Governmental Responsibility for Torts in Minnesota

Orville C. Peterson

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2037

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
GOVERNMENTAL RESPONSIBILITY FOR TORTS IN MINNESOTA*

By Orville C. Peterson†

M. STATUTES PROVIDING FOR THE INDIRECT ASSUMPTION OF LIABILITY

The advent of the motor car has made strikingly manifest the incongruity of holding municipalities responsible for torts committed in one capacity while leaving them immune from liability in another. It is difficult for a pedestrian whose skull is fractured by a publicly-owned automobile operated negligently to appreciate the fact that he has no recourse against the governmental owner because the motor vehicle was being operated at the time of the accident in a governmental capacity when he is told that he might have recovered if he had been struck by the same car or one like it the day before when it was operated in a proprietary capacity. In many instances the pedestrian will quickly discover that while he may sue the driver, the judgment he will recover is quite an empty one.

Prompted by considerations such as this, many municipal corporations and quasi corporations have tried to avoid the harshness of the immunity doctrine in such cases by paying the premiums on insurance against the liability of their employees in driving motor vehicles. The more cautious sought the consent of the attorney general to such a scheme for the indirect assumption of liability; but they were repeatedly told that the arrangement would be unlawful because it would amount to a gift of public funds, whether the liability insured against was that of the officer or that of the municipal subdivision itself.944 An agency

*Continued from 26 MINNESOTA LAW REVIEW 358, 480, 613 and 700. Views expressed in this study are the author's and not those of the League of Minnesota Municipalities, with which he is associated.

†Attorney for the League of Minnesota Municipalities, Minneapolis, Minnesota.

GOVERNMENTAL RESPONSIBILITY FOR TORTS

of the state, the University, met with the same response. The answers of attorneys general of other states to similar questions usually have also been in the negative.

Since the injustices resulting from the non-liability of municipal corporations for the negligence of their officers and employees in the performance of governmental functions were most apparent when the injury occurred through the negligent operation of a motor vehicle, it is not surprising that this situation received legislative attention first. In 1929 a general law was passed to permit the indemnification of police and fire department employees against loss or expense from torts of this character. A 1935 amendment extended the scope of the law to cover other political subdivisions besides municipal corporations, but limited the powers granted to the carrying of insurance and the defense of suits against employees. The law now reads:

"That all towns, school districts having an assessed valuation of over $2,000,000 and cities, villages and boroughs in this state are hereby authorized to carry insurance against liability of employees of any departments thereof by reason of claims for bodily injuries, death or property damage made upon any such employee by reason of his operation of a motor vehicle while in the performance of his duties, and to defend in the name and on behalf of such employee any suit brought against him to enforce a claim, whether groundless or not, arising out of the operation of a motor vehicle by him while in the performance of his duties."

A second section authorizes the governing body to pay the premiums on insurance policies "insuring individuals or groups of the employees referred to in sec. 1 hereof against liability for injury to person or property, within the limitations of sec. 1 hereof." Such payment of insurance premiums "shall in no way impose upon any municipality any liability whatever."

Two years later the same principle was extended to counties,

---

946 Many of the citations to such opinions dealing with liability insurance on school buses are collected in Borchard, Recent Statutory Developments in Municipal Liability in Tort, (1936) 2 Legal Notes on Local Government 89, 97 at footnotes 65, 66.
947 Minnesota, Laws 1929, ch. 81.
949 The absence of a comma between "towns" and "school districts" is a defect of the original act.
950 It is not apparent from the act whether or not the assessed valuation minimum applies to towns as well as school districts. It probably was intended so to apply.
951 Other acts have permitted the county sheriff of certain counties to carry liability insurance on automobiles under his control. See, for example,
but the authority granted, like that of the original 1929 law, included that of paying and compromising claims without suit in addition to insuring against them and defending suits arising out of them. In 1935 similar acts were passed for county school districts of less than 10,000 population and for the University of Minnesota. The fact that these three acts all legalize payments made before their passage suggests that the practice of insuring public officers and employees against liability in the operation of motor vehicles in the performance of official duties had already become established.

Another act, almost identical in wording, extended the same authority to cities, villages and boroughs in connection with the operation of motor vehicles by police and fire department employees. The fact that this law applies only to "employees" while the other comparable acts speak of "officers and employees" may or may not be significant. If the term is used in its strict sense in contrast to "officer." the application of the act must be confined within narrow limits, particularly in the case of police departments, since policemen, who would drive most police department automobiles, have been held in at least one situation to

---

922 Minnesota, Laws 1931, ch. 330, found in 3 Mason's 1927 Minn. Stats., 1940 Supp., secs. 672-1 to 672-3. Section 1 of the act, which has served as a model for at least three acts passed since 1931, reads, "The county boards of all counties in this state are hereby authorized to indemnify their officers and employees for loss or expense arising or resulting from claims for bodily injuries, death or property damage made upon such officers or employees by reason of their operation of motor vehicles while in the performance of their official duties, and to defend, in the names of and on behalf of such officers and employees, any suits brought against them to enforce claims, whether groundless or not, arising out of their operation of motor vehicles under such circumstances, and to compromise and settle any such claims or suits and to pay the amount of such settlements or compromises or the amount of any judgments rendered against such officers or employees on any such claims without first requiring such officers or employees to pay the same." Section 2 is similar to the second section of the 1929 act quoted in the text.


954 Minnesota, Laws 1937, ch. 149, 3 Mason's 1927 Minn. Stats., 1940 Supp., sec. 1933-67. This was virtually a reenactment of Minnesota, Laws 1929, ch. 81 and was evidently intended to reinstate the authority lost by cities and villages when Laws of 1929, ch. 81 was amended by Laws 1935, ch. 338. See (1937) 22 Minnesota Municipalities 214.
be officers.\textsuperscript{955} Probably the term should be given a broader con-
struction.

The last of this series of acts\textsuperscript{957} permits any school board to
"provide for the protection of school children in its respective
district, being transported for all school purposes or activities in
district owned, operated, leased or controlled motor vehicles,
against injuries or damages arising out of the operation thereof."
The board is authorized to procure insurance to get this protec-
tion, but like similar laws the statute specifically adds that the
payment of any insurance premiums imposes no liability on the
school district.\textsuperscript{958}

None of these acts has yet been construed by the courts, so
the interpretation that the judiciary will place upon them is still
doubtful. Evidently it has not been the intent of any of the laws
to change any of the rules of liability of the officers of the
government to the persons injured.\textsuperscript{959}

The act permitting school boards to protect school children
from damages arising out of the operation of school buses carries
a specific provision that any insurance contract negotiated for
this purpose should include a clause "expressly waiving the de-
fense, by the insurer, that the school district is engaged in a
governmental function.\textsuperscript{960} The effect of such a clause had been
determined by the supreme court three years before in \textit{Howard v. Village of Chisholm}.\textsuperscript{961} Since the injury for which recompense
was sought in that case occurred during a hockey game, the court
pointed out that the city could have defended successfully on the
ground that it owned and maintained the recreational building
in its governmental capacity for the health and recreation of its

\textsuperscript{955}State ex rel. Egan v. Schram, (1901) 82 Minn. 420, 85 N. W. 155.
\textsuperscript{957}Minnesota, Laws 1937, ch. 301, 3 Mason's 1927 Minn. Stats., 1940
Supp., secs. 2816-8, 9.
\textsuperscript{958}The latter provision is in sec. 2 of the act. Cf. Laws 1933, ch. 23,
3 Mason's 1927 Minn. Stats., 1940 Supp., secs. 2883-3 to 2883-5, authorizing
the formation of school safety patrols. Section 3 of that act specifically
provides that no liability should attach to the district or to any officer or
employee of the district because of injuries sustained by reason of the
operation of the school patrol.
\textsuperscript{959}See Tooke, The Extension of Municipal Liability in Tort, (1932)
the law does not authorize the county to purchase liability insurance to
protect the county itself from such claims; Minn. Op. Atty. Gen. 1934, No.
94: "The statute in no way changes or modifies the rules of law with
reference to liability of villages in operating automobiles in responding to
fire calls. This would be done in its governmental capacity and for neglig-
ence in its operation, the village is not liable."
\textsuperscript{960}3 Mason's 1927 Minn. Stats., 1940 Supp., sec. 2816-8.
\textsuperscript{961}(1934) 191 Minn. 245, 253 N. W. 766.
inhabitants. However, the plaintiff pleaded that the defendant had procured insurance against injuries from the operation of the community building and in the policy the insurer had agreed not to defend on the ground that the building was used for governmental functions. The effect of the provision seemed too clear for argument, for the court merely said that since the defendant was to be liable if a private person would be in the same circumstances, the verdict was clearly justifiable, there being ample evidence of negligence. The insurance in this case was not permitted by statute and involved an unauthorized expenditure of public funds if the attorney general's opinions are to be considered as correct. The case may probably be considered as authority for the proposition that the lack of municipal power to execute the insurance policy is not available as a defense to the insurance company.

This series of statutes may be extremely significant, because it may indicate the way in which the immunity of governments for their torts will be broken down by legislation. Since the municipality can act only through its agents, the device of underwriting the officer or employee's liability might be extended to give relief in most cases of misfeasance where the officer or employee is himself liable. Furthermore, the decision in *Howard v. Village of Chisholm* leaves the way open for a legislative enactment which, following the precedent established by the school bus insurance law, would permit the carrying of insurance against any public tort liability, the insurer waiving the defense of governmental immunity and thus in effect creating responsibility where none existed before. At present, however, not only is statutory extension of liability confined to insurance against motor vehicle torts, and indemnification of officers and employees in such cases, but even in that field, the new authority is given on a purely optional basis. In case the municipality chooses not to indemnify the officer or employee or to carry insurance against loss due to his

---

964 It has been held elsewhere that the presence of insurance gives the plaintiff a right to recover where his right would have been barred in its absence. Rogers v. Butler, (1936) 170 Tenn. 125, 92 S. W. (2d) 414 (insurance against liability); a contrary case involving insurance against loss is Simons v. Gregory, (1905) 120 Ky. 116, 85 S. W. 751. The situation is closely analogous to one where a charity, itself not liable for its torts, enters into a contract of insurance against liability. Consult on this point a recent case comment in (1940) 24 Minnesota Law Review 696.
motor vehicle torts, an injured person still has no recourse except against the officer or employee, who is in many cases financially irresponsible.\textsuperscript{665}

In one limited field, that of false arrest by a police officer, a statutory provision has made mandatory the assumption of some responsibility by the municipality. Any city, village, borough, township or county employing a police officer\textsuperscript{666} is required under a 1937 law\textsuperscript{667} to furnish competent legal counsel to defend the officer against actions to recover damages for alleged false arrest "when such alleged false arrest was made by such officer in good faith and in the performance of his official duties." It must also pay reasonable costs and expenses of the defense, including witness and counsel fees, notwithstanding contrary provisions in laws or charters. It is authorized to pay the amount of any judgment rendered against the officer "if, in the discretion of the governing body . . . , it seems fitting and proper to do so." If judgment is entered for the officer, the judgment for costs and disbursements is assigned to the municipality employing him. Statutory authority to pay counsel fees in such actions was not necessary, since the court had held a number of years earlier that in the absence of charter prohibition, a municipality could employ attorneys to defend its officers against false arrest and imprisonment when the arrest was made in good faith.\textsuperscript{668}

N. Home Rule Charter Provisions\textsuperscript{669}

1. Limitations of Liability

The established principle that a legislature may impose or withhold liability for torts of the state or its subdivisions has been

\textsuperscript{665}In some states legislation has gone further through the adoption of the Operators' and Chauffeurs' Licenses Act, part of the Uniform Motor Vehicle Code. Some ten states appear to have adopted sec. 24, which provides: "This state, and every county, city, municipal or other public corporation within this state employing any operator or chauffeur shall be jointly and severally liable with such operator or chauffeur for any damages caused by the negligence of the latter while driving a motor vehicle upon a highway in the course of his employment." See Borchard, Recent Statutory Developments in Municipal Liability in Tort, (1936) 2 Legal Notes on Local Government, 89, 94; Note, Municipal Liability for Motor Vehicle Torts, (1935) 10 Temple L. Q. 75, in which the Pennsylvania law is reviewed.

\textsuperscript{666}Sheriffs are included.\textsuperscript{667}Minnesota, Laws 1937, ch. 442, 3 Mason's 1927 Minn. Stats., 1940 Supp., secs. 1933-81, 82.

\textsuperscript{668}City of Moorhead v. Murphy, (1905) 94 Minn. 123, 102 N. W. 219.

\textsuperscript{669}This analysis of charter provisions covers all the 76 home rule charters in the state. Of these 71 are available in the library of the Municipal Reference Bureau and the League of Minnesota Municipalities at the
applied in this state to home rule charters, under which seventy-six of the cities of the state now operate. As might be expected, most of the present charters contain some provision on the subject of tort liability, but considering the wide range for experimentation, the charters manifest little inclination to develop new frontiers. Provisions on tort liability are of a few general types, obviously taken over for the most part word for word from neighboring charters already in effect. No provision has attempted to enlarge liability of the city for its torts; sections have been drawn rather to limit the common law liability of the city or to see that the responsibility for a tortious act in which the municipal corporation did not actively participate falls on the person whose negligence caused the injury.

Of the provisions limiting the city's liability, the most sweeping was upheld by the court in Schigley v. City of Waseca in which the principle was established that the conditions under which liability may be imposed upon a city for damages resulting from the unsafe condition of its streets is an appropriate subject for inclusion in a home rule charter. The provision sustained in that case was one which, as a condition precedent to municipal liability for an accident, required ten days' written notice of the existence of a defect before the accident occurred. Such a clause absolutely eliminates the rule as to constructive notice and, so far as liability is concerned, it also eliminates the requirement of inspection by municipal officials to keep them informed of defects. While no figures are available on the effect of such provisions on the number of claims which the city is required to pay, it is obvious that such a provision must cut cases in which liability can be established to a mere fraction of the number that would otherwise occur. As a matter of fact, except in a city with an inexcusably inefficient street department, a condition precedent to suit of written notice of the defect ten days in advance of the injury virtually abolishes the city's liability in street defect cases.

University of Minnesota. Access to the other five has been obtained through the state law library and the offices of the attorney general and secretary of state. Except where otherwise indicated, the reference is to the original charter. Some of the provisions may have been supplanted, however, by later amendments which do not appear in the collection at the University.

Schigley v. City of Waseca, (1908) 106 Minn. 94, 118 N. W. 259.
(1939) Minnesota Year Book 145. New Ulm, Biwabik and Gilbert have been added to the list since the 1939 Year Book was published.
Only four seem to omit mention of the subject. Fly (1903), Fairmont (1927), Hastings (1907), and South St. Paul (1905) are in this group.
(1908) 106 Minn. 94, 118 N. W. 259.
Yet the inclusion of a written notice provision in a charter is comparatively unusual. Only eight present home rule charters contain a condition as comprehensive as the Waseca clause involved in the Schigley Case.\[974\]

A somewhat larger number of cities have imposed less drastic conditions of the Waseca type in their charter. At least twelve provide that in actions for personal injuries (not property damage) resulting from defects in streets, bridges, culverts, or public utilities, the plaintiff must prove that the want of repair existed for ten days or that the city had actual notice and knowledge of the defective condition.\[975\] In one of these cases, Faribault, written notice must be made five days before the accident if the defect has not existed for ten days. Waseca requires that in any action for damages based on an alleged sidewalk defect, the plaintiff must prove that the defect existed for more than thirty days prior to the injury or that the city had actual notice or knowledge for ten days before the accident.\[976\]

A second type of charter provision limiting liability is a notice of claim provision, found in almost every charter.\[977\] Many of

---

\[974\]Biwabik (1941) sec. 67; Gilbert (1941) sec. 67; Glencoe (1909) ch. IX, sec. 7; Lake City (1909) ch. 14, sec. 6; Madison (1923) sec. 101; Northfield (1907) ch. IX, sec. 7, as amended in 1924; Warren (1941) sec. 165; Waseca (1904) ch. VII, sec. 7. All these provisions require 10 days' notice except that of Warren which prescribes actual notice of 48 hours.

\[975\]Anoka (1929) ch. XVI, sec. 2; Eveleth (1913) sec. 214; Faribault (1911) sec. 272; Glenwood (1937) sec. 108; Granite Falls (1936) sec. 113; Jackson (1920) sec. 241; Lake Crystal (1912) sec. 225; Mankato (1911) sec. 225; Pipestone (1913) sec. 222; St. James (1918) sec. 236; Sleepy Eye (1903) ch. VIII, sec. 13; Tracy (1933) sec. 102.

\[976\]Waseca (1904) ch. VII, sec. 6.

\[977\]Ada (1908) sec. 213; Albert Lea (1927) sec. 104; Alexandria (1909) sec. 176; Anoka (1929) Ch. XVI, sec. 1; Austin (1903) ch. VII, sec. 14; Barnesville (1898) ch. XIV, sec. 13; Bemidji (1905) ch. X, sec. 20; Benson (1908) ch. XIV, sec. 16; Blue Earth (1899) ch. IV, sec. 60; Breckenridge (1907) sec. 212; Brainerd (1908) sec. 94; Cannon Falls (1905) ch. XIV, sec. 14; Chisholm (1934) sec. 237; Columbia Heights (1921) sec. 112; Crookston (1906) sec. 110; Dawson (1911) ch. 19, sec. 5; Detroit Lawes (1903) sec. 203; Duluth (1913) sec. 103; Eveleth (1913) sec. 213; Faribault (1911) sec. 271; Fergus Falls (1903) sec. 206; Fraser (1932) sec. 62; Glenwood (1937) sec. 107; Granite Falls (1936) sec. 113; Hutchinson (1913) ch. X, sec. 7; International Falls (1910) ch. XVIII, sec. 7; Jackson (1920) sec. 240; Lake City (1909) ch. 14, sec. 6; Lake Crystal (1912) sec. 224; Little Falls (1920) sec. 100; Madison (1923) sec. 101; Mankato (1911) sec. 224; Minneapolis (1920) ch. VIII, sec. 19; Minnetonka Beach (1922) art. V, sec. 1; Montevideo sec. 107; Moorhead (1900) sec. 212; Morris (1913) sec. 107; New Ulm (1940) sec. 99, 100; Northfield (1907) ch. IX, sec. 7 as amended in 1924; Ortonville (1927) sec. 196; Owatonna (1909) ch. VI, sec. 6; Pipestone (1913) sec. 221; Red Wing (1902) ch. XVIII, sec. 4; Redwood Falls (1941) sec. 102; Renville (1906) ch. IX, sec. 7; Robbinsdale (1938) sec. 93; Rochester (1904) sec. 185; Rushford (1927) sec. 64; St. Cloud (1911) sec. 207.
these provisions are much like the statute requiring notice of tort claims, some making variations in the time when notice must be submitted or suit commenced and others applying only to actions for damages due to defects.\footnote{78} These are doubtless now quite ineffective in view of the holdings that the state law has superseded inconsistent charter provisions.\footnote{79} Others, notably those attempting to extend the notice requirement to other actions than those covered by the state law, may be in a different category. A number, for example, apply the notice requirement to "any action . . . on account of injuries or damages to persons or property,"\footnote{80} apparently attempting to make the notice a prerequisite in nuisance, trespass, assault and battery, and other tort actions where the state law requiring notice is inapplicable.\footnote{81} It is arguable that such provisions are valid since they are supplementary to, rather than inconsistent with, the state law; but one decision indicates, somewhat unconvincingly, that the whole field has been taken over by the notice statute to the complete exclusion of home rule charter provisions.\footnote{82}

St. James (1918) sec. 235; St. Paul (1914) sec. 184; Sauk Centre (1918) sec. 114; Sleepy Eye (1903) ch. VIII, sec. 12; Springfield (1924) sec. 110; Staples (1908) sec. 208; Stillwater (1915) sec. 371; Tower (1928) sec. 70; Tracy (1933) sec. 101; Two Harbors (1907) ch. XVIII, sec. 7; Virginia (1909) sec. 321; Wabasha (1920) sec. 110; Warren (1941) sec. 166; Waseca (1904) ch. VII, sec. 5; Wayzata (1928) sec. 69; White Bear Lake (1922) sec. 144; Willmar (1901) sec. 209; Winon (1920) sec. 207; Winthrop (1907) ch. 13, sec. 14; Worthington (1909) sec. 195.

\footnote{77} The latter group correspond to the effective portion of the 1897 statute. See note 778, (1942) 26 MINNESOTA LAW REVIEW 701.

\footnote{78} See (1942) 26 MINNESOTA LAW REVIEW 702.

\footnote{79} Albert Lea, Columbia Heights, Duluth, Fraser, Little Falls, Madison, Minnetonka Beach, Montevideo, Morris, Robbinsdale, Rushford, Sauk Centre, Springfield, Stillwater, Tower, Wabasha, Wayzata, White Bear Lake. Citations appear in note 979 above. A similar provision is included as sec. 105 of the model charter given in Professor William Anderson's City Charter Making in Minnesota (1922) 146. Austin's provision covers "injuries . . . by any other means" in addition to injuries from defects. By some curious reasoning, Duluth's provision, closely similar to most of the others cited in this note, has been held inapplicable to actions for such damages as those due to a change of grade. Johnson v. City of Duluth, (1916) 133 Minn. 405, 158 N. W. 616.

\footnote{80} See (1942) 26 MINNESOTA LAW REVIEW 703-709.

\footnote{81} Johnson v. City of Duluth, (1916) 133 Minn. 405, 158 N. W. 616. The court said, p. 408, "There can be no doubt that the legislature intended to establish a uniform rule which should apply to all municipalities, thus avoiding the confusion arising out of the many dissimilar provisions contained in their various charters." The court purported to follow the rule of Nicol v. City of St. Paul, (1900) 80 Minn. 415, 83 N. W. 375, that if it is clear that the statute includes and provides for all of the objects sought to be secured by the former, and is intended as the only rule which should govern in the case provided for, the statute alone governs. It is doubtful, however, whether any such test should have resulted in invalidating those portions of a charter provision relating to claims for property damage not due to negligence or defects.
If it is assumed that there is still room for valid home rule charter provisions of this kind, another difficult question arises with respect to the numerous charter provisions exempting persons "berefit of reason" by the injury, or liberalizing the time limit for notice or suit in such cases. A dictum in one case implied that such an exception in a charter provision is effective; but the case cannot be considered as a strong precedent because the relationship between the state law and the charter provision on notice was not mentioned, much less discussed.

A third class of charter provision is one confining liability for street defects to graded streets, to streets graded and opened for travel, or to streets "opened, used and traveled by the public as a street or highway." Several charters have similar provisions specifying that the acceptance of a plat imposes no liability to grade the streets covered by the plat or responsibility for any insufficiency of such streets unless they are graded and opened for travel. Since there may sometimes be liability for

---

983 Ada, Alexandria, Austin, Barnesville, Bemidji, Benson, Blue Earth, Brainerd, Breckenridge, Cannon Falls, Chisholm, Crookston, Dawson, Detroit Lakes, Duluth, Eveleth, Faribault, Fergus Falls, Glenwood, Granite Falls, Hutchinson, International Falls, Jackson, Lake City, Lake Crystal, Little Falls, Mankato, Minneapolis, Morris, Ortonville, Owatonna, Pipestone, Red Wing, Renville, Rochester, St. Cloud, St. James, Sauk Centre, Staples, Stillwater, Two Harbors, Virginia, Wabasha, Willmar, Windom, Winthrop, Worthington. Citations are given in note 977, supra.


985 Blue Earth (1899) ch. IV, sec. 60; Brainerd (1908) sec. 94; Cannon Falls (1905) ch. VIII, sec. 7; Crookston (1906) sec. 110; Dawson (1911) ch. 11, sec. 7, ch. 19, sec. 5; Hutchinson (1913) ch. X, sec. 7; Lake City (1909) ch. 14, sec. 6; Minneapolis ch. VIII, sec. 19; Ortonville (1928) sec. 126; Red Wing (1902) ch. XVII, sec. 3; Renville (1906) ch. IX, sec. 7; Winthrop (1907) ch. 8, sec. 7.

986 Austin (1903) ch. VII, sec. 14; Barnesville (1898) ch. XIV, sec. 13; Benson (1908) ch. VII, sec. 7; Brainerd (1905) ch. XV, sec. 9; Crookston (1906) sec. 11; Duluth (1907) sec. 110; Eveleth (1913) sec. 221; Faribault (1911) sec. 271; Fergus Falls (1905) ch. IX, sec. 7; Glencoe (1909) ch. IX, sec. 9; Hutchinson (1913) ch. X, sec. 9; International Falls (1920) ch. VII, sec. 23; Lake Crystal (1911) sec. 224; Lake City (1909) ch. XV, sec. 25; Mankato (1911) sec. 224; Minneapolis (1909) ch. VII, sec. 6; Minneapolis (1928) ch. XVII, sec. 185; Minneota (1909) ch. 101; Minnesota (1928) ch. 101; New Ulm (1940) sec. 101; Northfield (1907) ch. IX, sec. 9; Owatonna (1909) ch. VI, sec. 6; Pipestone (1913) sec. 221; Pipestone (1899) sec. 221; Red Wing (1902) sec. 185; St. Cloud (1911) sec. 207. These provisions also deny liability for an insufficiency of ground where sidewalks usually are built when no sidewalk has been constructed. In Graham v. City of Albert Lea, (1892) 48 Minn. 201, 50 N. W. 1108, the city sought to escape liability under such a clause, but the court found that a sidewalk had actually been built.

987 Eveleth (1913) sec. 213; Faribault (1911) sec. 271; Granite Falls (1936) sec. 113; Glencoe (1909) ch. IX, sec. 7; Hutchinson (1913) ch. X, sec. 9; Minneapolis (1920) ch. VIII, sec. 23; New Ulm (1940) sec. 101; Northfield (1907) ch. IX, sec. 9; Redwood Falls (1941) sec. 104; Renville (1906) ch. IX, sec. 9; Rochester (1905) sec. 104; St. Cloud (1911) sec. 201; Sleepy Eye (1903) ch. VIII, sec. 12; Tracy (1933) sec. 101.

988 Austin (1903) ch. VII, sec. 13; Bemidji (1905) ch. VIII, sec. 15; Brainerd (1908) sec. 96; Crookston (1906) sec. 112; Glencoe (1909) ch. IX, sec. 7; Hutchinson (1913) ch. X, sec. 9; Minneapolis (1920) ch. VIII, sec. 23; New Ulm (1940) sec. 101; Northfield (1907) ch. IX, sec. 9; Redwood Falls (1941) sec. 104; Renville (1906) ch. IX, sec. 9; Rochester (1905) sec. 108; St. Cloud (1911) sec. 204; Stillwater (1915) sec. 165; Tracy (1933) sec. 104; Warren (1941) sec. 168; Winthrop (1907) ch. 8, sec. 9.
defects in an ungraded street,989 such clauses may operate to some extent as a limitation on liability that might otherwise exist.

A more significant limitation of liability is found in the Lake City and Red Wing charters which make the city immune from legal responsibility in snow and ice cases.990 The Red Wing provision, copied in the Lake City charter, reads:

"No action shall be maintained against the City of Red Wing, for the recovery of any damages to persons or property on account of any injuries received or caused by reason of the deposit, accumulation, or condition of any snow or ice, upon any street, sidewalk, lane, alley or public grounds within said city."

No other charter except Lake City's has followed Red Wing's lead, although the charter of that city, one of the oldest in the state, has been in existence for almost forty years. However, such a provision would be of little practical effect in charters which require written notice of street and sidewalk defects in advance of accidents on which claims are based.

2. EXTENSIONS OF LIABILITY OF THIRD PERSONS

Home rule charters almost uniformly impose liability for damages resulting from street obstructions and excavations upon those persons who are responsible for them or fail to barricade them or otherwise warn against them.991 To this extent, probably no liability is added to that existing without legislative provision.992

---

989Miller v. City of Duluth, (1916) 134 Minn. 418, 159 N. W. 960. See also (1942) 26 MINNESOTA LAW REVIEW 488.
990Lake City (1909) ch. 14, sec. 3; Red Wing (1902) ch. XVII, sec. 3.
991Ada (1908) sec. 214; Albert Lea (1927) sec. 105; Alexandria (1927) sec. 178; Bemidji (1905) ch. VIII, sec. 10; Benson (1908) ch. VIII, sec. 8; Biwabik (1941) sec. 67; Breckenridge (1907) sec. 214; Brainerd (1908) sec. 92; Cannon Falls (1905) ch. VIII, sec. 6; Chisholm (1915) sec. 248; Columbia Heights (1921) sec. 113; Crookston (1906) sec. 108; Dawson (1911) ch. 11, sec. 6; Detroit Lakes (1903) sec. 205; Duluth (1913) sec. 105; Eveleth (1913) sec. 215; Fergus Falls (1903) sec. 208; Gilbert (1941) sec. 67; Glencoe (1909) ch. IX, sec. 6; Glenwood (1937) sec. 109, 110; Granite Falls (1936) sec. 115, 116; Hutchinson (1913) ch. X, sec. 6; International Falls (1910) ch. XVIII, sec. 18; Jackson (1920) sec. 238; Lake City (1909) ch. 14, sec. 1, 4; Little Falls (1920) sec. 103; Madison (1923) sec. 102; Minneapolis (1920) ch. VIII, sec. 17; Montevideo (1930) sec. 108; Moorhead (1900) sec. 214; New Ulm (1940) sec. 98; Northfield (1907) ch. IX, sec. 6; Ortonville (1927) sec. 127; Pipestone (1913) sec. 219; Red Wing (1902) ch. XVII, sec. 1; Redwood Falls (1941) sec. 101; Renville (1906) ch. IX, sec. 6; Robbinsdale (1938) sec. 94; Rushford (1927) sec. 66; St. Cloud (1911) sec. 205; St. James (1918) sec. 233; Sauk Centre (1918) sec. 115; Springfield (1924) sec. 111; Staples (1908) sec. 210; Stillwater (1915) sec. 371; Tower (1928) sec. 71; Tracy (1933) sec. 106; Two Harbors (1907) ch. XVIII, sec. 18; Virginia (1909) sec. 332; Wabasha (1920) sec. 111; Warren (1941) sec. 167; Wayzata (1928) sec. 70; Willmar (1901) sec. 211; Winona (1920) sec. 209; Winthrop (1907) ch. 8, sec. 6; Worthington (1909) sec. 197.
992See (1942) 26 MINNESOTA LAW REVIEW 527 ff.
In addition, however, these sections frequently add a requirement that the individual tort feasor be joined as defendant if the city is sued for damages resulting from the defect. Several cases have involved procedural aspects of such provisions. It has been held that under a provision requiring joinder of the obstructer of the streets with the city, a verdict may, if the evidence justifies it, be against both defendants or against one and in favor of the other; and in case the verdict is against the city and in favor of the co-defendant, the city cannot move for a new trial on the ground that the verdict ought to have been against the co-defendant also, unless the latter is made a party to the motion. If the person causing the defective condition of the street is not joined as the charter requires, the city must raise the objection by demurrer, if the facts on which it is based appear in the complaint, or by answer. If it raises the objection in its answer, it must name the person who should be joined as the defendant, and the proof must sustain the plea of non-joinder. The mode of procedure provided by the charter in such cases is not exclusive. Instead of waiting for an action against it, the city may pay damages without suit, and then recover the amount paid in an action against the person responsible.

Another less common type of charter provision is one attempting to shift to the abutting landowner the municipal corporation's duty to keep sidewalks in safe condition. An old city charter of Stillwater contained a provision of this kind, making it the duty of all landowners to construct and keep in repair the sidewalks abutting their lots. It also provided that they should be liable for all damages resulting from their negligence in not keeping the sidewalk in good repair, that the landowner had to be joined with the city as defendant and in case of judgment execution had to issue against the landowner first. However, the provision was held unconstitutional. The court said the liability was in the nature of a penalty to enforce performance of a duty imposed as a tax, just as a direct pecuniary penalty is very gen-

---

993 Bemidji, Brainerd, Crookston, Dawson, Eveleth, Glencoe, Glenwood, Hutchinson, Jackson, Lake City, Minneapolis, New Ulm, Northfield, Ortonville, Pipestone, Red Wing, Redwood Falls, Renville, St. Cloud, St. James, Winthrop. Citations appear in note 991 above.

994 The cases referred to deal with provisions of special laws; but doubtless they apply to charter provisions as well.

995 Clark v. City of Austin, (1888) 38 Minn. 487, 38 N. W. 615.

996 Jones v. City of Minneapolis, (1883) 31 Minn. 230, 17 N. W. 377.


998 Minnesota, Sp. L. 1881, ch. 92, subch. 8, sec. 13.

999 Noonan v. City of Stillwater, (1885) 33 Minn. 198, 22 N. W. 444.
erally provided to enforce payment of necessary assessments for local improvements. Since the penalty was but an incident of the tax, it was subject to the same qualifications: it had to be uniform and enforcement had to be limited to the particular property. The court continued: 1000

"The liability provided in the charter is one which subjects the owner to a personal action, and it cannot be sustained. The duty to construct and maintain sidewalks, being in the nature of a tax, is one that is owing only to the city, just as the duty to pay taxes for local improvements imposed in any other way. It is not and from its very nature cannot be, a duty owing to third persons. In this respect it differs from certain police regulations intended for the protection of each one of the public, such as laws regulating the speed of railroad trains, prohibiting fast driving of horses in the streets and the like. Now, whether it is competent for the legislature to make one liable to private persons for failure in the duty to pay taxes of any kind to the state or municipal corporations. is a very grave question."

Two of the five justices concurred on the ground that this was an attempt to shift upon the property owner—a private person—a liability for the failure of the public authorities to perform a governmental duty.

Since the case of Noonan v. City of Stillwater antedated the constitutional enabling authority for the adoption of home rule charters, the invalidity of such provisions made it appear useless to charter drafters to include similar provisions in home rule charters; consequently, none of the existing charters appears to go beyond the imposition of the cost of sidewalk construction and repair upon abutting property owners. 1001 Of course, if the abutting owner digs a hole or creates an obstruction on the sidewalk in front of his property, he, like others doing the same act, might be subject to a suit as co-defendant with the city under the charter provisions previously discussed.

A third type of charter provision imposing obligations on third persons in connection with acts for which the city is liable now appears to be largely unimportant. A section frequently has been included in charters placing upon railroads and street railway companies liability for damages resulting from their piling snow,

1000 (1885) 33 Minn. 198, 205, 22 N. W. 444.
1001 The Warren charter of 1914 at ch. 12, sec. 22, contained a provision making the owner liable when a pedestrian was injured because of a defect in a sidewalk; but this provision appears to have been dropped from the 1941 revision. There may have been similar provisions in other charters now superseded.
in clearing their tracks, on the traveled portion of the roadway.\textsuperscript{1002}

Since there have been no cases construing charter sections of this kind, it is difficult to appraise their effect; but it is doubtful whether they change the law in any material degree, since one causing a street defect is liable for the damages resulting from it.

Perhaps it is a fact worth comment that the charters which have any one type of charter provision, other than the notice of claims section and the provision requiring the person creating an unsafe condition in the street to answer in damages for the consequences, usually have the other types of provisions which have commonly appeared; and in most cases these are found in the older charters. Most of the newer charters display a noticeable tendency throughout toward brevity and the elimination of a great many provisions which used to appear in charters as regularly as sections like that on powers of the council; and this recent trend is no less evident in the sections on tort liability than elsewhere. The charters since 1920, with only a few exceptions, usually have contained but two provisions in this respect; one requiring notice of claims before the commencement of every tort action, and another making the person causing a street excavation or obstruction liable to the city or to third persons for damages resulting from it.\textsuperscript{1003} The Waseca provision, or modifications of it, have been included in only two or three recent charters.

\begin{enumerate}
\item \textbf{O. THE CONSTITUTIONAL PROHIBITION AGAINST TAKING OR DAMAGING PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION}
\end{enumerate}

In Minnesota, as in practically all states\textsuperscript{1004} the constitution contains a safeguard against the abuse of the governmental power to acquire property for public use. Minnesota's provision\textsuperscript{1} is couched in these words:

\textsuperscript{1002}Bemidji (1905) ch. VIII, sec. 12; Benson (1908) ch. VIII, sec. 10; Brainerd (1908) sec. 95; Cannon Falls (1905) ch. VIII, sec. 8; Crookston (1906) sec. 111; Dawson (1911) ch. 11, sec. 8; Glencoe (1909) ch. IX, sec. 8; Hutchinson (1913) ch. X, sec. 8; International Falls (1910) ch. VII, sec. 44; Lake City (1909) ch. 14, sec. 7; Minneapolis (1920) ch. VIII, sec. 20; Northfield (1907) ch. IX, sec. 8; Ortonville (1928) sec. 129; Red Wing (1902) ch. XVII, sec. 5; Renville (1906) ch. IX, sec. 8; Warren (1914) ch. XII, sec. 8; Winthrop (1907) ch. 8, sec. 8.

\textsuperscript{1003}In this respect, as in many others, the charter makers have either consciously or unconsciously followed Professor Anderson's Model Charter, published in 1922 as part of his monograph on City Charter Making in Minnesota.

\textsuperscript{1004}Even as early as 1909, only one state, North Carolina, could be listed as an exception. Lewis, Eminent Domain, (3rd ed. 1909) sec. 11.

\textsuperscript{1}Minnesota constitution, art. 1, sec. 13.
"Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

Originally, the constitutional prohibition extended only to the taking of property. The words "destroyed or damaged" were not inserted until 1896.2

This study is not concerned, of course, with the regular exercise under the statutes3 of the power of eminent domain, since such action cannot be considered tortious; but the taking or damaging of property for public use, without exercising that power, may be considered tortious under the constitution.4

Prior to the amendment of 1896 it was held that the municipal corporation was not liable for consequential damages necessarily suffered through the establishment of a street grade.5 Changes in grade were treated in the same manner as original grades in this respect.6 The hardship of this rule led to the amendment of 1896;7 and since that time, damages suffered by a property owner from the establishment of a street grade have been compensable.8 The rule has been applied also to a change in the original established grade.9 Recoverable damages include damages

---

2The amendment was proposed by Laws 1895, ch. 5 and was ratified by the voters on November 3, 1896.
3Mason's 1927 Minn. Stats., ch. 41 governs the procedure except for municipal corporations whose charters contain other provisions.
4It is not clear to what extent the state or its subdivisions would be subject to restrictions similar to those of art. 1, sec. 13, in the absence of that explicit provision. The courts of nearly all the states which were without such a limitation have held that the limitation was merely declaratory of certain fundamental principles of natural justice and equity which were as binding upon the legislature as though expressly incorporated in the constitution. Later authorities are opposed to this view. In other states the right to compensation has been worked out through other constitutional provisions, such as the due process clause. Consult Lewis, Eminent Domain, (3rd ed. 1909) sec. 11.
5Lee v. City of Minneapolis. (1875) 22 Minn. 13: Alden v. City of Minneapolis. (1877) 24 Minn. 254: Yanish v. City of St. Paul, (1892) 50 Minn. 518, 52 N. W. 925; Willis v. Winona City. (1894) 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142. Charters or special laws often provided, however, for the payment of damages in such cases through an assessment procedure. See McCarthy v. City of St. Paul, (1876) 22 Minn. 527; Taylor v. City of St. Paul, (1878) 25 Minn. 129; Wilkin v. City of St. Paul, (1885) 33 Minn. 181, 22 N. W. 249; Abel v. City of Minneapolis, (1897) 68 Minn. 99, 70 N. W. 851.
6Henderson v. City of Minneapolis. (1884) 32 Minn. 319, 20 N. W. 322; Rakowsky v. City of Duluth, (1890) 44 Minn. 188, 46 N. W. 338; Abel v. City of Minneapolis. (1897) 68 Minn. 99, 70 N. W. 851.
7Dickerman v. City of Duluth. (1903) 88 Minn. 288, 92 N. W. 1119.
9Dickerman v. City of Duluth. (1903) 88 Minn. 288, 92 N. W. 1119; Maguire v. Village of Crosby, (1929) 178 Minn. 144, 226 N. W. 398; Foss.
GOVERNMENTAL RESPONSIBILITY FOR TORTS

“for lowering the grade, lateral support rendered necessary by excavations in the street, injury to a driveway leading from the street, and for all other acts which result in substantially changing conditions to the injury of the property owner.10

An early case held that any damages from a change of grade accrued when the change was ordered and that the change is unaffected by any subsequent conduct either by the lot owner or the city.21 This rule was later specifically abrogated by a holding that the damage accrues when the physical change of grade is made and not before, since a paper change does no damage.12

The amended constitutional provision has been held to apply to damages resulting from the vacation of a street.13 In that case, the street was not vacated in front of the plaintiff’s lot but in such a way as to make the street in front of his lot a blind alley. It was held that for such consequential damages, the constitution did not require the damage to be first ascertained and paid as a condition precedent to the vacation. The plaintiff is fully protected because the city is liable in an action for damages in such a case. In other words, if the property is physically taken, provision for compensation must be made prior to the taking; but where none of the property is taken, the right of the owner to go into court and compel payment for the damage to his property by the invasion of his constitutional right is considered to satisfy the requirement that payment should first be made or secured.14

Speaking of the amendment to the constitution made in 1896, the court once said:15

“The purpose of the change is not to change the substantive law of damages or to enlarge the definition of that term. It was rather the purpose to make the law of damages uniform so that a property owner may recover against persons or corporations having power of eminent domain under the same circumstances that would have authorized recovery against one not armed with that power.”

To a large extent, as has been pointed out previously, municipalities in their possession of property had already been placed in

10Morgan v. City of Albert Lea, (1915) 129 Minn. 59, 151 N. W. 532.
11McCarthy v. City of St. Paul, (1876) 22 Minn. 527.
12Sather v. City of Duluth, (1913) 123 Minn. 300, 143 N. W. 906.
14Austin v. Village of Tonka Bay, (1915) 130 Minn. 359, 153 N. W. 738.
the same category as private possessors in their subjection to responsibility for tortious acts against abutting owners; and the cases since the amendment, particularly those dealing with street grading and vacation, have bridged the remaining gap between municipalities and other possessors of land in this respect. They are liable for removing the lateral support of abutting land, and for gathering surface waters in artificial channels and casting them on private land; and, in general, towns and counties have also been held liable in damages to property owners when the owners' property rights are invaded. Long before the constitutional amendment of 1896, this exception to the usual immunity of towns and counties was laid to the constitutional prohibition against the taking of private property for public use without compensation; and the court has recently reiterated the explanation that "this exception is designed, and necessarily so, to protect the owner against illegal exercise of the power of eminent domain." This may be a satisfactory explanation of the cases cited by the court as establishing the principle; but it is not so easy to justify the extension of the rule to such wrongful acts as the negligent spreading of quack grass from a highway to private property and especially the negligent spreading of fire while burning brush on a highway. Negligence is not a taking

16Dyer v. City of St. Paul, (1881) 27 Minn. 457, 8 N. W. 272; Nichols v. City of Duluth, (1889) 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; Munger v. City of St. Paul, (1894) 57 Minn. 9, 58 N. W. 601; "In the control and improvement of its thoroughfares for public use the city has the same rights and powers as a private owner has over his own land, and is subject to the same liabilities. It would be liable for damages caused to plaintiff's property by grading the avenue and street, just as a private owner of the soil over which they were laid would have been liable when improving it for his own use; and the right to inflict damage beyond that which a private owner might have inflicted without liability did not exist. The city was authorized to grade, but without exercising the right of eminent domain it was not authorized to encroach upon plaintiff's property when so doing. It could not excavate to the full width of the street, leaving or placing the slope thereon upon his lots to their injury and impairment." See also Armstrong v. City of St. Paul, (1883) 30 Minn. 299, 15 N. W. 174.


20Dynes v. Town of Kilkenney, (1922) 153 Minn. 11, 189 N. W. 439.

21Newman v. County of St. Louis, (1920) 145 Minn. 129, 176 N. W. 191.
or damaging of property for public use within the meaning of the constitutional provision.  

To state this is not to quarrel with the case of *Newman v. County of St. Louis* or decisions following it; it suggests, however, that the explanation of this whole line of cases may not be bound up so much with a constitutional guaranty as with a keen realization in cases of injury to property of the inadequacies of the traditional immunity doctrine. The decision of *Newman v. County of St. Louis* indicates that a basic provision forbidding the taking or damaging of property without compensation is not the sine qua non of recovery for tortious property damage; and the virtual absence of a remedy when the tortious taker is the state demonstrates that the constitutional guaranty alone is not sufficient to afford relief to the injured party.

The owners of land abutting streets are considered the fee owners of the street, subject only to the easement of the public for travel. Consequently interferences in the street with the rights of the owner may constitute an unlawful taking of his property within the meaning of the constitutional provision; but these cases, as contrasted with those mentioned in the previous paragraph, have made no mention of art. 1, sec. 13 of the state constitution as impelling the decisions. There would appear to be as much reason for doing so as in the cases just discussed, but the court has preferred to rest its decision in each instance upon common law principles which apparently would be applicable had a bill of rights never been included in the constitution.

It has been held, for example, that the soil and mineral in the street belong to the owner of the fee and that the municipal corporation may remove only so much as is necessary to bring the street to grade, probably using such material in the improvement of other parts of the street; but the public easement justifies only the taking of material which the process of the construction or repair of the street requires. Recovery has been allowed, there-

---


24 See State by Benson v. Erickson, (1931) 185 Minn. 60, 239 N. W. 908; State by Benson v. Stanley, (1933) 188 Minn. 390, 247 N. W. 509.


fore, for the value of the stone or other minerals removed when not required for street improvement.\textsuperscript{27}

Other action by municipal authorities has likewise been treated as an unlawful interference with the ownership of the fee. In \textit{West v. Village of White Bear},\textsuperscript{28} the owner of the fee was held entitled to enjoin the village authorities from cutting down trees outside the traveled portion of a road but within the platted portion when it would serve no useful purpose.

The same principle was applied in \textit{Pederson v. City of Rushford},\textsuperscript{29} where the city had removed a woodshed and cut down and converted a tree belonging to the plaintiff but encroaching on an alley not used for general travel. Since the woodshed and tree did not interfere with any present or proposed use of the alley, judgment was given for the plaintiff, following \textit{West v. Village of White Bear}.

In \textit{Johnson v. Village of Gibbon},\textsuperscript{30} a landowner was awarded damages when the village council, proceeding against the plaintiff alone, tore out and destroyed a curb which the plaintiff had installed without encroachment on the traveled way. The authority of the village to take this action if done properly was conceded, but the court felt that when the council did it because it was considered a "duty to make him take it out in order to show him the village council had jurisdiction over the streets," its arbitrary action entitled the jury to find for the plaintiff. The principle of the case is somewhat obscure, but it is clear that according to the decision the village is to be held accountable for its arbitrary and capricious action even though the action would be perfectly lawful if the village's authority had been properly exercised.

P. Proposals for Future Legislative Action

Perhaps the suggestions that conclude this study may be better understood and appraised in the light of a brief summary picture of the Minnesota situation with respect to governmental responsibility for torts. The state's immunity has as yet prevented any substantial modification of its complete irresponsibility for the torts of its officers and agents; aside from payment of a few claims through legislative channels, only in the last few

\textsuperscript{27}\textit{Ibid.}
\textsuperscript{28}(1909) 107 Minn. 237, 119 N. W. 1064.
\textsuperscript{29}(1920) 146 Minn. 133, 177 N. W. 943.
\textsuperscript{30}(1927) 170 Minn. 12, 212 N. W. 15.
years has there been any subject of the state to judicial processes in determining its responsibility in tort, a development which as yet has been far too limited to reflect a trend. Counties, towns, and school districts, while traditionally acting as the state's agents in carrying on their activities, have recently been placed, with one exception, in the same category as true municipal corporations with respect to tort liability. Like cities and villages, these quasi municipal corporations have been held accountable for the tortious performance of what the court has classified as proprietary functions while sharing the immunity of the state in their discharge of governmental functions. The one exception, the maintenance of streets, where cities and villages have been held inexplicably liable while counties and towns have not, occasions more damage suits than almost all other functions combined. The application of the traditional distinction between governmental and proprietary functions has sometimes been difficult, as it has in other states, but the classification thus far adopted in Minnesota has been fairly orthodox. Of the borderline functions, hospitals have been placed somewhat conditionally in the proprietary group, parks in the governmental class; the rest of Minnesota's classification has fit into the traditional pattern.

Yet the governmental-proprietary test of liability has not been universally applied. The court has repeatedly held it of no significance in the case of tortious invasions of interests in real property. This has assertedly been due to the constitutional inhibition against taking private property for public use without compensation, but it may be due to a more solicitous regard for rights in property in such cases, a regard which is merely reflected in the constitutional provision.

Statutes have made but slight inroads on governmental tort liability in this state. The most important legislation has attempted to safeguard municipal corporations against fraudulent claims and unnecessary law suits by requiring a notice of claim as a condition precedent to suit in case of a tortious injury due to the negligence of their servants or the defective condition of public property. The extension of liability by legislation has been slow in coming; the only important step thus far taken has been the adoption of legislation permitting governmental units in effect to underwrite the tort liability of their officers and employees through the carrying of liability insurance for them. Common law principles of tort liability have been unaffected by such legislation or in any material
From this survey, the conclusion seems almost inescapable that the present state of the public law of torts in Minnesota, as in most other states, cannot be defended in principle; and in the results it achieves in its failure to impose upon governments complete responsibility for tortious injuries inflicted upon innocent persons it can only be regarded as reflecting "defective social engineering." The recent statutes permitting some indirect assumption of responsibility have manifested a legislative recognition of the injustices inherent in the immunity doctrine; but as yet no statute of any appreciable application has whittled away any of the immunity which the state and its political subdivisions have enjoyed ever since the state was organized.

And if there is to be any substantial extension of governmental responsibility, it is clear—so far as future judicial interpretation can be predicted from the past performance of the courts—that it must come by legislation. As new functions are undertaken by government, the court will probably strive, wherever it can do so without doing violence to accepted principles, to place those functions in the category in which liability is imposed for tortious acts and omissions; but it is extremely unlikely that, in the case of established functions, the court will make any appreciable change in the rule of liability. It has itself said, "If it is a better policy to spread the loss to the individual over the taxing district, if this is thought to be promotive of social justice, as some think, the legislature can bring the result by statute."

What form that legislation should take is conjectural. Theoretically, it should completely abrogate the immunity doctrine by throwing open the courts to claimants against the state and its political subdivisions on exactly the same basis as if the claims were against private persons. Practically this may be going much too far. Just how much too far cannot be evident except after some such study of the practical administration of tort claims in Minnesota as has been made in a few cities elsewhere; and

---

31Borchard, Governmental Responsibility in Tort—A Proposed Statutory Reform, (1925) 11 A. B. A. Jour. 495, 500. He attributes the phrase elsewhere to Roscoe Pound. The term appears also in Harper, Torts (1933) sec. 155 and has now come into rather common usage among legal scholars.
32Justice Dibell in Bang v. Independent School District No. 27, St. Louis County, (1929) 177 Minn. 454, 235 N. W. 449.
33Studies have been completed in Los Angeles, Chicago, Boston, Austin, Texas, and Medford, Massachusetts, under the sponsorship of the Committee on Public Administration of the Social Science Research Council with the
without the benefit of information that such a study would reveal, any proposals for statutory reform may be too academic to be of value.

The keen and profound analysis of the law by Professor Borchard in his series of articles demonstrates convincingly that sovereign immunity and the governmental-proprietary bifurcation of functions cannot be explained satisfactorily on principle, but little has yet been done, aside from the few studies mentioned, to show what financial burdens would be assumed by the state and its municipalities were these doctrines to be abrogated by legislation. One serious accident could cost a small village far more than the total of its annual budget. This might be an almost impossible burden unless the risk could be spread by insurance or assumed in part or in whole by the state. Professor Borchard in his draft act suggests that the small municipality might be obliged to contribute a portion of its tax revenues to a state fund, the state assuming any excess of liability over the amount contributed. This can be justified by the fact that in many cases the municipality is performing state functions. As an incentive to efficient government, a local community which does not exhaust its two per cent liability contribution in any one year might be given credit for the unexpended portion in the next year and returns might be made of excess amounts paid in at regular periods.

cooperation of the National Institute of Municipal Law Officers, the American Municipal Association, and a committee of the Municipal Law section of the American Bar Association. These studies have been used as the basis for a recent article by Fuller and Casner, Municipal Tort Liability in Operation, (1941) 54 Harv. L. Rev. 437. The Los Angeles study has been published by the Committee on Public Administration of the Social Science Research Council. David & Feldmeier, (1939) The Administration of Public Tort Liability in Los Angeles, 1934-1938. The Boston study has appeared as Report No. 4 of the Bureau for Research in Municipal Government, Harvard Graduate School of Public Administration. Fuller, Tort Liability of Municipalities in Massachusetts with special reference to its administration in Boston, 1934-1938. See Ascher, Studies in Municipal Tort Liability, (1940) 5 Legal Notes on Local Government 352. A recent work has included a survey of municipal tort administration in Virginia. Warp, Municipal Tort Liability in Virginia, (1942) 63-82.


He suggests two per cent.

If existing experience were known, it might already have demonstrated the necessity for other safeguards in any legislation imposing tort liability on the state and its subdivisions. Little attempt at fraud was found in Los Angeles, Boston and the other cities studied, and the total amount paid in tort claims under conditions of partial legal immunity did not show that it would be impracticable to have restricted immunity there still further. However, municipal officials generally have been somewhat apprehensive of the additional expenditures from public funds which an extension of liability would necessitate. The danger of fraud and of excessive claims can be minimized by the inclusion of a provision for maximum liability or, perhaps better still, by the adoption of a schedule of payments for various kinds of injuries somewhat comparable to the schedule found in the workmen's compensation act.

With motor vehicle claims a possible exception, the greatest number of tort claims would arise under any law in a field in which responsibility is already complete so far as municipal corporations are concerned. As a practical matter, this liability for street and sidewalk defects may be already too extensive in cities and villages at the present time if the various provisions included in home rule charters to limit liability are any criterion. A study of the cases inclines one toward the view that there is a tendency

---

36 Fuller and Casner, Municipal Tort Liability in Operation, (1941) 54 Harv. L. Rev. 437, 450, 460. The total payments for claims settled administratively in Los Angeles during 1935-1938 averaged $7,578.25 annually and the average individual payment during the same period was $94.73; payments during 1933-1939 in Austin averaged $597.26 annually or $87.09 per recovery; in Chicago, total payments averaged $3,944 annually during 1937-1938 and the average individual payment was $59.31; in Medford, payments of the city averaged $1,709.67 between 1934 and 1939 with an average individual recovery of $179.76. Fuller and Casner, op. cit. 449. As those authors point out, "A single area of municipal tort liability opens the door to the would-be defrauder in quite the same way as would a doctrine of complete liability." Idem, 450.

37 Among the law review articles discussing liability, those written by officials have been most critical of the extension of liability. See, for example, Webber, Municipal Tort Liability, (1938) 3 Peabody L. Rev. 60; McCash, Ex Delicto Liability of Counties in Iowa, (1924) 10 Iowa L. B. 16. Note also the opinions of city attorneys in Virginia in Warp, Municipal Tort Liability in Virginia, (1942) 83-102. Most of them favored continuance of the governmental-proprietary distinction.

40 Fuller and Casner have suggested instead that recovery in tort actions against a municipal corporation be confined to actual monetary damages. Municipal Tort Liability in Operation (1941) 54 Harv. L. Rev. 437-461. "Practically, the purpose of tort liability would be sufficiently served with complete municipal liability limited by statute to the recovery of actual monetary damages. With this limitation, the cost of complete liability would almost certainly be less than municipalities now spend for unlimited liability in particular areas. Distribution of damages paid would be far more in accord with the demands of justice and public policy." Ibid.
for the courts to advance the position of the municipal corporation to that of an insurer in such cases, particularly where the defect complained of is an accumulation of ice or snow. Perhaps this belief is what prompted the League of Minnesota Municipalities in 1939 to sponsor legislation to abolish liability resulting from the defective condition of streets and sidewalks resulting from wear and tear or climatic conditions.\footnote{A provision exempting cities and villages in snow and ice cases might be more defensible, and at least two cities by charter have adopted this rule. The standard of care required to prevent the kind of accumulations of ice and snow which now give rise to liability is such a high one that few, if any, cities and villages can attempt to meet it; the possible liability is in most cases considered less burdensome than the expense of removing snow and ice from sidewalks and streets. Perhaps it ought not to be considered negligence in this climate to permit the accumulation of hummocks of snow and ice on streets and sidewalks; but it is, and only a legislative declaration to the contrary can supplant this standard of care with one which more nearly accords with reasonableness.}

If this is found to be undesirable, a more modest change might be considered: the allowance of a shorter period within which to file notice of claims in cases of defective conditions due to snow and ice.\footnote{Snow and ice conditions are so transitory, even in a climate such as this, that if a notice requirement is to serve its purpose, it should be satisfied in time to permit the investigating authorities to find the street or sidewalk in a condition as nearly as possible like that which existed at the time of the accident.}

If a study of the administration of tort claims in this state were to indicate that inflated verdicts against the city or village in street and sidewalk cases were not unusual, it might be worth considering a provision like the notice requirement of the Owatonna charter\footnote{If a study of the administration of tort claims in this state were to indicate that inflated verdicts against the city or village in street and sidewalk cases were not unusual, it might be worth considering a provision like the notice requirement of the Owatonna charter under which the claimant is required to waive a jury trial unless the city has received a written notice of the defect at least five days before the injury complained of. The provision is much less harsh than one which requires actual notice before the accident in all cases, and if the city is more likely to receive just treatment at the hands of a court than at the hands} under which the claimant is required to waive a jury trial unless the city has received a written notice of the defect at least five days before the injury complained of. The provision is much less harsh than one which requires actual notice before the accident in all cases, and if the city is more likely to receive just treatment at the hands of a court than at the hands
of a jury, such a provision may have some merit in preventing
the imposition of liability in excessive amounts. 44

Whether municipal liability for street and sidewalk defects is
limited or left as it is, serious consideration should be given by the
legislature to placing towns and counties in exactly the same
category as cities and villages in this respect. The present law in
this respect is indefensible on principle and can be explained only
as a historical accident. The only practical objection to a legisla-
tive abolition of the immunity of towns and counties for their
failure to maintain their roads in safe condition is the financial
burden that might thereby be occasioned; but this is a burden
which has been borne by cities and villages since the state was
organized. The expense would probably be no more intolerable
in one case than in the other.

While proposals like the foregoing can be made only in very
tentative fashion in the absence of some knowledge of the number
and amount of claims that would be affected, 45 two suggestions
may be made with less hesitation. One is that the notice require-
ment be extended, as it already has been by a number of charters,
to cover all claims for damages resulting from injuries to persons
or property. If the purpose of the notice requirement is sound,
it applies not only to claims resulting from defects and from negli-
gence but to other damage claims as well. The same need for a
prompt investigation, the same necessity for an opportunity to
settle without suit exists in cases of other torts as in the case of
those now covered by the statute requiring notice.

If this change is made, the statute should also be extended
to towns, counties, and school districts. Even if the scope of
the statute as to the type of claims covered is not broadened, the
amendment of the statute to cover claims against quasi municipal
corporations seems desirable, although the claims to which the
present notice statute would apply in the case of these units are so
few that the change is probably unimportant.

The other proposal is that the present statutes permitting the
insurance of officers against liability and the payment of claims
resulting from motor vehicle torts be extended to all other torts

44 The problem of jury trial obviously is too vast and too controversial
to permit more than this brief mention of the point here.
45 In addition to studies of municipal tort administration already men-
tioned, some like material is available in connection with claims against
the state of New York under its Court of Claims Act. See Borchard,
Recent Statutory Developments in Municipal Liability in Tort, (1936) 2
Legal Notes on Local Government 89, 99. Claims allowed over the period
from 1929 to 1935 approximated fifteen per year and the amount allowed
averaged $82,000 a year, an insignificant amount for New York state.
whether committed in a governmental or proprietary capacity.\(^4\) Governmental immunity is now a bar to payment of claims which some municipal councils feel should be discharged as a moral obligation. Furthermore, many “risks” which cannot now be insured against because, with the municipal corporation not liable, there is no actual risk, might be considered worthy of insurance protection to those who are injured through the fault of the municipality. Claims resulting from defects in public buildings are of this character. It is possible that because of a lack of actuarial data and other factors, it may not be feasible, at least at the present time, to secure liability insurance against all torts; but this should not prevent the enactment of a permissive statute that could be availed of to whatever extent insurance proved practicable. This optional legislation has the advantage of imposing no burdens on municipalities which felt unable or unwilling to assume them; and if it authorized the compromise or settlement of any claim on which there might be liability but for the present rules of governmental immunity, it would give municipalities an opportunity of avoiding the hardship frequently resulting from the present rules.

The state is so large a unit that it would cost more for it to insure against claims than for it to pay those claims itself.\(^4\) Experience is showing, however, that the legislature is finding itself more and more unable to act as the claim adjuster for the state; and no adequate remedy is likely to be found short of a general act either setting up a separate court of claims or, preferably, investing the present courts with the functions of a court of claims. Such an act presupposes, of course, a waiver of the state’s immunity from suit.

There is no reason in principle why the same rules should not apply to municipal liability in tort as in contract; and there is no more reason why the state should not be held just as accountable as the municipality in both cases. Until this is done, the injured citizen will not secure the “remedy for every wrong” to which he feels entitled under the state constitution. The state’s obligations, moral or legal, that exist but cannot be enforced “are ghosts that are seen in the law, but that are elusive to the group.”\(^4\)

(Concluded)

\(^4\)This assumes, of course, that complete legislative abolition of the immunity doctrine is not found to be practicable.

\(^5\)Large municipalities frequently have the same experience. Los Angeles reported saving a considerable amount by acting as self-insurer in workmen’s compensation cases. David and Feldmeier, The Administration of Public Tort Liability in Los Angeles 37. Several of the larger cities in Minnesota have similar records.

\(^6\)Mr. Justice Holmes in The Western Maid, (1922) 257 U. S. 419, 42 Sup. Ct. 159, 66 L. Ed. 299.