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## TORT LIABILITY OF MUNICIPAL CORPORATIONS IN INDIANA

ALMA CHATTIN\*

Even at common law there seems to have been no time when municipal corporations were entirely free from responsibility for torts,<sup>1</sup> and this liability has in most states now been extended or modified in varying degrees. It is under this particular branch of the law that the demarcation between governmental functions and private functions becomes most important since judicial decisions, in theory at least, generally predicate liability or immunity upon this distinction. The Indiana court has repeatedly stated that municipal corporations are not liable for negligence in discharging governmental functions,<sup>2</sup> but are liable for negligence in the exercise of their private, proprietary functions.<sup>3</sup> Thus stated, the rule is simple, but a great deal of confusion arises when an attempt is made to determine in what capacity the municipality was acting in committing the tort complained of. In the beginning this peculiar doctrine of dual capacity of the municipality was probably useful as a means of evading the total immunity afforded by the theory that the sovereign can do no wrong. The great increase in the functions performed by the municipality and the changing policy of the state have rendered the rule entirely unworkable.

On other occasions this court has stated that the municipality is not liable for a tort committed in the performance of an act which is legislative or discretionary in its nature, but that it is liable for torts committed in the performance of an act ministerial in character.<sup>4</sup> An analysis of the Indiana cases indicates the impracticability of the application of either rule, and for the most part the courts have adhered to such declarations only in theory.

A governmental act is usually defined as one which is performed not to promote the private interests of the municipality, but as one performed for public benefit. Thus, recognizing that the municipality acts in the interest of the public in protecting the health of its citizens,<sup>5</sup> in protecting property

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<sup>1</sup> McQuillin, Vol. VI, Municipal Corporations, ch. 53, p. 741.

<sup>2</sup> Indianapolis v. Williams (1814), 58 Ind. App. 447; Louisville Traction Co., v. Jennings (1919), 73 Ind. App. 69; Union Traction Co. v. Muncie (1923), 80 Ind. App. 260.

<sup>3</sup> Anderson v. East (1887), 117 Ind. 126; Aiken v. Columbus (1906), 167 Ind. 139.

<sup>4</sup> Stackhouse v. Lafayette (1866), 26 Ind. 17; Brinkmeyer v. Evansville (1867), 29 Ind. 187; Logansport v. Wright (1865), 25 Ind. 512; Wells v. Madison (1881), 75 Ind. 241; see Borchard, Government Liability in Tort (1924), 34 Yale L. Jrl. 129, 229 for discussion of the unsoundness of these distinctions.

<sup>5</sup> Knightstown v. Homer (1905), 36 Ind. App. 139.

of its inhabitants from fire,<sup>6</sup> in providing medical attention for the poor,<sup>7</sup> in providing jails and keeping them clean and inhabitable,<sup>8</sup> in providing a police force for protection,<sup>9</sup> and in maintaining hospitals<sup>10</sup> and other public buildings<sup>11</sup> in safe and proper condition, liability of the municipality for negligence in the performance of any one of these duties is quite uniformly denied. It is true that care of the poor, maintenance of jails and hospitals and less often some of the other duties listed here are sometimes performed by the county, which has a greater immunity from tort liability than a town or city, but this distinction is not made.

*Passing and enforcing ordinances.* It is upon the theory of sovereignty that the municipality is held immune from liability for failure to enforce an ordinance prohibiting coasting,<sup>12</sup> riding of bicycles,<sup>13</sup> or horse racing<sup>14</sup> on the public streets; nor is it liable for failure to enact a proper ordinance prohibiting driving of vehicles for hire without a license,<sup>15</sup> or failure to enact ordinances regulating the speed of railroad engines running along certain public streets.<sup>16</sup> In the case of *Wheeler v. City of Plymouth*,<sup>17</sup> where an ordinance forbade firing of explosives except upon license by the mayor, and the plaintiff's buildings were damaged as a result of the exercise of such a license, recovery was denied on the theory that the city was not liable for failure to enact and enforce proper ordinances; nor was it liable for acts of its licensees unless the act was inherently dangerous. However, in the case of *Moore v. City of Bloomington*,<sup>18</sup> where the municipality had the same sort of ordinance, recovery was permitted when a small girl who was standing in the street watching a July Fourth celebration, was injured upon being struck by a rocket. In the latter case an attempt was made to distinguish *Wheeler v. City of Plymouth*<sup>19</sup> upon the ground that in that case the license to fire explosives was to be exercised in a vacant lot adjoining a public street, while in the principal case it was contemplated that the license would be exercised in the public streets and was therefore inherently dangerous and a nuisance, also that the city was violating its duty to keep the streets in

<sup>6</sup> *Robinson v. Evansville* (1882), 87 Ind. 334; *DePauw v. New Albany Water Works* (1923), 193 Ind. 368; *Larimore v. Indianapolis* (1926), 197 Ind. 457; *Union Traction Co. v. Muncie* (1923), 80 Ind. App. 260; *Fitch v. Seymour Water Co.* (1894), 139 Ind. 214; *Brinkmeyer v. Evansville* (1867), 29 Ind. 187; *Louisville Traction Co. v. Jennings* (1919), 73 Ind. App. 69.

<sup>7</sup> *Summers v. Daviess County* (1885), 103 Ind. 262; *Williams v. Indianapolis* (1900), 26 Ind. App. 628.

<sup>8</sup> *White v. Sullivan County* (1891), 129 Ind. 396; *Morris v. Switzerland County* (1892), 131 Ind. 285; *Pritchett v. Knox County* (1908), 42 Ind. App. 3; *Greene County v. Boswell* (1891), 4 Ind. App. 133.

<sup>9</sup> *Smith v. Gary* (1931), 93 Ind. App. 675; *Lafayette v. Timberlake* (1882), 88 Ind. 330; *Vaughtman v. Waterloo* (1895), 14 Ind. App. 649; *Laurel v. Blue* (1890), 1 Ind. App. 281.

<sup>10</sup> *Scott v. Indianapolis* (1920), 75 Ind. App. 387; *Williams v. Indianapolis* (1900), 26 Ind. App. 628.

<sup>11</sup> *Vigo County v. Dailey* (1892), 132 Ind. 73; *McDermott v. Delaware County* (1915), 60 Ind. App. 209; *Smith v. Allen County* (1891), 131 Ind. 116.

<sup>12</sup> *Faulkner v. Aurora* (1882), 85 Ind. 130; *Lafayette v. Timberlake* (1882), 88 Ind. 330.

<sup>13</sup> *Millett v. Princetown* (1906), 167 Ind. 582; *Knouff v. Logansport* (1900), 26 Ind. App. 202; *Logansport v. Kihm* (1902), 159 Ind. 68.

<sup>14</sup> *City of North Vernon v. Aldridge* (1920), 74 Ind. App. 309.

<sup>15</sup> *Vaughtman v. Town of Waterloo* (1895), 14 Ind. App. 649.

<sup>16</sup> *Kistner v. Indianapolis* (1884), 100 Ind. 210. See also *Mayne v. Curtis* (1920), 73 Ind. App. 640, holding that city is not liable for failure to require R.R. to install bumper blocks.

<sup>17</sup> (1888), 116 Ind. 158.

<sup>18</sup> (1912), 51 Ind. App. 145.

<sup>19</sup> (1888), 116 Ind. 158.

a safe condition. This distinction is somewhat inconclusive, since it can hardly be said that it is more dangerous to fire explosives in the street than to fire them from a vacant lot across the street. The only real difference in the two cases seems to be that in the Wheeler case the damage was to property abutting the street, which the city is under no duty to protect, while in the Moore case the injury was to a traveler in the streets to whom the city is under the obligation of keeping the streets reasonably safe.

*Nuisances.* The power of a municipality to prevent, remove, or abate nuisances<sup>20</sup> is generally held to be governmental so that the municipality is not liable with respect thereto, but an exception to this rule is apparent where the nuisance is one which makes the public streets unsafe.<sup>21</sup>

Where the municipality creates a nuisance it is guilty of tort and is liable in damages, even though the nuisance is created in the performance of a governmental duty.<sup>22</sup> Thus, the municipality has been held liable for creating nuisances in the following manner: Maintaining a pest house in such close proximity to dwelling houses that the latter were rendered unsafe and unpleasant,<sup>23</sup> collecting garbage and rubbish and dumping it near dwelling houses,<sup>24</sup> dumping garbage where it would wash into streams and thereby render them unfit for use,<sup>25</sup> and depositing garbage above a point where plaintiff maintained docks, causing the harbor to fill up and be unapproachable.<sup>26</sup> In the case of *City of Valparaiso v. Moffitt*<sup>27</sup> the city was held liable for maintaining a nuisance by disposing of the city sewerage in a stream flowing through plaintiff's property and rendering such property unfit for use. The later decision of *City of Richmond v. Test*<sup>28</sup> denies liability under the same circumstances on the ground that this was the best modern method of disposing of sewerage and that the city was guilty of no wrong. The previous case is distinguished by saying that the discharge of sewerage into the stream was "wrongful" in that instance. Just why such a method was considered "wrongful" in one case and legal in the other is not made clear by the court. *City of Valparaiso v. Hagen*<sup>29</sup> follows the Richmond case, stating that this was the only method of sewerage disposal available to the city and that private interest must yield to public good. However, in a recent case,<sup>30</sup> judgment was rendered against the city of Frankfort under substantially the same facts on the basis that there was no longer any necessity for polluting streams in this manner since a sewerage disposal plant could be built and maintained by the expenditure of a reasonable sum. It may be that the varying results were justified in each case, but this illustrates the ineffectiveness of any hard and fast distinction such as the courts have attempted to make.

*Pounds.* Most states consider the maintenance of a public pound the exercise of a public function in connection with which the city is not liable,<sup>31</sup>

<sup>20</sup> *Miller v. Valparaiso* (1893), 10 Ind. App. 22; *Anderson v. East* (1888), 117 Ind. 26.

<sup>21</sup> *Grove v. City of Fort Wayne* (1874), 45 Ind. 429; see also *Moore v. City of Bloomington*, note 18.

<sup>22</sup> *New Albany v. Slider* (1899), 21 Ind. App. 392.

<sup>23</sup> *Haag v. Vanderburg County* (1878), 60 Ind. 54; *Anabel v. Montgomery County* (1904), 34 Ind. App. 72.

<sup>24</sup> *New Albany v. Slider* (1899), 21 Ind. App. 392; *New Albany v. Armstrong* (1899), 22 Ind. App. 15; *Cannelton v. Bush* (1909), 45 Ind. App. 638.

<sup>25</sup> *New Castle v. Harvey* (1913), 54 Ind. App. 243.

<sup>26</sup> *Peck v. Michigan City* (1897), 149 Ind. 670.

<sup>27</sup> (1894), 12 Ind. App. 250.

<sup>28</sup> (1897), 18 Ind. App. 482.

<sup>29</sup> (1899), 153 Ind. 337.

<sup>30</sup> *Frankfort v. Slipper* (1928), 88 Ind. App. 356.

<sup>31</sup> 43 Corpus Juris, p. 1174.

but in the case of *City of Greencastle v. Martin*,<sup>32</sup> where the plaintiff's horse was injured because the pound fence was not high enough and due to the negligence of the city employees in tying the horse, the court permitted recovery, saying that municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries caused by the negligence or unskillfulness of their agents in the construction of works for the benefit of cities or towns under their government. The case relies upon the earlier decisions of *Ross v. City of Madison*,<sup>33</sup> which is not a tort case, *Stackhouse v. City of Lafayette*,<sup>34</sup> which was a sewer construction case, and *Brinkmeyer v. Evansville*,<sup>35</sup> which stated the rule as dictum. While this language has been repeated in a few later decisions<sup>36</sup> it is apparent that the application of such a broad rule would extend the liability of municipal corporations much beyond that imposed at the present time. In the later decision of *Schnurr v. Huntington County*,<sup>37</sup> which is not a pound case, this language of the *Greencastle* case was in effect repudiated by refusing to hold the county liable for a tort arising out of the construction of a public project.

*Public Parks and Playgrounds.* In determining whether there shall be a public park or playground our courts have held that the municipality exercises a governmental function for which it is not liable.<sup>38</sup> However, in the case of *City of Indianapolis v. Baker*<sup>39</sup> it was stated that the municipality is liable for misfeasance or negligence in maintaining and operating a public playground and its equipment because in so doing it acts "ministerially." Such a liability is contrary to the rule in most states<sup>40</sup> and this decision is particularly objectionable since the distinction usually made is between "governmental" and "corporate" acts, or between "discretionary" and "ministerial" acts. Nor was any such statement necessary in view of the fact that in this case the municipality was found to have been acting properly.

In the case of *Gibson v. City of Indianapolis*<sup>41</sup> plaintiff's minor daughter was drowned when the boat in which she was riding overturned, throwing her into the water, where she was caught and held by barbed wire on the bed of the stream. The accident occurred in a portion of White River adjoining a public park where persons were invited to use the river for boating and bathing. The jury found that reasonable care in policing the stream would not have disclosed the wire and that the municipality was not negligent. Assuming that the facts were found correctly, the court properly placed the non-liability of the corporation on the ground that it was guilty of no tort. *Sarber v. City of Indianapolis*,<sup>42</sup> which arises out of practically identical facts, goes upon the same basis. In both these cases the courts refrained from placing their decision upon any such theory as that adopted by the *Baker* case.<sup>43</sup>

*Defects, Obstructions and Excavations.* Quite obviously the city is acting for the benefit of the public in caring for its streets, but even in the absence

<sup>32</sup> (1881), 74 Ind. 449.

<sup>33</sup> 1 Ind. 281 (1848).

<sup>34</sup> (1866), 26 Ind. 17.

<sup>35</sup> (1867), 29 Ind. 187.

<sup>36</sup> *Indianapolis v. Williams* (1914), 58 Ind. App. 447; *Greencastle v. Martin* (1881), 74 Ind. 449.

<sup>37</sup> (1898), 21 Ind. App. 188.

<sup>38</sup> *Indianapolis v. Baker* (1919), 72 Ind. App. 323; *Kokomo v. Loy* (1916), 185 Ind.

18.

<sup>39</sup> (1919), 72 Ind. App. 323.

<sup>40</sup> McQuillin, *Municipal Corporations* (2nd ed.), vol. 6, p. 911.

<sup>41</sup> (1918), 68 Ind. App. 89.

<sup>42</sup> (1919), 72 Ind. App. 594; see also *Caldwell v. Alley* (1919), 70 Ind. App. 313.

<sup>43</sup> Note 39.

of a statute imposing the obligation of maintaining streets of the municipality, liability has been enjoined for injuries incurred by reason of negligent failure to keep the streets in a reasonably safe condition,<sup>44</sup> and the duty extends to crossings,<sup>45</sup> gutters,<sup>46</sup> public alleys,<sup>47</sup> culverts,<sup>48</sup> bridges,<sup>49</sup> and sidewalks,<sup>50</sup> as well as to the street proper. This is on the theory that the duty arises by implication from the exclusive authority and control over streets which is granted the municipality by the legislature,<sup>51</sup> and liability cannot be escaped on the ground that the municipality is acting in a governmental capacity.<sup>52</sup> The duty is one which cannot be delegated so as to relieve the municipality for injuries caused by failure to perform it, by entering into a contract whereby a third person assumes it<sup>53</sup> or by employing an independent contractor to make repairs.<sup>54</sup> While the city is bound to use active vigilance to discover and repair defects in the streets and sidewalks,<sup>55</sup>

<sup>44</sup> *Grove v. Fort Wayne* (1874), 45 Ind. App. 429; *Indianapolis v. Slider* (1911), 48 Ind. App. 38; *Evansville v. Frazer* (1900), 24 Ind. App. 629.

<sup>45</sup> *Glantz v. South Bend* (1885), 106 Ind. 305 (defect here was crossing raised above the sidewalk); *Evansville v. Thacker* (1891), 2 Ind. App. 370 (hole in wooden crossing); *Lyon v. Logansport* (1893), 9 Ind. App. 21 (iron crossing worn slippery); *Indianapolis v. Mitchell* (1901), 27 Ind. App. 589 (plank crossing raised above sidewalk); *Mishawaka v. Kirby* (1903), 32 Ind. App. 233 (abrupt descent from temporary crossing); *Indianapolis v. Scott* (1880), 72 Ind. 196 (decayed timber over gutter); *Aurora v. Bittner* (1884), 100 Ind. 396 (loose boards); *Lafayette v. West* (1908), 43 Ind. App. 325 (flagstone crossing which was worn smooth); *Dondono v. Indianapolis* (1909), 44 Ind. App. 366 (slippery flagstone crossing).

<sup>46</sup> *Buscher v. Lafayette* (1893), 8 Ind. App. 590 (loose brick in gutter); *Indianapolis v. Schoening* (1911), 48 Ind. App. 76 (gutter so constructed as to look like part of street); *Hammond v. Jahnke* (1912), 178 Ind. 177 (hole in crossing).

<sup>47</sup> *Indianapolis v. Murphy* (1883), 91 Ind. 382 (hole).

<sup>48</sup> *Indianapolis v. Lawyer* (1871), 38 Ind. 348 (caved-in culvert); *Stackhouse v. Lafayette* (1866), 26 Ind. 17 (defectively planned culvert); *Elwood v. Addison* (1900), 26 Ind. App. 28 (making culvert higher than stream so that water collected and P's intestate was drowned); *Elwood v. Laughlin* (1902), 29 Ind. 667 (loose boards).

<sup>49</sup> *Logansport v. Justice* (1881), 74 Ind. 378 (disrepair); *Blair v. Fort Wayne* (1912), 51 Ind. App. 652 (disrepair); *Indianapolis v. Marold* (1900), 25 Ind. App. 428 (disrepair); *Odon v. Dobbs* (1900), 25 Ind. App. 522 (irregular length of boards of bridge); *Riest v. Goshen* (1873), 42 Ind. 339 (loose boards); *Goshen v. Myers* (1889), 19 Ind. 196 (rotten planks); *Wabash v. Carver* (1891), 129 Ind. 552 (rotten timbers); *Williamsport v. Smith* (1891), 2 Ind. App. 360 (narrow approach at edge of embankment); *Franklin v. Davenport* (1903), 31 Ind. App. 648 (rotton timbers); *Connersville v. Snider* (1903), 31 Ind. App. 218 (rotten timbers); *Indianapolis v. Cauley* (1904), 164 Ind. 304 (disrepair).

<sup>50</sup> *Huntington v. McClurg* (1898), 22 Ind. App. 261 (rotten boards); *Boswell v. Wakley* (1893), 7 Ind. App. 361 (rotten boards); *Kentland v. Hagen* (1896), 13 Ind. App. 1; *Williamsport v. Lisk* (1898), 21 Ind. App. 414 (steep slope); *Grubb v. Franklin* (1910), 175 Ind. 500. See note 63 for other cases where city has been held liable for defective sidewalks.

<sup>51</sup> *Goshen v. Myers* (1889), 119 Ind. 196; *Grove v. Fort Wayne* (1874), 45 Ind. 429; *Centerville v. Woods* (1877), 57 Ind. 192; *Lowery v. Bloomington & Chicago R.R.* (1912), 52 Ind. App. 510; *Williamsport v. Lisk* (1898), 21 Ind. App. 414; *Decatur v. Stoop* (1898), 21 Ind. App. 397; *Worthington v. Morgan* (1897), 17 Ind. App. 603; *Knightstown v. Musgrove* (1888), 116 Ind. 121.

<sup>52</sup> *Lafayette v. Clark* (1921), 76 Ind. App. 565; *Hudson v. Terre Haute* (1928), 88 Ind. App. 454, but see *Jourdan v. Lagrange* (1913), 55 Ind. App. 502, and *Stackhouse v. Lafayette* (1866), 26 Ind. 17, indicating that a city acts in private capacity. Also see *New Albany v. McCullough* (1890), 127 Ind. 500, holding that the city cannot escape liability on the ground that it has no funds with which to make repairs.

<sup>53</sup> *Evansville v. Behme* (1911), 49 Ind. App. 448; *Indianapolis v. Stokes* (1914), 182 Ind. 31.

<sup>54</sup> *Anderson v. Fleming* (1903), 160 Ind. 597; *Logansport v. Dick* (1880), 70 Ind. 65; *Evansville v. Senhen* (1898), 151 Ind. 42; *Indianapolis v. Marold* (1900), 25 Ind. App. 428; *Evansville v. Pifer* (1912), 51 Ind. App. 646.

<sup>55</sup> *Washington v. Small* (1882), 86 Ind. 462; *Evansville v. Fraser* (1899), 24 Ind. App. 628.

it is not an insurer of their safety,<sup>56</sup> but is liable only for failure to exercise ordinary care to keep them in a reasonably safe condition;<sup>57</sup> nor is it liable for latent defects which would not have been discovered by reasonable care,<sup>58</sup> or for the disrepair of streets outside the city limits.<sup>59</sup>

If rails or barriers are necessary to provide proper protection for travelers against excavations and dangerous defects immediately adjoining the highway the municipality charged with the duty of keeping the streets in a safe condition is bound to provide them, and is liable in damages for injuries received by reason of its failure to do so.<sup>60</sup> The duty also extends to keeping the way free from overhanging objects which are dangerous.<sup>61</sup>

Where the unsafe condition of the street or sidewalk is the result of an obstruction or excavation placed there by the city, no notice is necessary to complete its liability,<sup>62</sup> but where the condition is due to disrepair,<sup>63</sup> or

<sup>56</sup> Higbert v. City of Greencastle (1873), 43 Ind. App. 574; Monticello v. Kennard (1893), 7 Ind. App. 135; Huntington v. Barton (1911), 48 Ind. App. 117; Muncie v. Spence (1904), 33 Ind. App. 599; Worthington v. Morgan (1897), 17 Ind. App. 603.

<sup>57</sup> Evansville v. Wilter (1882), 86 Ind. 415; Albany v. McCullough (1890), 127 Ind. 500; Indianapolis v. Cox (1912), 76 Ind. App. 174.

<sup>58</sup> Bicher v. South Bend (1897), 20 Ind. App. 177.

<sup>59</sup> Huntington v. Thomas (1927), 80 Ind. App. 476, 86 Ind. App. 401.

<sup>60</sup> Spencer v. Mayfield (1908), 43 Ind. App. 134; Hammond v. Winslow (1903), 33 Ind. App. 92 (sidewalk built 4 ft. above adjoining lots); Indianapolis v. Schoenig (1911), 48 Ind. App. 76 (deep gutter at side of walk); Franklin v. Harter (1890), 127 Ind. 446 (cellarway at edge of walk); Stevens v. Logansport (1881), 76 Ind. 498 (ditch at edge of walk); Wabash v. Bruso (1917), 186 Ind. 637 (stone quarry at side of road); Vincennes v. Spees (1904), 35 Ind. App. 389 (large stone at edge of walk); Indianapolis v. Moss (1920), 74 Ind. App. 129 (canal at edge of road); New Albany v. McCullough (1890), 127 Ind. 500 (embankment); New Castle v. Grubbs (1908), 171 Ind. 482 (excavation adjoining walk); Knouff v. Logansport (1900), 26 Ind. App. 202 (embankment at edge of walk); Sellersburg v. Ford (1906), 39 Ind. App. 94 (7-in. rise of sidewalk); Jeffersonville v. McHenry (1898), 22 Ind. App. 10 (cellar of mill which had burned adjoining walk); Monticello v. Condo (1910), 47 Ind. App. 490 (embankment at edge of road); Aurora v. Colshire (1876), 55 Ind. 484 (embankment); Higert v. Greencastle (1873), 43 Ind. 574 (abrupt descent of walk); Huntington v. Lusch (1904), 33 Ind. App. 476; Elwood v. Addison (1901), 26 Ind. App. 28 (pool at edge of sidewalk); Delphi v. Lowery (1881), 74 Ind. 520 (canal adjoining walk); Portland v. Taylor (1890), 125 Ind. 522 (ditch adjoining walk).

<sup>61</sup> Grove v. Ft. Wayne (1874), 45 Ind. 429; Indianapolis v. Slider (1911), 48 Ind. App. 38; rehearing reported in 56 Ind. App. 200.

<sup>62</sup> Lafayette v. Clark (1921), 76 Ind. App. 565; Goshen v. Alford (1899), 154 Ind. 58 (hole left by removing hitching post); Fowler v. Linquist (1894), 188 Ind. 438 (row of wooden blocks for crossing); Alexandria v. Liebler (1903), 162 Ind. 438 (row of wooden crossing blocks); Kokomo v. Boring (1899), 24 Ind. App. 552 (scales in road); Titus v. Bloomfield (1923), 80 Ind. App. 483 (concrete post); Sellersburg v. Ford (1906), 39 Ind. App. 94 (7-in. rise of sidewalk); Columbus v. Goodnow (1929), 91 Ind. App. 6 (sand pile in street); Hudson v. Terre Haute (1928), 88 Ind. App. 454 (safety zone marker in street); Muncie v. Spence (1904), 33 Ind. App. 599 (steep grade of sidewalk); Knightstown v. Musgrove (1888), 116 Ind. 121 (gravel pile in street); Dondono v. Indianapolis (1909), 44 Ind. App. 366 (raised flagstone); Mitchell v. Tell City (1907), 41 Ind. App. 294 (trench); Turner v. Indianapolis (1884), 96 Ind. 52; contra; Bluffton v. Mathews (1883), 92 Ind. App. 213 (trench); Valparaiso v. Chester (1911), 176 Ind. 636 (flagstone raised 8 in.); Indianapolis v. Emmelman (1886), 108 Ind. 530 (excavation by city at side of road); Lafayette v. Weaver (1883), 92 Ind. 477 (offset in sidewalk); Fort Wayne v. Durnell (1895), 13 Ind. App. 669 (steep slope).

<sup>63</sup> Fort Wayne v. Patterson (1891), 3 Ind. App. 34 (washout); Indianapolis v. Cartlet (1923), 194 Ind. 273 (iron pole); Rushville v. Poe (1882), 85 Ind. 83 (hole left in street while grading); Evansville v. Thacker (1891), 2 Ind. App. 370 (hole in wooden walk); Terre Haute v. Landa (1914), 58 Ind. App. 480 (hole in wooden walk); Columbus v. Strassner (1890), 124 Ind. 482; Princetown v. Gutheridge (1917), 66 Ind. App. 602 (hole in pavement); Princetown v. Fields (1919), 72 Ind. App. 278 (hole in pavement); Jacksonville v. Griggs (1924), 82 Ind. App. 104 (hole in street); Logansport v. Stevens (1881), 76 Ind. 498 (excavation); Terre Haute v. Constance (1900), 26 Ind. App. 421 (loose bricks); Madison v. Baker (1885), 103 Ind. 4 (washout); New

where the obstruction or excavation is one made by a third person<sup>64</sup> the city is not liable in the absence of notice, either actual or constructive, and the passing of a reasonable time in which to have made the repairs.<sup>65</sup> What length of time is sufficient to charge the city with constructive notice is usually a question of fact for the jury.<sup>66</sup> Thus, 2 days,<sup>67</sup> 4 days,<sup>68</sup> 10 days,<sup>69</sup> 3 months,<sup>70</sup> etc.,<sup>71</sup> have been held to be sufficient. Actual notice to the

Castle v. Mullen (1909), 43 Ind. App. 280 (hole in sidewalk); Bloomington v. Woodworth (1907), 40 Ind. App. 373 (hole in sidewalk); Evansville v. Frazer (1899), 24 Ind. App. 628 (hole in wooden walk); Columbia City v. Langhor (1898), 20 Ind. App. 395 (hole in wooden walk); New Albany v. Stallings (1919), 71 Ind. App. 289 (loose brick in walk); New Albany v. Kiefer (1919), 70 Ind. App. 289 (loose brick); Home Brewing Co. v. Indianapolis (1919), 70 Ind. App. 674 (depression in sidewalk); Tipton v. Freeman (1909), 45 Ind. App. 76 (slippery limestone walk); Fort Wayne v. Durnell (1895), 13 Ind. App. 669 (slope of walk); Goshen v. England (1889), 119 Ind. 368 (hole in walk); Bluffton v. McAfee (1899), 23 Ind. App. 112 (hole in sidewalk); Valparaiso v. Schwerdt (1907), 40 Ind. App. 608 (loose bricks); Indianapolis v. Mullally (1906), 38 Ind. App. 125 (hole in street); Bloomington v. C. I. & L. Ry. (1912), 52 Ind. App. 510 (hole in wooden walk); Huntington v. McClurg (1898), 22 Ind. App. 261 (rotten wooden walk); Nappanee v. Ruckman (1893), 7 Ind. App. 361 (loose board in walk); Kentland v. Hagen (1896), 17 Ind. App. 1; East Chicago v. Gilbert (1915), 59 Ind. App. 613 (hole in sidewalk); Lafayette v. Larson (1881), 73 Ind. 367 (rotten wooden walk); Washington v. Small (1882), 86 Ind. 462 (rotten wooden walk); Michigan City v. Phillips (1904), 163 Ind. 449 (hole in wooden walk); Huntington v. Burke (1894), 12 Ind. App. 133 (hole in wooden walk); Bauer v. City of Indianapolis (1884), 99 Ind. 56 (defective plank crossing); French Lick v. Allen (1916), 63 Ind. App. 649 (hole in street); Franklin v. Smith (1910), 175 Ind. 236 (raised flagstone); Chicago v. Gilbert (1915), 59 Ind. App. 613 (rotten wooden walk); Murphy v. Indianapolis (1883), 91 Ind. 382 (washout); Huntington v. First (1898), 22 Ind. App. 66 (loose planks).

<sup>64</sup> Indianapolis v. Cartlet (1923), 194 Ind. 273 (iron pole); Vincennes v. Thuis (1902), 28 Ind. App. 523 (ridge left when water main was laid); Wickwire v. Angola (1891), 4 Ind. App. 253 (excavation); Huntington v. McClurg (1898), 86 Ind. 414 (stone on walk); Black v. Mishawaka (1902), 30 Ind. App. 104 (lumber); Elkhart v. Ritter (1879), 66 Ind. 136; Jeffersonville v. McHenry (1898), 22 Ind. App. 110 (cellar); Indianapolis v. Gaston (1877), 58 Ind. 224 (stump); Monticello v. Kennard (1893), 7 Ind. App. 135 (brush pile); Indianapolis v. Doherty (1880), 71 Ind. 5 (building materials); Michigan City v. Boeckling (1889), 22 Ind. App. 39 (iron rails); Laporte v. Henry (1907), 41 Ind. App. 197 (building materials); Laporte v. Osborn (1908), 43 Ind. App. 100 (building materials); Lewisville v. Batson (1901), 29 Ind. App. 21 (scrap iron); Huntington v. Breen (1881), 77 Ind. 29 (excavation); Fort Wayne v. Dewitt (1874), 47 Ind. 39 (excavation); Greenfield v. Roback (1909), 45 Ind. App. 70 (timber); Lafayette v. Ashby (1895), 8 Ind. App. 214 (guy wire); Alexandria v. Liebler (1903), 162 Ind. 438 (163 Ind. 438 (blocks)); Terre Haute v. O'Neal (1918), 72 Ind. App. 485 (coal hole); Frankfort v. Coleman (1897), 112 Ind. 576 (hole); Warsaw v. Dunlap (1887), 112 Ind. 57 (runway for bricks); Rosedale v. Ferguson (1891), 3 Ind. App. 596 (rolls of wire); Bauer v. City of Indianapolis (1884), 99 Ind. 56 (planks); Anderson v. Reed (1927), 87 Ind. App. 379 (iron pipes); Lafayette v. Blood (1872), 63 Ind. 62 (hole); Peoples v. Valparaiso (1912), 178 Ind. 673; Sipe v. Kokomo (1920), 74 Ind. App. 365 (cement step); Fort Wayne v. Durnell (1895), 13 Ind. App. 669 (tree trunk).

<sup>65</sup> Huntington v. Burke (1898), 21 Ind. App. 655; Lewisville v. Batson (1901), 29 Ind. App. 21; Huntington v. Breen (1881), 77 Ind. 29; Huntington v. Sturver (1907), 41 Ind. App. 171; Lafayette v. Ashby (1893), 8 Ind. App. 214; Monticello v. Kennard (1893), 7 Ind. App. 135; Michigan City v. Boeckling (1889), 178 Ind. 177.

<sup>66</sup> Fort Wayne v. Paterson (1891), 3 Ind. App. 34; Hammond v. Jahnke (1912), 178 Ind. 177; Huntington v. Sturver (1907), 41 Ind. App. 171.

<sup>67</sup> Monticello v. Kennard (1893), 7 Ind. App. 135.

<sup>68</sup> Fort Wayne v. Duryee (1893), 9 Ind. App. 620.

<sup>69</sup> Rushville v. Poe (1882), 85 Ind. 83.

<sup>70</sup> Princetown v. Gutheridge (1917), 66 Ind. App. 602.

<sup>71</sup> Indianapolis v. Mullally (1906), 38 Ind. App. 124 (6 weeks); Hammond v. Winslow (1903), 33 Ind. App. 92 (2 yrs.); Frankfort v. Coleman (1897), 19 Ind. App. 368 (60 days); New Castle v. Grubbs (1908), 171 Ind. 482 (several days); Greenfield v. Roback (1909), 45 Ind. App. 70 (6 mos.); Tipton v. Freeman (1909), 45 Ind. App. 76 (2 yrs.); Lafayette v. Larson (1881), 73 Ind. 367 (6 mos.); Aurora v. Bitner (1893), 8 Ind. App. 214 (1 day); Warsaw v. Dunlap (1887), 112 Ind. 376 (1¼ hrs. held insufficient).



mayor,<sup>72</sup> to any councilman,<sup>73</sup> or to any street commissioner,<sup>74</sup> is considered actual notice to the city.

If the obstruction is one which may reasonably be expected to frighten ordinarily gentle horses, the city is liable even though the person or property injured does not come in actual contact with the defect, obstruction, or excavation, but is injured due to the fright of the horse.<sup>75</sup>

The city is not liable for injuries arising from a general slippery condition of a sidewalk resulting from an accumulation of ice or snow through natural causes,<sup>76</sup> but liability may exist where the ice or snow becomes so rough as to be an obstruction to travel,<sup>77</sup> or where water is allowed to drain into defective places in the sidewalk by a leaky hydrant,<sup>78</sup> or a waterspout<sup>80</sup> placed nearby and which has remained there for such a length of time that the city has notice that damage may result.

Posts placed on the street for the purpose of hitching horses, or for other lawful purposes, are not obstructions which will render the municipality liable for injuries sustained thereby, if they are properly constructed and located,<sup>81</sup> nor is the city liable where it has granted permission to a third person to place temporary obstructions in the street if such obstructions are in fact properly guarded.<sup>82</sup> It has also been held proper for the municipality to maintain grass plots and tree spaces between the sidewalk and curb and to protect them by suitable barriers.<sup>83</sup> It is obvious that liability is denied here simply because the city is acting properly in each instance and is guilty of no tort.

If the person injured by the failure of the municipality to keep its streets in a reasonably safe condition is guilty of contributory negligence he cannot recover,<sup>84</sup> but according to the modern rule,<sup>85</sup> the mere fact that he knew of the danger does not render him guilty of negligence in using the street.<sup>86</sup>

<sup>72</sup> *Michigan City v. Ballance* (1889), 123 Ind. 334.

<sup>73</sup> *Logansport v. Justice* (1881), 74 Ind. 378; *Hammond v. Jahnke* (1912), 178 Ind. 177.

<sup>74</sup> *Valparaiso v. Chester* (1901), 176 Ind. 636; *Lafayette v. Larson* (1881), 73 Ind. 367; but notice to a fireman held not to be notice to the city in the case of *Indianapolis v. Ray* (1912), 52 Ind. App. 388.

<sup>75</sup> *Rushville v. Adams* (1886), 107 Ind. 475; *Logansport v. Dick* (1880), 70 Ind. 65; *Bloomington v. Rogers* (1882), 83 Ind. 261; *Salem v. Walker* (1896), 16 Ind. App. 687; *Huntington v. Lusch* (1904), 33 Ind. App. 476; *Crown Point v. Thompson* (1903), 31 Ind. App. 195; *Royal Center v. Bingham* (1905), 37 Ind. App. 626; *Crawfordsville v. Smith* (1891), 79 Ind. 388; *Fowler v. Linquist* (1894), 138 Ind. 366; *Mount Vernon v. Hoehn* (1898), 22 Ind. App. 282; *Alexandria v. Liebler* (1903), 162 Ind. 438.

<sup>76</sup> *McQueen v. Elkhart* (1895), 14 Ind. App. 671; *Linton v. Jones* (1920), 75 Ind. App. 320.

<sup>77</sup> *Linton v. Jones* (1920), 75 Ind. App. 320; *Valparaiso v. Kenney* (1921), 75 Ind. App. 660.

<sup>78</sup> *Linton v. Mattox* (1920), 75 Ind. App. 449.

<sup>79</sup> *Diffenderfer v. Jeffersonville* (1917), 67 Ind. App. 10.

<sup>80</sup> *Muncie v. Hey* (1904), 164 Ind. 570.

<sup>81</sup> *Weinstein v. Terre Haute* (1896), 147 Ind. 556.

<sup>82</sup> *Dooley v. Sullivan* (1887), 112 Ind. 451; *South Bend v. Turner* (1900), 158 Ind. 418; *Warsaw v. Dunlap* (1887), 112 Ind. 576; *Plymouth v. Fields* (1890), 125 Ind. 323; *LaPorte v. Henry* (1907), 41 Ind. App. 197; *LaPorte v. Osborn* (1908), 43 Ind. App. 100.

<sup>83</sup> *Teague v. Bloomington* (1906), 40 Ind. App. 68.

<sup>84</sup> *Richmond v. Mulholland* (1888), 116 Ind. 158; *Salem v. Walker* (1896), 16 Ind. App. 687.

<sup>85</sup> The earlier rule seems to have been contra: See *North Vernon v. Dousouchette* (1851), 2 Ind. 586; *Brunker v. Covington* (1879), 69 Ind. 33; *Bloomington v. Rogers* (1893), 13 Ind. App. 121; *Trout v. Elkhart* (1894), 12 Ind. 343.

<sup>86</sup> *Ft. Wayne v. Breese* (1889), 123 Ind. 581; *Richmond v. Mulholland* (1888), 116 Ind. 158; *Columbus v. Strassner* (1890), 124 Ind. 482; *Poseyville v. Lewis* (1890), 126 Ind. 81; *Indianapolis v. Cook* (1884), 99 Ind. 10; *Huntington v. Breen* (1881), 77 Ind.

He is merely required to use care commensurate with the known danger,<sup>87</sup> and whether he does use such care is a question for the jury.<sup>88</sup> In order to successfully maintain a suit against the municipality the plaintiff must also prove that he has notified the city of the injury sustained as required by statute,<sup>89</sup> and that the negligence of the city was the proximate cause of his injury.<sup>90</sup>

The foregoing rules are applicable only to cities and towns. In 1895 the cases<sup>91</sup> holding that the statute imposing the obligation of maintaining certain bridges in the county impliedly made the county liable for negligence in the performance of this duty were overruled,<sup>92</sup> and the county now enjoys the same immunity in this respect as does the state.<sup>93</sup> This liability was never imposed for failure of the county to perform its obligation to keep its roads in repair.

*Lighting Streets.* The position of our courts regarding the lighting of the streets by the municipality is an anomalous one. There are numerous cases holding that this is a governmental function and for failure

29; *Murphy v. Indianapolis* (1884), 83 Ind. 326; *Albion v. Hetrick* (1883), 90 Ind. 545; *Vance v. Franklin* (1891), 4 Ind. App. 515; *Bedford v. Neal* (1895), 143 Ind. 425; *Gosport v. Evans* (1887), 112 Ind. 133; *Winamac v. Stout* (1905), 165 Ind. 365; *Bedford v. Woody* (1899), 23 Ind. App. 231; *Elkhart v. Witman* (1889), 122 Ind. 538; *Huntington v. Folk* (1899), 154 Ind. 91; *Lafayette v. West* (1908), 43 Ind. App. 325; *Fort Wayne v. Farnan* (1895), 13 Ind. App. 536.

<sup>87</sup> *Fowler v. Linquist* (1894), 138 Ind. 566; *Salem v. Walker* (1896), 16 Ind. App. 687; *Huntington v. First* (1896), 15 Ind. App. 552; *Evansville v. Christy* (1901), 29 Ind. App. 44; *Hammond v. Winslow* (1903), 33 Ind. App. 92; *New Albany v. Stalling* (1919), 71 Ind. App. 232; *Mooresville v. Spoon* (1918), 69 Ind. App. 565.

<sup>88</sup> *New Castle v. Mullen* (1908), 43 Ind. App. 280; *New Albany v. Slaterry* (1919), 72 Ind. App. 503; *Cochran v. Shirley* (1908), 43 Ind. App. 453.

<sup>89</sup> *Touhey v. Decatur* (1910), 175 Ind. 98; *Huntingburg v. Hocker* (1921), 76 Ind. App. 435; *Fort Wayne v. Bender* (1914), 57 Ind. App. 689; *Rushville v. Morrow* (1913), 54 Ind. App. 538; *Valparaiso v. Kinney* (1921), 75 Ind. App. 660; *Gibben v. Franklin* (1919), 175 Ind. 500; *People v. Valparaiso* (1912), 178 Ind. 673; *Blair v. Fort Wayne* (1912), 51 Ind. App. 652, holds that actual notice to the city is insufficient—must comply with statute strictly; *French Lick v. Allen* (1916), 63 Ind. App. 649; *Valparaiso v. Cartwright* (1893), 8 Ind. App. 429.

<sup>90</sup> *Plymouth v. Milner* (1888), 117 Ind. 324; *Vincennes v. Thuis* (1901), 28 Ind. App. 523; *Crawfordsville v. Henry* (1907), 41 Ind. App. 197; *Fort Wayne v. Merri-man* (1909), 45 Ind. App. 286; *Logansport v. Kihm* (1902), 159 Ind. 68.

<sup>91</sup> *Park v. Adams County* (1891), 3 Ind. App. 536; *Madison County v. Brown* (1883), 89 Ind. 48; *Vaught v. Johnson County* (1884), 101 Ind. 121; *Howard County v. Legge* (1886), 110 Ind. 479; *Allen County v. Bacon* (1884), 96 Ind. 31; *Gibson County v. Emmerson* (1884), 95 Ind. 579; *Abbett v. Johnson County* (1884), 114 Ind. 61; *House v. Montgomery County* (1878), 60 Ind. 580; *Patton v. Montgomery County* (1884), 96 Ind. 131; *Pritchett v. Morgan County* (1878), 62 Ind. 20; *Woods v. Tipton County* (1890), 128 Ind. 289; *Apple v. Marion County* (1890), 127 Ind. 553; *Knox County v. Montgomery* (1886), 109 Ind. 69; *Allen County v. Creviston* (1892), 133 Ind. 39; *Shelby County v. Deprez* (1882), 87 Ind. 509; *Huntington County v. Bonebrake* (1896), 146 Ind. 311; *Huntington County v. Huffman* (1892), 134 Ind. 1; *Fulton County v. Richel* (1885), 106 Ind. 501; *Jackson County v. Nichlos* (1894), 139 Ind. 611; *Posey County v. Stock* (1894), 11 Ind. App. 167; *Vermillion County v. Chipps* (1891), 131 Ind. 611; *Parke County v. Wagner* (1894), 138 Ind. 609; *Sullivan County v. Arnett* (1888), 116 Ind. 438; *Sullivan County v. Sisson* (1891), 2 Ind. App. 312; *Shelby County v. Castetter* (1893), 7 Ind. App. 309; *Wabash County v. Pearson* (1889), 120 Ind. 428; *Parke County v. Sappenfield* (1892), 6 Ind. App. 577; *Shelby County v. Blair* (1893), 8 Ind. App. 574.

<sup>92</sup> *Board of Jasper County v. Allman* (1895), 42 Ind. 573; see also *Yeager v. Tippecanoe Township* (1881), 81 Ind. 46, denying liability of township for failure to repair bridge.

<sup>93</sup> *Johnson County v. Hemphill* (1895), 14 Ind. App. 219; *Montgomery County v. Coffenburg* (1895), 14 Ind. App. 701.

<sup>94</sup> *Abbett v. Johnson County* (1894), 137 Ind. 404; *Carroll County v. Bailey* (1887), 122 Ind. 46; *Clark County v. Brod* (1891), 3 Ind. App. 585; *Shrum v. Washington County* (1895), 13 Ind. App. 585.

to exercise such power the municipality is not liable.<sup>95</sup> Other cases<sup>96</sup> reach the same result, but do so on the ground that it is a "discretionary" act which the municipality has no duty to perform. However, where a light would have disclosed an obstruction or defect in the street so that injury therefrom might have been avoided and no such light was maintained, the municipality is held liable on the theory that there was a breach of its duty to keep its streets in a reasonably safe condition.<sup>97</sup> In effect this is imposing liability for failure to light the streets. Recovery is also permitted where injury has been sustained due to the failure of the municipal corporation to maintain the electric light wires in a safe and proper conditions.<sup>98</sup> In *Aiken v. City of Columbus*<sup>99</sup> the court said that while the lighting of streets incidentally checked crime and immorality and thus served a governmental purpose, such lighting was also a corporate utility, sufficient to make municipal corporations liable for negligence. The court fails to point out in what way the lighting of streets may be said to be a corporate utility, and in view of the fact that the municipality receives no monetary gain from performing this function, the declaration is somewhat difficult to sustain.

*Acts of Licensees Which Make The Streets Dangerous.* The question of the liability of the municipality for the negligent acts of its licensees frequently, but not always, arises in connection with its duty of keeping its streets in a reasonably safe condition. The usual rule and the rule of this state is that the municipality is not liable for injuries resulting from the negligence of a licensee unless the act authorized is intrinsically dangerous,<sup>100</sup> and this rule applies even though an ordinance makes the act improper unless authorized by some designated official.<sup>101</sup>

*Constructing, Grading and Improving Streets.* Where the city takes possession of land and permanently appropriates it for a street without complying with statutory requirements, it is liable as a tortfeasor and damages are assessed against it on the basis of its value.<sup>102</sup>

Grading and improving streets is a public function which the city may perform or not as it sees fit, but having once determined to do so it is liable for negligence in the plan<sup>103</sup> or construction<sup>104</sup> of such undertaking. However, for a consequential injury resulting from the original proper improvement or grading of a street the city is not liable,<sup>105</sup> although it may be subject to an action of trespass if its servants wrongfully enter upon private

<sup>95</sup> *Bloomington v. C. I. & L. Ry. Co.* (1912), 52 Ind. App. 510; *Vincennes v. Spees* (1904), 35 Ind. App. 389; *Vincennes v. Thuis* (1902), 28 Ind. App. 523.

<sup>96</sup> *Spencer v. Mayfield* (1908), 43 Ind. App. 134.

<sup>97</sup> *Shreve v. Ft. Wayne* (1911), 176 Ind. 347; *Titus v. Bloomfield* (1923), 80 Ind. App. 483; *Hobart v. Cashon* (1923), 81 Ind. App. 24.

<sup>98</sup> *Logansport v. Smith* (1910), 47 Ind. App. 64; *Richmond v. Lincoln* (1906), 167 Ind. 468.

<sup>99</sup> (1906), 167 Ind. 139.

<sup>100</sup> *Mayne v. Curtis* (1920), 73 Ind. App. 640.

<sup>101</sup> *Wheeler v. Plymouth* (1888), 116 Ind. 158.

<sup>102</sup> *Fort Wayne v. Hamilton* (1892), 132 Ind. 487.

<sup>103</sup> *Valparaiso v. Adams* (1889), 123 Ind. 25; *Seymour v. Cummins* (1889), 119 Ind. 148.

<sup>104</sup> *Princetown v. Gieske* (1883), 93 Ind. 102; *North Vernon v. Voegler* (1883), 103 Ind. 314; *Jeffersonville v. Myers* (1891), 2 Ind. App. 532.

<sup>105</sup> *Davis v. Crawfordsville* (1888), 119 Ind. 1; *Valparaiso v. Spaeth* (1906), 166 Ind. 14; *Vincennes v. Richards* (1864), 23 Ind. 381; *Morris v. Indianapolis* (1911), 177 Ind. 369; *Snyder v. Rockport* (1855), 6 Ind. 237; *Macy v. Indianapolis* (1861), 17 Ind. 237; *Kokomo v. Maham* (1884), 100 Ind. 242; *Valparaiso v. Adams* (1889), 123 Ind. 25; *Anderson v. Bain* (1889), 120 Ind. 254; *Stein v. Lafayette* (1892), 6 Ind. App. 414; *Hirth v. Indianapolis* (1897), 18 Ind. App. 673; *Terre Haute v. Turner* (1871), 36 Ind. 522.

property while engaged in carrying out this work.<sup>106</sup> This immunity from liability for consequential injuries has been limited by a statute<sup>107</sup> providing that after the grade is once established an abutting property owner may recover for the consequential injury to his property even though such injury was not the result of negligence.<sup>108</sup> This statutory liability extends only to cities, however, and does not apply to towns<sup>109</sup> even if the grade is changed after the town becomes a city.<sup>110</sup>

The city is not permitted to cut down the grade of a street merely for the purpose of obtaining dirt for another street,<sup>111</sup> but where the council has ordered the improvement of different streets the earth, gravel and stone excavated from one street may be used on another.<sup>112</sup>

*Drains and Sewers.* As a part of its control over the streets, the municipality has the power to construct drains and sewers, and it is well settled in this state that this power is a discretionary one of public character so that it is not liable for failure to exercise it,<sup>113</sup> unless the sewers and drains are made necessary by the municipality's own act of grading the streets in such a manner that water is collected where it will flow upon private property in the absence of a proper sewer or drain.<sup>114</sup> When the city once undertakes the work, however, it is liable for negligence in so doing,<sup>115</sup> and contrary to the law of most states,<sup>116</sup> is liable for negligence in the plan as well as in the prosecution of the work.<sup>117</sup> In a few cases<sup>118</sup> the courts have stated that the corporation would not be liable for a mere error of judgment as distinguished from negligence in the plan, but this distinction would seem to be of little practical value. The city is also required to use reasonable care to keep

<sup>106</sup> *Platter v. Seymour* (1882), 86 Ind. 323; *Martinsville v. Shirley* (1882), 84 Ind. 546.

<sup>107</sup> Burns Ann. Statutes, 1926, sec. 10441.

<sup>108</sup> *Lafayette v. Nagel* (1887), 113 Ind. 425; *Lafayette v. Wortman* (1886), 107 Ind. 404.

<sup>109</sup> *Baker v. Shoals* (1892), 6 Ind. App. 319.

<sup>110</sup> *Wabash v. Albert* (1882), 88 Ind. 428.

<sup>111</sup> *Delphi v. Evans* (1917), 36 Ind. 90; *Aurora v. Fox* (1881), 78 Ind. 1.

<sup>112</sup> *Delphi v. Evans* (1871), 36 Ind. 90.

<sup>113</sup> *Elkhart v. Wickwire* (1889), 121 Ind. 331; *Finley v. Kendallville* (1909), 45 Ind. App. 430, holding that it may even be discontinued if property owners are left in no worse position than before its construction; *Colburn v. Bossert* (1895), 13 Ind. App. 359; *Monticello v. Fox* (1891), 3 Ind. App. 481; *Logansport v. Wright* (1865), 25 Ind. 512.

<sup>114</sup> *Evansville v. Decker* (1882), 84 Ind. 325; *Princeton v. Gieske* (1883), 93 Ind. 102; *Wells v. Madison* (1881), 75 Ind. 241; *Davis v. Crawfordsville* (1888), 119 Ind. 1; *Thortown v. Fugate* (1898), 31 Ind. App. 537; *Crawfordsville v. Bond* (1884), 96 Ind. 236; *Evansville v. Decker* (1882), 84 Ind. 325; *Weis v. Madison* (1881), 75 Ind. 241; *New Albany v. Ray* (1891), 3 Ind. App. 321; *North Vernon v. Voegler* (1883), 89 Ind. 77; *Valparaiso v. Keys* (1902), 30 Ind. App. 447; *Cromer v. Logansport* (1905), 38 Ind. App. 661; *French Lick v. Teaford* (1912), 78 Ind. App. 609.

<sup>115</sup> *Logansport v. Wright* (1865), 25 Ind. 512; *Indianapolis v. Williams* (1914), 58 Ind. App. 447; *Cummins v. Seymour* (1881), 79 Ind. 491; *Peru v. Brown* (1894), 10 Ind. 597.

<sup>116</sup> *McQuillin, Municipal Corporations* (2nd ed.), vol. 6, ch. 53, p. 794.

<sup>117</sup> *Lebanon v. Twiford* (1895), 13 Ind. App. 384; *Garrett v. Winterich* (1909), 44 Ind. App. 322; *Evansville v. Decker* (1882), 84 Ind. 325; *Roll v. Indianapolis* (1876), 52 Ind. 547, denying liability of the basis of a contract to hold immune from liability; *Indianapolis v. Lawyer* (1871), 38 Ind. 348; *Terre Haute v. Hudnut* (1887), 112 Ind. 542; *Indianapolis v. Huffer* (1868), 30 Ind. 235; *Albany v. Lines* (1898), 21 Ind. App. 380; *New Albany v. Ray* (1891), 3 Ind. App. 321; *Weis v. City of Madison* (1881), 75 Ind. 241; *New Castle v. Smith* (1927), 87 Ind. App. 418; *Indianapolis v. Tate* (1872), 39 Ind. 282.

<sup>118</sup> *Rice v. Evansville* (1886), 108 Ind. 7; *Rozell v. Anderson* (1883), 91 Ind. 591; *Lafayette v. Clark* (1921), 76 Ind. App. 565.

drains and sewers in a reasonable state of repair after they are constructed,<sup>119</sup> but here again the city is liable only after actual or constructive notice of the defect.<sup>120</sup> The city's obligation in this respect is the same toward one who makes a private connection with the sewers as it is toward any other person using them.<sup>121</sup>

The municipality is said to be acting in its corporate or proprietary capacity in carrying on any function from which it derives a substantial revenue. Responsibility for torts committed while acting in this capacity is limited only by the doctrine that a municipal corporation is never liable for acts which are *ultra vires*.<sup>122</sup> Inasmuch as the sole purpose of creating the municipality is to make more efficient the government of the state and to act for the benefit of the public it is incongruous, to say the least, to maintain that the municipality may carry on a private business and still act *intra vires*. It may be that in a few instances the corporation does derive a revenue in excess of the actual operating costs of some function properly performed by it, but even so the profit is used solely for reducing the burdens of government borne by the inhabitants of the unit. Nevertheless, the distinction persists, and it is small wonder that the courts have, in their attempt to follow the rule, been driven to such absurd classifications.

*Water Companies Owned By the Municipality.* As pointed out before, where a municipal corporation maintains a water plant for the sole purpose of extinguished fire, such corporation is not liable for its negligence therein,<sup>123</sup> but where it supplies citizens with water and charges them therefor, the city acts in its "private" capacity and is liable for its negligence in fulfilling the obligations assumed in respect to furnishing such services.<sup>124</sup> For instance, the municipality has been held liable in damages to one whose property was injured by the bursting of a defective water main when extra pressure was added at the pumping station in order to extinguish a fire which broke out in the business district of the city.<sup>125</sup> The city has also been held accountable to one who contracted typhoid fever from drinking water which had been contaminated due to the negligent manner in which the city maintained its reservoirs,<sup>126</sup> and to the owner of a greenhouse whose property was injured when the supply was shut off.<sup>127</sup>

*Wharves.* It is usually held<sup>128</sup> that the city is acting in its private capacity while engaged in the management of wharves over which it has been given control by the legislature. The Indiana courts have imposed liability upon the municipality for failure to keep such wharves in repair,<sup>129</sup> but apparently

<sup>119</sup> *Murphy v. Indianapolis* (1901), 158 Ind. 238; *Fort Wayne v. Coombs* (1889), 123 Ind. 250; *Logansport v. Newby* (1911), 49 Ind. App. 674; *Valparaiso v. Ramsey* (1894), 11 Ind. App. 215; *South Bend v. Paxton* (1879), 67 Ind. 228.

<sup>120</sup> *Ft. Wayne v. Coombs* (1889), 123 Ind. 250; but see *French Lick v. Teaford* (1921), 78 Ind. App. 609, holding notice unnecessary where sewer is rendered ineffective by city's own negligence.

<sup>121</sup> *Ft. Wayne v. Coombs* (1889), 123 Ind. 250.

<sup>122</sup> *Leeds v. Richmond* (1885), 103 Ind. 372; *Shelby County v. Deprez* (1882), 87 Ind. 509; *Haag v. Vanderburg County* (1878), 60 Ind. 511; *Browning v. Owen County* (1873), 44 Ind. 11.

<sup>123</sup> *Fitch v. Seymour Water Co.* (1894), 139 Ind. 214; *Huntingburg v. Morgen* (1928), 90 Ind. App. 573; *Brinkmeyer v. Evansville* (1867), 29 Ind. 187.

<sup>124</sup> *Aschoff v. Evansville* (1904), 34 Ind. App. 25; *Sarber v. Indianapolis* (1919), 72 Ind. App. 594.

<sup>125</sup> *Aschoff v. Evansville* (1904), 34 Ind. App. 25.

<sup>126</sup> *Pa. R. R. Co. v. Lincoln Trust Co.* (1929), 91 Ind. App. 28.

<sup>127</sup> *Huntingburg v. Morgen* (1929), 90 Ind. App. 572.

<sup>128</sup> *C. W. Tooke, The Extension of Municipal Liability in Tort* (1932), 19 Va. L. Rev., p. 748.

<sup>129</sup> *Jeffersonville v. Gray* (1905), 165 Ind. 26; *Jeffersonville v. L. & L. Ferry Co.* (1866), 27 Ind. 100; *Jeffersonville v. Steam Ferryboat Co.* (1870), 35 Ind. 19.

did not put their decisions on the ground that the municipality derived a profit from performing this function. The reasons given are not very clear, but it would seem that the decisions might very well go upon the same ground as the street cases, namely, that the absolute duty to keep them in repair creates liability for failure to do so.

*Independent Contractors.* The general rule is that a municipal corporation is not responsible for the negligence of an independent contractor,<sup>130</sup> but this rule has certain well recognized exceptions. It is generally stated that the rule has no application where the work required to be done is inherently dangerous or where the necessary consequence of doing the work as specified is injury to another, or where it is unlawful or involves a trespass, or where the subject matter of the contract involves a duty, the performance of which may not be delegated.<sup>131</sup> It is on the theory that the work of making repairs and improvements to the public streets is inherently dangerous and that the duty to keep the streets safe is one which cannot be delegated, that the municipality has been held liable for negligence of independent contractors in performing this work.<sup>132</sup>

*Actions by Employees.* In the few instances where the question of suit against the municipality by an employee has arisen no very definite rule governing recovery has been laid down. In *City of Kokomo v. Loy*<sup>133</sup> the court stated that the liability of the municipality depended not on the relation existing between the municipality and the person injured, but upon the capacity in which the municipality was acting at the time. After laying down the test, however, the court permitted recovery by a park employee who was injured by the explosion of a cannon which he was attempting to unload under the direction of the park commissioner, saying that the statute which gave the city complete power over its parks created a corresponding duty of the proper exercise of the power. It is on this same basis that the municipality is held liable for failure to keep its streets in a reasonably safe condition.

In the case of *City of Lebanon v. McCoy*<sup>134</sup> an employee was allowed to recover for injuries sustained due to the negligence of a fellow employee while both were employed in repairing a bridge. In this case the common law rule that the master is not liable for injuries caused by the negligence of a co-servant was apparently ignored, as was the earlier case of *Turner v. City of Indianapolis*<sup>135</sup> which expressly stated that this rule is not applicable to municipal corporations. The doctrine of assumption of risks of the employment is held to be appropriate, but no such assumption was found to exist in the cases just mentioned. Recovery was denied on this ground in *Swanson v. City of Lafayette*<sup>136</sup> where an employee of the city was injured by the caving in of a gravel pit in which he was working, and *Smith v. Commissioners of Allen County*,<sup>137</sup> denied recovery under similar circumstances but put the decision on the ground that the county is a subdivision of the state and therefore not liable for negligence.

<sup>130</sup> *Leeds v. City of Richmond* (1885), 102 Ind. 372; *Stalder v. City of Huntington* (1899), 152 Ind. 354; *Kinser v. Dewitt* (1893), 7 Ind. App. 587.

<sup>131</sup> *Julius Keller Construction Co. v. Herkless* (1915), 59 Ind. App. 47.

<sup>132</sup> *Anderson v. Fleming* (1902), 160 Ind. 597; *Logansport v. Dick* (1888), 70 Ind. 65; *Indianapolis v. Marold* (1900), 25 Ind. App. 428; *Indianapolis v. Cox* (1921), 76 Ind. App. 174; *Evansville v. Piefer* (1912), 51 Ind. App. 646; *Evansville v. Behme* (1911), 49 Ind. App. 448.

<sup>133</sup> (1916), 185 Ind. 18.

<sup>134</sup> (1894), 12 Ind. App. 500.

<sup>135</sup> (1884), 96 Ind. 51.

<sup>136</sup> (1895), 134 Ind. 623.

<sup>137</sup> (1891), 131 Ind. 116.

*Jourdan v. Town of Lagrange*<sup>138</sup> holds that in prosecuting the work of paving a street the city is not performing a duty enjoined upon it as a subdivision of the state, and hence it is not exempt from liability for injury to its employees in the prosecution of the work.

The case of *City of Lafayette v. Allen*<sup>139</sup> permitted recovery by a city fireman who was injured due to the defective condition of the fire engine, and *Lyons v. City of New Albany*<sup>140</sup> permitted recovery by the administrator of a city fireman who was killed while repairing a fire alarm wire at the direction of the fire chief. Whether the employee had assumed the risk was held to be a question for the jury. In neither case did the court mention the fact that the employees were engaged in carrying out duties incident to the performance of a governmental function.

From an examination of the cases in which the municipality was held liable to employees, it is apparent that the tendency of the courts has been to hold the municipality to a more stringent liability than that imposed upon a private employer before the Workmen's Compensation Act. This is somewhat strange in view of the usual irresponsibility of municipalities.

Even a somewhat perfunctory examination of the cases discloses that any value which the theory of dual capacity may once have had has long since ceased to be of any assistance to the courts as a test for determining whether the municipality shall be liable or immune. In recent years there has been a tendency to try to solve the problem by statutory enactments.<sup>141</sup> Perhaps the most common type of statute which illustrates this trend is the act imposing liability for damages resulting from mob violence. Such an enactment is somewhat curious since in the ordinary situation where damage results from mob violence the municipality is not guilty of a wrong, unless perhaps, there is a failure to properly police the city, and as already pointed out, practically every jurisdiction denies liability for failure to perform this function efficiently. For the most part such statutes have been fragmentary and unsatisfactory.<sup>142</sup>

Upon facing the problem squarely, it can readily be seen that in each instance the liability or immunity of the municipal corporation is a matter of public policy. On the one side is the interest of the taxpayers, who ultimately bear the burden when the municipality is held liable, and the interest of the state in having certain functions adequately carried out without interference. On the other side is the interest of the individual in freedom from losses caused by the torts of the municipality. The increasing number of functions performed by the government makes an equitable disposition of the problem all the more important. Such a solution will be obtained only when the courts cease to play Blind Man's Bluff with such antiquated doctrines as dual capacity, and when they frankly recognize and acknowledge that each case presents its own individual question, determinable only by a consideration of the relative importance of the interests involved in each instance. It is to be noted that in a large majority of the modern cases the Indiana court seems to have reached the most desirable result, but whether this was accidental or whether the court secretly recognized the problem before it, is well obscured by the language of the courts.

<sup>138</sup> (1913), 55 Ind. App. 502.

<sup>139</sup> (1881), 81 Ind. 166; *Valparaiso v. Chester* (1911), 176 Ind. 636.

<sup>140</sup> (1913), 54 Ind. App. 416.

<sup>141</sup> C. W. Tooke, *Extension of Municipal Liability in Tort*, 19 Va. L. Rev., p. 748 (1932).

<sup>142</sup> C. W. Tooke, *Extension of Municipal Liability in Tort*, 19 Va. L. Rev., p. 748 (1932).