the Governmental or Proprietary Test, (1936) 22 Va. L. Rev. 910. 939-941. A recent case of interest involving mixed functions is
I. Torts to Which the Distinction Between Governmental and Proprietary Functions Does Not Apply

1. Invasions of Private Property

What happens when a trespass, nuisance, or other invasion of an interest in land is committed in the performance of a governmental function is a collision between the immunity rule, so thoroughly established in negligence cases in which injuries to real property are not involved, and the protection from damage given by the law to private property, epitomized in the constitution in the due process provision and especially the clause forbidding the taking or damaging of private property for public use without compensation. Since the principle that private property should not be taken without due process and compensation is even more firmly established than the rule of immunity in the performance of governmental functions, there has developed an exception to the doctrine that a municipality is immune from liability for torts committed in its governmental capacity. It has been said that the courts uniformly charge cities with liability when the injury complained of is the result of a positive trespass to real property or a nuisance created by the acts of its officers. In general, this seems to be true in Minnesota if the word "nuisance" is used in its more limited and accurate sense of an invasion of interests in the private use of land.

Much of the difficulty in so-called nuisance cases is that in modern law the term "nuisance" has been extended beyond this primary meaning of interference with the use and enjoyment of real property to include invasions of a variety of personal rights. This extension is recognized by statute in Minnesota. As a matter of fact, the term "nuisance" has been used so freely that it has almost completely lost its connotation as a specific tort. The confusion in terminology between negligence, nuisance,
and trespass is perhaps most apparent in the case of actions for
damages caused by surface water, but the difficulty encountered
in any attempt to attach proper labels to torts in these categories
is evident in other cases; and any one who studies the decisions,
even casually, finds it difficult to determine where nuisance leaves
off and trespass begins and what the relation is between these
torts and negligence. In one case involving a claim for damages
from the discharge on plaintiff's farm of effluent from the city's
septic tank, the court said, "The question of negligence is not
involved. A nuisance does not rest upon the degree of care used
but rather upon the danger, indecency, or offensiveness existing
or resulting even with the best of care." The court then referred
to the statute to indicate what the elements of a nuisance are.
On the other hand, obstructions, excavations, and other defects
in streets have commonly been called nuisances, and liability has
uniformly been determined in actions involving damages due to
such obstructions by applying the test of the municipality's due
care in keeping its streets in a safe condition for travel. Contrasted with Johnson v. City of Fairmont is Powers v. Village of
Hibbing in which the court refused to allow the plaintiff
damages suffered when her premises were flooded because of the
backing up of a village sewer during an almost unprecedented
rainfall. The plaintiff claimed damages because of the defendant's
negligence in maintaining the sewer in the condition it was in
for a number of years, trespass in flooding her basement, and
the maintenance of a nuisance in keeping the sewer in this condi-
tion. The court construed the trespass allegation as charging the
equivalent of a tort or wrong in characterizing the resulting con-
sequence of the defendant's alleged negligence in maintaining
this sewer, and applied the standard of reasonable care and

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689 Johnson v. City of Fairmont, (1933) 188 Minn. 451, 247 N. W. 572.
690 Mason's 1927 Minn. Stats., sec. 9580.
691 These cases have been discussed, therefore, in the section on street
and sidewalk cases rather than here. For a few of the cases where obstruc-
tions or excavations have been termed nuisances, see Cleveland v. City of
St. Paul, (1871) 18 Minn. 279 (Gil. 255); Moore v. Townsend, (1899) 76
Minn. 64, 78 N. W. 880; Svendsen v. Village of Alden, (1907) 101 Minn.
158, 133 N. W. 461. See also Mueller v. City of Duluth, (1922) 152 Minn.
159, 188 N. W. 205; Mesberg v. City of Duluth, (1934) 191 Minn. 393, 254
N. W. 597; Heidemann v. City of Sleepy Eye, (1935) 195 Minn. 611, 264
N. W. 212; O'Hara v. Morris Fruit & Produce Co., (1938) 203 Minn. 541,
282 N. W. 274.
692 (1930) 182 Minn. 66, 233 N. W. 597.
diligence required of the municipality in constructing its sewers.\textsuperscript{692} As for the nuisance allegation, the court sanctioned and applied a rule in a New York case\textsuperscript{694} that it is necessary to prove negligence in nuisance cases except when the nuisance is the result of an unauthorized or unlawful and wrongful act.\textsuperscript{695}

In spite of the confusion in terminology, the court has applied different rules for a nuisance from those used in the cases of negligence and other torts heretofore considered only where the tort is a nuisance in the true sense of being an invasion of an interest in the use and enjoyment of property. Where a personal injury has been involved, the court has applied the usual distinction between governmental and proprietary functions, even though the pleader has sought to treat the wrongful act as a nuisance or a trespass. Thus in \textit{Bojko v. City of Minneapolis},\textsuperscript{696} recovery was not permitted for damages suffered as a result of failure to light streets, and the court concluded that it made no difference “whether the neglect be characterized . . . as creating a nuisance, or as mere negligence.” The same point was made in \textit{Mokovich v. Independent School District, No. 22},\textsuperscript{697} in which the plaintiff sought damages for injuries suffered when he was thrown onto a marking line of unslaked lime while playing football for the school. With some courts, an allegation based on nuisance has been successful in cases like these, involving actions where recovery on the ground of negligence would have been precluded;\textsuperscript{698} but the Minnesota cases indicate that a mitigation of the immunity rule cannot be sought in that direction.

\textsuperscript{692}As the court says, “The case of Netzer v. Crookston City, (1894) 59 Minn. 244, 61 N. W. 21, sufficiently points out that where the improvement is lawful and the flooding is caused by some careless act or omission in maintaining the same, the municipality is required only to exercise ordinary care, and that the rule applies whether the action be considered as one for trespass or for negligence. The case of Tate v. City of St. Paul, (1894) 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501, is held not in conflict with that rule.”


\textsuperscript{695}\textit{Cf. Restatement of Torts}, sec. 822, as to the elements of liability for a nontrespassory invasion of another’s interest in the private use and enjoyment of land. According to the Restatement, the invasion must be either (1) intentional and unreasonable, or (2) unintentional and otherwise actionable under the rules governing liability for negligence, reckless or ultrahazardous conduct.

\textsuperscript{696}(1923) 154 Minn. 167, 191 N. W. 399.

\textsuperscript{697}(1929) 177 Minn. 446, 225 N. W. 292.

On the other hand, when the wrongful act complained of amounts to an invasion of an interest in the use or possession of land, the municipality which has occasioned the injury has been held liable uniformly without regard to the distinction between governmental and proprietary functions. The doctrine is thoroughly established that no political subdivision of the state may cause an invasion of private property through its own use of property, either directly or indirectly, without being subject to liability for the resulting damages. The municipality has been placed in exactly the same position as private landowners with respect to its trespasses upon adjacent lands. The principle has been extended to apply in situations where it seems difficult to rely for the conclusion on the constitutional guarantee of compensation for the taking or damaging of property for public use. Newman v. County of St. Louis is such a case. In clearing, opening and improving a county road, St. Louis County employees negligently set fire to certain inflammable brush and refuse within the road, and the fire spread to the plaintiff’s adjacent lands because it was negligently tended. As a result of this, the plaintiff’s buildings were destroyed. Overruling defendant’s demurrer in the plaintiff’s action for damages, the court held that liability of a county is not limited to cases of positive trespass. Since the county stands in exactly the same position through its possession of county roads as a private landowner toward other landowners for damages to adjacent lands caused by acts done in the management and control of the highway, the complaint was held to state a cause of action. Shortly after the Newman decision, the court

96 F. (2d) 1078; Shapiro v. City of Chicago, (Ill. App. 1941) 32 N. E. (2d) 338. A recent case note on the Adams decision, found in (1940) 25 Minnesota Law Review 115, concludes, “Although the result in the instant case may be desirable, it would seem that little is gained by calling purely negligent conduct a nuisance in order to uphold the liability of a municipality.”


100 See the discussion of that provision of the constitution, infra, text at footnote 1003 et seq.

101 (1920) 145 Minn. 129, 176 N. W. 191.

102 The question had been left open in an earlier case. Shute v. Princeton Township, (1894) 58 Minn. 337, 59 N. W. 1050.
decided that a town would be liable for spreading quack grass on to land which had previously been free from quack grass.  

Municipal and quasi municipal corporations have been liable for invasions of property in various situations. Many of those cases have been mentioned previously. They have been held liable, for example, for placing an embankment on private property, for trespass on a cemetery lot, and for damming a river so as to overflow private land. A city has been held liable for damages to private buildings caused by blasting on its own property.

The private nuisance statute in terms makes no distinction between political subdivisions of the state and others, and the results in cases in which municipal corporations have been accused of maintaining a nuisance suggest that the court has read none into the law. The public nuisance statute apparently is also applicable to municipal corporations, although no one can bring an action because of the maintenance of such a nuisance unless he suffers special or particular damages arising from the

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703 Dynes v. Town of Kilkenny, (1922) 153 Minn. 11, 189 N. W. 439. This point was dictum in the case, the holding being that injunction against hauling dirt containing quack grass did not lie.

704 Nelson v. Village of West Duluth, (1893) 55 Minn. 497, 57 N. W. 149.

705 Sacks v. City of Minneapolis, (1898) 75 Minn. 30, 77 N. W. 563.

706 Boye v. City of Albert Lea, (1898) 74 Minn. 230, 76 N. W. 1131.

707 Hughes v. City of Duluth, (1938) 204 Minn. 1, 281 N. W. 871. Injuries to the person were also held compensable in that case, where the blasting was in connection with street construction. So far as the building was concerned, the result would have been the same whether or not the distinction between governmental and proprietary functions had been applied.

As a matter of fact, the only question discussed was the liability of a municipal corporation for acts of WPA workers engaged on municipal projects. As to blasting, cf. Nelson v. McKenzie-Hayne Co., (1934) 192 Minn. 180, 256 N. W. 96, where a contractor constructing a highway for the state was held not liable for blasting damage, the blasting being considered as a necessary act which would have been a nuisance had it not been authorized by the state.

No Minnesota case has involved municipal liability for a noise nuisance on city or village property. See on this point the recent Wisconsin case of Blake v. City of Madison, (1940) 237 Wis. 498, 297 N. W. 422, which held that a municipality may be liable for such a nuisance maintained on its athletic field even though it operates the athletic field in its governmental capacity.

708 Mason's 1927 Minn. Stats., sec. 9580.

709 Mason's 1927 Minn. Stats., sec. 10240, defines a public nuisance as a crime against the order and economy of the state, consisting in unlawfully doing an act or omitting to perform a duty, which act or omission (1) annoys, injures, or endangers the safety, health, comfort, or repose of any considerable number of persons, (2) offends public decency, (3) unlawfully interferes with, obstructs, or renders dangerous for passage a lake, river, or other public water, or a public park or street, or (4) in any way renders a considerable number of persons insecure in life or the use of property.

710 See Mesberg v. City of Duluth, (1934) 191 Minn. 393, 254 N. W. 597.
nuisance apart from the general injury to the public. Of course an act or omission is not a public nuisance if it has been authorized by the state.

Apart from the numerous cases in which street obstructions, excavations, or other defects have been termed nuisances and those in which casting sewage on private lands or into streams also has been considered a nuisance, nuisance cases involving municipal corporations have not been many, and those involving quasi municipal corporations have been few indeed. Usually, the court has taken it for granted that the immunity of political subdivisions of the state for negligence in the exercise of governmental functions does not extend to "nuisances" which do not arise out of or are indistinguishable from negligence; and since counties, towns, and school districts have been held to exercise only governmental functions, the imposition of liability upon these quasi municipal corporations in what have been considered to be nuisance actions seems to show conclusively that the liability of political subdivisions of the state for the maintenance of a nuisance in its correct sense is the same as that of a private individual under the same circumstances. That liability

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711 Long v. City of Minneapolis, (1895) 61 Minn. 46, 63 N. W. 174; Viebahn v. Board of County Commissioners, (1905) 96 Minn. 276, 104 N. W. 1089.
713 See note 691. A bridge obstructing navigation on a river also has been held to be a public nuisance. Viebahn v. Board of County Commissioners, (1905) 96 Minn. 276, 104 N. W. 1089.
714 Batcher v. City of Staples, (1912) 120 Minn. 86, 139 N. W. 140; Joyce v. Village of Janesville, (1916) 132 Minn. 121, 155 N. W. 1067; Nienow v. Village of Mapleton, (1919) 144 Minn. 60, 174 N. W. 517; Hughes v. Village of Nashwauk, (1929) 177 Minn. 547, 225 N. W. 898; Power v. Village of Hibbing, (1930) 182 Minn. 66, 233 N. W. 597; Johnson v. City of Fairmont, (1933) 188 Minn. 257, 247 N. W. 572; Shuster v. City of Chisholm, (1938) 203 Minn. 518, 282 N. W. 135. Compare the recent Wisconsin case of Hasslinger v. Village of Hartland, (1940) 234 Wis. 201, 240 N. W. 647, which held that while the operation of a sewage disposal plant constituted the exercise of a governmental function, the village was not thereby exempted from liability for maintenance of a nuisance.
715 As in Mokovich v. Ind. School District No. 22, St. Louis County, (1929) 177 Minn. 446, 225 N. W. 292, where, as has been pointed out, the court could see no difference in the result whether the tort was called nuisance or negligence.
716 With the exception, previously noted, of the operation of a telephone system in the case of towns.
717 Schussler v. Board of Commissioners of Hennepin County, (1897) 67 Minn. 412, 70 N. W. 6; Viebahn v. Board of County Commissioners of Crow Wing County, (1905) 96 Minn. 276, 104 N. W. 1089; Bohrer v. Village of Inver Grove, (1926) 166 Minn. 336, 207 N. W. 721. See also Dynes v. Town of Kilkenny, (1922) 153 Minn. 11, 189 N. W. 439. In the
for such torts as nuisance is broader than that for negligence is suggested by *Schussler v. Board of Commissioners of Hennepin County*. Holding the county liable for damages suffered by the owner of a grist mill when the county constructed a dam on a creek above the plaintiff's mill, the court said, "This is therefore 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." The principle that a municipality is liable for damages resulting from nuisances of its own creation seems to be generally accepted elsewhere.

Somewhat akin to these cases, but more limited in application, are the decisions establishing the principle that one who for his own profit keeps on his premises anything not naturally belonging there, the natural tendency of which is to become a nuisance and do mischief if it escapes, is liable if it escapes, without proof of negligence for all damages thus resulting. The doctrine has been applied to municipal corporations engaged in the business of distributing water to its inhabitants for profit. Apparently, the rule of absolute liability without proof of negligence is not applicable except where the municipality is engaged in a strictly proprietary venture.

### a. Interferences with Surface Water

The rule that a municipal corporation or quasi municipal corporation is liable for actions resulting in damages to adjacent lands when a private owner would likewise be liable under the

Schussler Case, there is no mention of nuisance, but that is apparently the basis of the action. Most of the discussion centers around the ultra vires character of the act. Cf. Thompson v. County of Polk, (1899) 38 Minn. 130, 36 N. W. 267, in which the court, while holding the county not liable for damages due to allegedly negligent ditch construction, specifically pointed out that the injury was not caused by the maintenance of a nuisance on the property of the county.

718(1897) 67 Minn. 412, 70 N. W. 6.
719(1897) 67 Minn. 412, 416, 70 N. W. 6.
720See cases cited in an annotation in 75 A. L. R. 1196.
721Cathill v. Eastman, (1872) 18 Minn. 324 (Gil. 324); Berger v. Minneapolis Gas Light Co., (1895) 60 Minn. 296, 62 N. W. 336.
722Wiltse v. City of Red Wing, (1906) 99 Minn. 255, 109 N. W. 114; Bridgeman-Russell Company v. City of Duluth, (1924) 158 Minn. 509, 197 N. W. 971. Damages in the first case resulted from a broken reservoir, in the second case a broken water main. The court has refused to extend the doctrine to a mill dam lawfully constructed by a city in a stream. City Water Power Co. v. City of Fergus Falls, (1910) 113 Minn. 33, 128 N. W. 817.
same circumstances has been most frequently applied in connection with interference with surface waters. These cases are numerous, and their confusion in the statements of the applicable legal principles\textsuperscript{724} is almost as great as their number. In a recent careful analysis of the cases decided by the courts of the country in which interferences with surface water have been involved, the evolution of the Minnesota doctrine of reasonable use has been lucidly traced.\textsuperscript{725} The earliest Minnesota cases professed to follow the “common enemy” rule.\textsuperscript{726} This doctrine, even at first, was subject to several qualifications. A municipality was subject to liability for an interference with the flow of surface water resulting unnecessarily in turning destructive currents on other land,\textsuperscript{727} for blocking up the natural flow of surface water through ravines and casting it in harmful quantities on private property,\textsuperscript{728} and for gathering up surface water through artificial means and turning it in increased quantities on private lands.\textsuperscript{729} Doubt had been expressed during the same period about the rule of \textit{O’Brien v. City of St. Paul} in cases where municipal corporations were not involved,\textsuperscript{730} and the original rule was restated in

\textsuperscript{724} The results achieved appear to be more consistent than the principles stated to achieve them.

\textsuperscript{725} Kinyon and McClure, Interferences with Surface Waters, (1940) 24 MINNESOTA LAW REVIEW 891, 908-911. The brief history of the Minnesota rule given in this study is abstracted in part from that article.

\textsuperscript{726} I.e. Surface water is a common enemy which each landowner has an unlimited legal privilege to deal with as he pleases, regardless of the physical damage his action may cause to others. The early cases are cited in Kinyon and McClure, Interferences with Surface Waters, (1940) 24 MINNESOTA LAW REVIEW 891, 908 and include the municipal cases of \textit{O’Brien v. City of St. Paul}, (1878) 25 Minn. 331, 33 Am. Rep. 470; McClure v. City of Red Wing, (1881) 28 Minn. 186, 9 N. W. 767; Pye v. City of Mankato, (1887) 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; Follman v. City of Mankato, (1891) 45 Minn. 457, 48 N. W. 192.


\textsuperscript{728} McClure v. City of Red Wing, (1881) 28 Minn. 186, 9 N. W. 767.

\textsuperscript{729} Township of Blakey v. Devine, (1886) 36 Minn. 53, 29 N. W. 342; Pye v. City of Mankato, (1887) 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671. That principle has been repeatedly applied since. Robbins v. Village of Willmar, (1898) 71 Minn. 403, 73 N. W. 1097; Gunnerus v. Town of Spring Prairie, (1904) 91 Minn. 473, 98 N. W. 340, 974; Weber v. City of Minneapolis, (1916) 132 Minn. 170, 156 N. W. 287. It has been held to be immaterial that surface water was first discharged upon the defendant’s own land by artificial means as long as the increased and injurious quantity and volume of the water upon the plaintiff’s land was the inevitable result. Beach v. Gaylord, (1890) 43 Minn. 476, 45 N. W. 1095.

\textsuperscript{730} See Hogenson v. St. Paul, Mpls. & Manitoba Ry. Co., (1883) 31 Minn. 224, 226, 17 N. W. 374, where the court said, “The right of an owner to improve his land for the purpose for which such land is ordinarily used, and to do it in the ordinary manner, as by building on it, or raising the surface where necessary to its improvement, even though as an incident to it the rain and snow waters falling on it may be diffused over adjoining
considerably modified form in the leading case of Sheehan v. Flynn,\textsuperscript{731} in which a general rule was established to the effect that one who possessed land might alter the flow of surface water so long as he used reasonable care\textsuperscript{732} and did not cause unnecessary or unreasonable harm to others.\textsuperscript{733} The idea of reasonableness embraced consideration of all the circumstances of the particular case,\textsuperscript{734} including the amount of benefit to the one who interfered with the surface water compared to the harm caused to others\textsuperscript{735} and the topography of the land in the vicinity.\textsuperscript{736} The cases since Sheehan v. Flynn have for the most part looked back to that famous decision as a precedent, but have veered more and more toward a complete acceptance of the reasonable use rule,\textsuperscript{737} al-

\textsuperscript{731}(1894) 59 Minn. 436, 61 N. W. 462, 26 A. L. R. 632.

\textsuperscript{732}"This is a reasonable doctrine, that takes into consideration all the circumstances of each case. It gives to each man the common-law right to improve and enjoy his own property to its fullest extent, but limited by the requirement that he use reasonable care in disposing of surface water, which the common law did not always require him to do. When he has used such reasonable care, he can generally stand on his common-law rights. . . ." Idem, p. 442. The requirement of reasonable care is not, however, part of the reasonable use rule. Bush v. City of Rochester, (1934) 191 Minn. 591, 255 N. W. 256.

\textsuperscript{733}The common-law rule as to liability for the diversion of surface water has been modified in this and other states by the rule that a person must so use his own as not unnecessarily or unreasonably to injure his neighbor." Idem, p. 441.

\textsuperscript{734}See the quotation in note 732 above.

\textsuperscript{735}Sheehan v. Flynn, (1894) 59 Minn. 436, 441, 61 N. W. 462, 26 L. R. A. 632.

\textsuperscript{736}Idem, p. 449, especially this passage: "... if he would prevent it (the surface water) from coming upon his land, he must not do so by obstructing some natural drain, and thereby hold back the water and flood the land of his neighbor."

\textsuperscript{737}The reasonable use rule was apparently accepted fully in a case decided shortly after Sheehan v. Flynn. In Gilfillan v. Schmidt, (1896) 64 Minn. 29, 36, 66 N. W. 126, 31 L. R. A. 547, 58 Am. St. Rep. 515, the court, speaking through Judge Mitchell, said, "No person has the absolute and unqualified legal right to the use of his own property unaffected by the reasonable use by his neighbor of his property. The use by my neighbor of his property in a particular way may discommode and injuriously affect me in the enjoyment of my property; but if his use is a reasonable one, I must submit to any resulting inconvenience. The question, after all, is really one of reasonable use. . . ."
though the court has not consistently adhered to it. The reasonable use rule was fully accepted in the most recent Minnesota case, *Bush v. City of Rochester,* in which, although it was stated that the common law doctrine as applied in *Sheehan v. Flynn,* is still in force in this state, the rule was asserted in this way:

"The disposition of surface water must be 'reasonable under all the circumstances,' and the consequent injury to others must not be so great, as compared to the benefit derived, as to make it unreasonable on that account. If a municipality in the improvement of its streets collects surface waters, it is bound both to care for the same when reasonably practicable and to prevent damage to others. This duty is not absolute. Reasonable regard for the rights of others is required so that injury may be prevented."

It has been pointed out elsewhere that the Minnesota cases have presented this picture of the evolution of the reasonable use rule: first, the unqualified common enemy rule; then specific exceptions; then the "qualified" common enemy rule; and finally, the gradual adoption of the reasonable use principle as the sole test. It is clear, however, that the court itself has been aware of

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728 *See, for example, Robbins v. Village of Willmar, (1898) 71 Minn. 403, 73 N. W. 1097; Dudley v. Village of Buffalo, (1898) 73 Minn. 347, 76 N. W. 44; Offelie v. Town of Hammond, (1898) 78 Minn. 275, 80 N. W. 1123; Gunnerus v. Town of Spring Prairie, (1904) 91 Minn. 473, 98 N. W. 340, 974; O'Neill v. City of St. Paul, (1908) 104 Minn. 491, 116 N. W. 114; Weber v. City of Minneapolis, (1916) 132 Minn. 170, 156 N. W. 287; Kieffer v. County of Ramsey, (1918) 140 Minn. 143, 167 N. W. 362; Sandmeier v. Town of St. James, (1925) 165 Minn. 34, 205 N. W. 634. No effort has been made here to collect cases involving interferences by private individuals with surface water. The important ones are cited in Kinyon and McClure, *Interference with Surface Waters,* (1940) 24 *Minnesota Law Review* 891, 908-911, and a note in (1918) 2 *Minnesota Law Review* 449.

729 (1934) 191 Minn. 591, 255 N. W. 256.

730 (1934) 191 Minn. 591, 593, 255 N. W. 256.

740 The reasonable use doctrine had been recognized quite completely also in Simonson v. Township of Alden, (1930) 180 Minn. 200, 231 N. W. 921 where Judge Dibell, speaking for the court, said, "An upper landowner may discharge surface waters from his lands upon lower lands but in so doing must proceed reasonably and not so use his own as unnecessarily to damage the property of a lower owner; and he may not unreasonably gather waters on his lands and cast them upon lower lands in destructive quantities. The question of what is reasonable depends largely on the facts in the particular case."


742 Those authors have pointed out that several other states have completed all but the last step in this cycle. As they classify the courts of the various states, only Minnesota and New Hampshire subscribe to the reasonable use rule completely. They list 21 states and the District of Columbia as advocates of the common law rule with numerous qualifications and modifications, and 18 states, also with qualifications and modifications, as adherents of the civil law rule, which in substance is that one who interferes with the natural flow of surface waters so as to cause
no such transition in its concepts, and repeatedly it has professed to be following the rule of Sheehan v. Flynn. At any rate, regardless of the court's statement of what the rule is, the cases appear generally to have been decided consistently with the rule of reasonable use.

An invasion of another's interests in the use and enjoyment of his land is subject to liability to the other.

Even in Bush v. City of Rochester, (1934) 191 Minn. 591, 255 N. W. 256, this was the court's attitude, as is evidenced by this quotation: "By the rule of the common law, adhered to by this court, a landowner may within reason appropriate to his own use or expel from his land all mere surface water. Surface water is regarded as a common enemy which each proprietor may fight or rid himself of as he chooses..." The spread and diffusion of water over adjacent land is recognized as a necessary consequence of improvement. What is reasonable use is subject to question and in many cases must be determined by the jury upon the facts and circumstances of the particular case. In our cases the terms negligence, trespass, and nuisance are sometimes loosely applied to the improper diversion of surface waters. Even in Sheehan v. Flynn, the phrase 'reasonable care' is sometimes used where obviously 'reasonable use' is intended. The common law doctrine as there modified is still in force in this state." The quotation appears on pp. 592 and 593.

Kinyon and McClure state the reasonable use rule as follows: "A possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable. The issue of reasonableness or unreasonableness is a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm on the part of the possessor making the alteration in the flow, the purpose or motive with which he acted, and others." Kinyon and McClure, Interferences with Surface Waters, (1940) 24 Minnesota Law Review 891, 904-905.

Kinyon and McClure found that this was true, to a somewhat lesser extent, in other states as well, where other rules were being professedly followed. See their article, especially p. 934. The American Law Institute has adopted this rule in the Restatement of Torts, sec. 833. Perhaps any attempt to classify the states according to which of three rules they follow, as Kinyon and McClure have done in their article, must result in some rather arbitrary pigeon-holing; whether they say so or not, the courts inject an element of the reasonable use concept into the rule they profess to follow almost every time they establish or apply a new limitation or qualification. Since, as in Minnesota, the courts are not likely to throw overboard the common law or civil law rule when they have reached the stage in which the Minnesota court finds itself now, it is difficult for anyone to determine when the line between the civil law or the common law rule and the rule of reasonable use has been crossed by a court. The subjective nature of classifications of this character is illustrated by the fact that Farnham in his work on Waters and Water Rights (1904) sec. 889f concludes that the Minnesota cases, in spite of their professed adherence to the common law rule actually apply the rule of the civil law. See also the note to Sheehan v. Flynn in 26 L. R. A. 632 and the comment note in (1919) 2 Minnesota Law Review 449, 453. At any rate it must be conceded that Kinyon and McClure's classification is as good a one as can be made; certainly their article displays the results of thorough and painstaking research into the cases.
It is apparent from the cases which have been cited on surface water interference that quasi municipal corporations are held to the same degree of accountability as true municipal corporations,\(^747\) and that both are in exactly the same position in this regard as are individuals.\(^748\)

Perhaps a detailed analysis of the cases involving interferences with surface water by political subdivisions of the state would serve only to confuse, since in their statement of the principles involved they cannot always be fitted into the same mold. A few general statements may be helpful, however.

Regardless of the rule the court purports to follow, it would probably arrive at the conclusion, as it has done, that if the municipality in its work of improving its streets or public places interferes with the natural flowage of surface water or fails to take care of it, it is not liable if the possessor of lower land is no worse off than before.\(^749\) In such a case it need not put in any sewerage system at all, or one adequate to take care of all the water.\(^750\) It has even been held that a municipal corporation is not subject to liability when it has diverted surface waters from natural ravines, and through storm sewers deposited them in a swamp at different points from the natural points of discharge.\(^761\)

Whether or not it is an inseparable part of the concept of reasonable use, necessity frequently has been declared to be a factor in determining the liability of a governmental unit for interferences with surface water. Frequently this idea has been linked with reasonableness; if an interference is necessary and reason-

\(^{747}\) See, for example, Oftelie v. Town of Hammond, (1899) 78 Minn. 275, 80 N. W. 1123; Lindstrom v. County of Ramsey, (1917) 136 Minn. 46, 161 N. W. 222; Kieffer v. County of Ramsey, (1918) 140 Minn. 143, 167 N. W. 362.

\(^{748}\) O'Brien v. City of St. Paul, (1878) 25 Minn. 331, 33 Am. Rep. 470; Oftelie v. Town of Hammond, (1899) 78 Minn. 275, 80 N. W. 1123.

\(^{749}\) O'Brien v. City of St. Paul, (1872) 18 Minn. 176; Henderson v. City of Minneapolis, (1884) 32 Minn. 319, 20 N. W. 322; St. Paul & Duluth R. R. Co. v. City of Duluth, (1894) 56 Minn. 494, 58 N. W. 159; Dudley v. Village of Buffalo, (1898) 73 Minn. 347, 76 N. W. 44.

\(^{750}\) Henderson v. City of Minneapolis, (1884) 32 Minn. 319, 20 N. W. 322; Dudley v. Village of Buffalo, (1898) 73 Minn. 347, 76 N. W. 44.

\(^{761}\) St. Paul & Duluth R. R. Co. v. City of Duluth, (1894) 56 Minn. 494, 58 N. W. 159. It is conceivable that under some circumstances this might not involve a reasonable use by the municipal corporation of its property; possibly the same conclusion might not have been reached in this case after Sheehan v. Flynn, although this does not seem likely. See Dudley v. Village of Buffalo, (1898) 73 Minn. 347, 76 N. W. 44; Nichols v. Village of Morristown, (1935) 195 Minn. 621, 263 N. W. 900. In O'Neill v. City of St. Paul, (1908) 104 Minn. 491, 116 N. W. 114, a municipal corporation was held not liable where it merely changed the distribution of the waters which flowed on plaintiff's land.
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able, it does not subject the municipality to liability. In other cases the rules have been stated as if necessity alone were a defense to an action for damages from the casting of surface water in harmful quantities on the plaintiff's land. Actually, necessity can at most be considered only one of several factors bearing on the question of reasonable use; if other methods of drainage are easily available which would avoid harm to the plaintiff, the method causing the interference can hardly be considered to be a reasonable use. On the other hand, necessity alone can scarcely be considered sufficient in ordinary circumstances to justify action which would otherwise subject the municipality to liability. Yet in _Schuett v. City of Stillwater_, the court criticized a charge to the effect that a city, although it might make any needful arrangements for the disposition of surface water involved in street grading, might not collect surface water at a point where it could not naturally go and turn it in destructive currents upon adjoining land. The court thought the charge should have been qualified by adding that this was true only if it could be done practicably and at reasonable expense.

In the full statement of the reasonable use rule given in _Bush v. City of Rochester_, it was said that the city was bound "both to care for the same when reasonably practicable and to prevent damage to others," a statement which suggests that while necessity may dictate that the city undertake the improvement without taking care of the surface water, it is still subject to liability if it floods adjoining land. This seems more equitable to the aggrieved possessor of the flooded land.

If there is an interference with surface waters which amounts to an unreasonable use of the defendant's land, the question of negligence should be immaterial. This appears to be the case although even recent cases have used language indicating that

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752 Oftelie v. Town of Hammond, (1899) 78 Minn. 275, 80 N. W. 1123; Kooper v. Town of Louisville, (1908) 106 Minn. 269, 118 N. W. 1025; Simonson v. Township of Alden, (1930) 181 Minn. 200, 231 N. W. 921. Sheehan v. Flynn seems to be the origin for this statement.

753 O'Brien v. City of St. Paul, (1878) 25 Minn. 331, 33 Am. Rep. 470; Pye v. City of Mankato, (1887) 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; Kieffer v. County of Ramsey, (1916) 140 Minn. 143, 167 N. W. 362. It will be noticed that the last case was decided considerably after Sheehan v. Flynn.

754 (1900) 80 Minn. 287, 83 N. W. 180.

755 The court added that this qualification was especially important where the surface of the ground was rough and hilly as was that involved in the Stillwater case.

756 (1934) 191 Minn. 591, 255 N. W. 256.

757 Kieffer v. County of Ramsey, (1918) 140 Minn. 143, 167 N. W. 362.
the standard of reasonable care was to be applied to the municipality's action.\textsuperscript{759} The explanation for the reference to the negligence concept perhaps may be found in the statement in the early case of \textit{Pye v. City of Mankato}\textsuperscript{760} that "Having attempted to conduct the natural flow in another direction by an artificial channel, the city had to use reasonable care to do this so as not to cause a positive trespass. Not to do so was negligence." What the court seems to have had in mind is that if the municipality had used reasonable care, no invasion would have been caused and consequently there could have been no liability. On the other hand if the municipality had unreasonably diverted surface water on to the plaintiff's land, the absence of negligence should have made no difference.

The construction of ditches under the drainage statutes, which had such a vogue a few years ago, involves one method of interference with surface waters, but since the damages incident to the construction have been assessed against benefited property and paid to the injured parties as part of the statutory proceedings, tortious interferences have been confined largely to subsequent interferences with the drainage system established through the ditch proceedings. As a matter of fact when a county constructs a ditch at the instance of petitioning landowners, it is not liable for damages caused by the interferences thus made with the existing drainage system. The landowner's opportunity for redress is limited to the method of ascertaining damages under the statute, and he cannot obtain compensation by bringing action against the county.\textsuperscript{760} Once established, drainage systems may not be interfered with any more than any natural system of surface drainage. A town that does so, like an individual, is subject to liability for the consequent flooding of private land.\textsuperscript{761} The ordinary rules governing interferences with surface waters apply in such cases.\textsuperscript{762}

\textsuperscript{759}Sandmeier v. Town of St. James, (1925) 165 Minn. 34, 205 N. W. 634. In Bush v. City of Rochester, (1934) 191 Minn. 591, 255 N. W. 256, Chief Justice Devaney's opinion pointed out that in Sheehan v. Flynn, "the phrase 'reasonable care' is sometimes used where obviously 'reasonable use' is intended."

\textsuperscript{760}(1887) 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671.

\textsuperscript{761}Defiel v. County of Clay, (1926) 169 Minn. 79, 210 N. W. 626. See also Gaare v. Board of County Commissioners, (1903) 90 Minn. 530, 97 N. W. 422.

\textsuperscript{762}Olson v. County of Roseau, (1925) 164 Minn. 452, 205 N. W. 372; Felepe v. Towns of America and Cedarbend, (1928) 174 Minn. 317, 219 N. W. 158.

\textsuperscript{759}See, in addition to the cases cited in the preceding note, Reed v. Board of Park Commissioners, (1907) 100 Minn. 167, 110 N. W. 1119; Rasmussen v. Town of Hutchinson, (1910) 111 Minn. 457, 127 N. W. 182.
b. Obstruction of Natural Watercourses

Probably the same rule of reasonable use applies to interferences with natural watercourses as with surface waters in Minnesota.\(^7\)\(^6\)\(^3\) Apparently, as in the case of surface waters, the distinction between governmental and proprietary functions is not applied in such cases, and liability is imposed in the same situations as those in which a private individual would be held liable.\(^7\)\(^6\)\(^4\)

2. Other Torts

While there have been a few hints at some difference in liability of a municipality between an act of negligence and an "active, affirmative tort,"\(^5\) it seems clear that the court holds crucial the distinction between governmental and proprietary functions in actions arising out of assault and battery, false imprisonment, malicious prosecution, and like torts.\(^7\)\(^6\)\(^6\) Whether or not there are any municipal torts other than invasion of interests in land to which the distinction between governmental and proprietary functions does not apply appears never to have been

\(^7\)\(^6\)\(^3\)Red River Roller Mills v. Wright, (1883) 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194; Pinney v. Luce, (1890) 44 Minn. 367, 46 N. W. 561; Minnesota Loan and Trust Co. v. St. Anthony Falls Water-Power Co., (1901) 82 Minn. 505, 85 N. W. 520. This question is discussed in Kinyon and McClure, Interferences with Surface Waters, (1940) 24 Minnesota Law Review 891, 892. These authors argue that all invasions of a possessor's interests in the use and enjoyment of his land should be treated as different phases of a single problem involving the application of the same fundamental principles, irrespective of the medium through which the invasions are caused. Only in New Hampshire, and possibly Minnesota, is this the case. Idem, pp. 892-893.

\(^7\)\(^6\)\(^4\)See Schussler v. Board of Commissioners of Hennepin County, (1897) 67 Minn. 412, 70 N. W. 6; Cf. Erickson v. County of Stearns, (1934) 190 Minn. 433, 252 N. W. 219. See also Biron v. Board of Water Commissioners of St. Paul, (1889) 41 Minn. 519, 43 N. W. 482, where a proprietary function was involved. The case turned on a point of pleading.

\(^7\)\(^6\)\(^5\)See Schussler v. Bd. of County Commissioners of Hennepin County, (1897) 67 Minn. 412, 416, 70 N. W. 6.

\(^7\)\(^6\)\(^6\)Lamont v. Stavanaugh, (1915) 129 Minn. 321, 152 N. W. 720; Barmel v. Minneapolis-St. Paul Sanitary District, (1938) 201 Minn. 622, 277. N. W. 208. Other cases have indicated that the immunity in connection with the exercise of a governmental function extends beyond purely negligent torts. See Gullifson v. McDonald, (1895) 62 Minn. 278, 64 N. W. 812, where the court held a municipality was exempt from liability for damages resulting from wrongful acts of a police officer in making arrests or detaining prisoners; and Grube v. City of St. Paul, (1886) 34 Minn. 402, 26 N. W. 229, where it was said that a municipality is not liable for damages resulting from the "acts or misconduct" of its firemen. Elsewhere these acts have been treated like those based on negligence. Moss v. City of Augusta (1894) 93 Ga. 797, 20 S. E. 653; Brown v. Town of Pensacola, (1926) 92 Fla. 931, 110 So. 873; City of Lawton v. Harkins, (1912) 34 Okla. 545, 126 Pac. 727; Tzatzken v. City of Detroit, (1924) 226 Mich. 603, 198 N. W. 214.
expressly determined by the Minnesota court. On principle, it seems difficult to differentiate such torts as fraud, duress, or deceit from assault and battery and torts involving negligence; the reasons given for the immunity of the municipality in carrying on governmental functions are equally cogent in both cases.

Fraud or duress may constitute a tort if it results in the invasion of a possessory or proprietary interest. The liability of a municipal corporation or quasi-municipal corporation for these torts in Minnesota remains somewhat clouded in doubt because there have been no cases directly on the point.

There is a dearth of authority on the question of ex delicto liability of a municipality for deceit; but a dictum in one case from another jurisdiction states that a city is not liable for deceit arising from a transaction involving the performance of a governmental function. Perhaps the reason for the scarcity of such decisions is that because of the peculiar nature of the liability imposed for deceit, under which an action ex contractu is permitted in cases where misrepresentation is associated with a contract, there is an easy means of avoiding the traditional limitations on a municipal corporation's tort liability.

The Minnesota court has expressly left open the question of liability of a political subdivision of the state for fraud or fraudulent concealment. Reference in that case, involving a

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767 Restatement on Torts, sec. 871, Comments e, f; (1935) 39 Harv. L. Rev. 108.

708 No distinction has been drawn between the two types of political subdivisions with regard to restitution of taxes or other contributions paid under coercion. Restatement on Restitution, sec. 75. This is, however, a subject beyond the scope of this study. The only case remotely relevant on the question of liability for duress appears to be Flanigan v. City of Minneapolis, (1887) 36 Minn. 406, 31 N. W. 863. There the plaintiffs had become sureties on the bond of a man arraigned in the Minneapolis municipal court for a felony. The accused failed to appear. Plaintiffs alleged that the chief of police threatened to take them into custody and conducted them before the municipal court clerk who demanded the money due on the bond. They paid it and then sued for its recovery on the ground of duress. Finding that there was no duress and that the clerk was a proper person to receive the money, the court held that the defendant's demurrer should have been sustained. There is nothing in the decision to indicate what the outcome would have been if there had been duress.


771 (1939) 37 Mich. L. Rev. 808.

town, to an Indiana decision which assumed that a city would be subject to liability where there had been some affirmative act or conduct and not mere silence, may imply, perhaps, that whatever the rule eventually adopted, it is likely to apply equally to cities and villages and to quasi municipal corporations.

(To be continued.)

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73 Churchman v. City of Indianapolis, (1887) 110 Ind. 259, 11 N. E. 301.
74 While not a case of fraud or duress, the case of Bass v. City of Shakopee, (1880) 27 Minn. 250, 4 N. W. 619, 6 N. W. 776, involving contempt, may be of interest here. There the city had been enjoined from proceeding to enter upon the plaintiff's land to remove earth and trees in building a highway. An order was later made suspending the injunction until the hearing and determination of a motion to dissolve it. The plaintiff claimed that the city disobeyed the injunction, was in contempt and therefore could not be heard. This objection was overruled and the injunction was dissolved. On the plaintiff's appeal, the court held that a municipal corporation could not be guilty of contempt in disobeying an injunction. The contempt if any was held to be that of individual persons, as for instance officers of the corporation. Perhaps the basis for immunity here is similar to that in criminal cases; municipalities probably cannot be held guilty of crimes unless the statutes provide so quite expressly. See Barnett, Criminal Liability of American Municipal Corporations, (1938) 17 Or. L. Rev. 289-306. Professor Barnett found that the criminal liability of quasi municipal corporations had been assumed or expressly declared in American cases beginning in an early day, although there was practically no discussion of principles involved and few references to English precedents. Idem, pp. 296-297. An early Minnesota case implied that indictment would lie against a town for failure to keep its roads in good repair. Altnow v. Town of Sibley, (1883) 30 Minn. 186, 198, 14 N. W. 877.