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GOVERNMENTAL TORT LIABILITY IN INDIANA

I. THE STATE

Like many other of our legal concepts, the doctrine of immunity of the state from suit was inherited from the English law. This doctrine found popular expression in the maxim that "The King can do no wrong," and seems to have its roots in feudalism and political theories of the Middle Ages,¹ when the theory of the "divine right of kings" was in full bloom. Government was regarded as a divine institution; therefore, the sovereign held its position by divine right and was superior to man-made law.

From this background then, our modern law adheres to the notion that the state is not answerable in damages for the wrongs committed by its officers and agents. It might be thought that the analogy has no protraction beyond the spheres of national government; nevertheless it is generally accepted that an individual state cannot be sued in its own courts without its consent.² Apparently the doctrine of sovereign immunity was accepted without the recognition of any necessity for explanation.³

The Indiana Constitution, Article 4, Section 24, authorizes provision by general act for the bringing of suit against the state. This section of the Constitution prohibits a special act which authorizes such suit or which makes compensation to any person claiming damages against the state. The General Assembly in 1899 passed a general act under the author-

1. Pollack and Maitland, 1 "History of English Law" 518 (2d ed. 1923).
3. Watkins, "The State as a Party Litigant" 55 (1927). In Kawananakon v. Polyblank, 205 U.S. 349, 353 (1907), Mr. Justice Holmes stated the reason for this exemption: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." It might be argued that the sovereign does not make much of our tort law since it has its origin in common law, but rather that the sovereign only enforces such law. However it is not the province of this comment to quarrel with the philosophical acceptability of the doctrine of sovereign immunity. For an exhaustive criticism, see Borchard, "Government Liability in Tort" 34 Yale L. J. 1, 129, 229 (1924-1925); 36 Yale L. J. 1, 757, 1039 (1925-1926).
ity of this provision. The statute provides for suit against the state on money demands arising out of contracts, express or implied; but it is inapplicable to tort actions. This statute is the only one existent providing for suability of the state. The conclusion is that the state itself is not liable for its torts in the absence of a statute expressly waiving immunity. Increased governmental activity by states has made more acute the problems raised by governmental immunity. Because the state has been coming in contact with more and more of the affairs of everyone, damages to person and property by the state's agents have tended to increase proportionately. The ever increasing number of citizens using state highways, working in government buildings, and attending state educational institutions can receive no recompense if they have the misfortune to be injured by the state in its capacity as caretaker, landlord or owner. There is no reason why the state should not be held to a standard of due care in its operations. It is more just for the state, through its taxing powers, to distribute the risk of injury than it is for the individual injured citizen to bear the burden himself. Further, the state today has taken over many functions which once had belonged to the private enterpriser, and so the citizen now is without a remedy which he once had against the private individual. American political thought long ago repudiated the doctrine that government can act with impunity in dealing with its citizens; still the antiquated notions of non-liability linger on. Legal scholars believe it is high time that the outmoded doctrine be abolished.

In recent years, there has been some statutory encroachment on the doctrine of non-liability of the state. A 1941 Act empowers the state to purchase policies of insurance insuring servants or employees of the state against liability arising out of the use of any motor vehicle owned or operated by the state. The policy must contain a provision that the insurance company will not set up as a defense the immunity of the state. Previous to this enactment the State Board of Accounts refused to approve expenditures from public funds

6. See Borchard, supra n.3.
for liability insurance, for the assigned reason that the state was not liable for its torts. While the statute cannot be implied to have waived the immunity of the state since servants and employees rather than the state itself are insured, it indicates that the legislature, if not the courts, realizes the injustice worked on injured citizens where the state is involved. The Insurance Statute also provides, however, that in no event shall the state be liable in any amount in excess of the maximum amount of valid insurance in full force and covering the motor vehicle involved in the accident causing the loss or damage.

II. THE COUNTIES

Once again the theory of liability of quasi-municipal corporations—counties, townships, and school districts—stems from the English law. Thus the touchstone for the early American cases was Russell v. Men of Devon. The Court of King's Bench decided that an unincorporated county was not responsible for injury caused to an individual by a defective bridge, because damages could not be recovered against the inhabitants in their individual capacity, and there was no corporation fund out of which satisfaction could be made. The Massachusetts court applied this reasoning to a town in Mowrer v. Leicester and the decision became a leading case.

Nevertheless, in a case of first impression in Indiana in 1878, House v. Montgomery County, the court reviewed the historical precedents and came to the conclusion that the defendant county was liable for failure to keep a bridge in repair as a result of which the plaintiff's mule was injured in crossing the bridge. The court reasoned that the obligation

10. 9 Mass. 247 (1812). The court refused to accede to the plaintiff's argument that none of the reasons advanced in the English case was logically applicable. Here the town was a corporation capable of being sued, the town was expressly bound by statute to keep the road in repair, and there was a treasury out of which the judgment could be recovered. Instead, the Massachusetts court held that quasi-corporations are not liable to an action for neglect unless the cause of action be specifically given by some statute.
11. 60 Ind. 580 (1878).
imposed by statute\textsuperscript{12} to keep bridges in repair, with ample power to provide means to discharge the obligation, carried with it a corresponding right in persons using the bridge to have the obligation fulfilled. The court convincingly pointed out that the reasons assigned for non-liability in the early English cases were not applicable here.\textsuperscript{13} Within a few years, however, the court began to drain the case of its vitality. Thus when a plaintiff sued a county for injuries occurring by reason of planks sticking upright in a bridge and frightening his horses, it was held that the county was not liable because the duty to keep the bridge in repair extended only to travelers on the bridge, and in fact the horses were frightened before they were on the bridge structure.\textsuperscript{14} The court held that actual physical contact with the defective bridge was essential to liability. Finally in \textit{Jasper County v. Alleman},\textsuperscript{15} the early Indiana case was overruled as a departure, and the law is settled that a county is not liable to suit in regard to bridges and highways. Therefore in spite of statutes placing a duty of repair and maintenance on a county, there can be no recovery for injuries caused by violation of the duty because such statutes do not specifically create liability.

A plaintiff suing the county for an injury where a public building is concerned meets the same fate, for a county is not liable for personal injuries caused by negligence of its Board of Commissioners in the care and control of public buildings.\textsuperscript{16} There is, however, one exception. It seems that quasi-municipal corporations are liable in damages for nuisances created by them. Thus, in \textit{Haag v. Vanderburgh Coun-}

\begin{itemize}
\item \textsuperscript{12} \textit{Ind. Stat. Ann.} (Burns, 1933) \S 26-620.
\item \textsuperscript{13} Supra n.10.
\item \textsuperscript{14} \textit{Fulton County v. Rickel}, 106 Ind. 501, 7 N.E. 220 (1886). See also \textit{Abbett v. Johnson County}, 114 Ind. 61, 16 N.E. 127 (1888) where it was held that in the absence of a statute imposing the duty upon counties in express terms and authorizing county boards to raise and appropriate funds for keeping highways in repair, a county is not responsible for negligence of those charged with care of public highways.
\item \textsuperscript{15} 142 Ind. 573 (1895). Accord, \textit{McDermott v. Delaware County}, 60 Ind.App. 209, 110 N.E. 237 (1915).
\item \textsuperscript{16} \textit{Vigo County v. Daily}, 132 Ind. 73, 31 N.E. 531 (1892). The court admitted there was no distinction between the cases of public buildings and the early bridge cases finding liability, but it flatly stated that rule could not be extended. Accord, \textit{McDermott v. Delaware County}, 60 Ind.App. 209, 110 N.E. 237 (1915).
\end{itemize}
ty,17 the defendant county was held liable for injuries sustained by the plaintiff by reason of the maintenance of a pest-house near a dwelling house. The court compared the liability of a county to that of a municipal corporation and made no mention of the doctrine that a county is but an arm of the state and hence immune. Why there is magic in the idea of a nuisance begetting liability while other torts go unredressed is far from clear. The danger in the maintenance of a pest-house which may subject the plaintiff to contagious diseases and impair his health does not seem basically different from the danger in maintaining a bridge in a defective condition which may impair the plaintiff's safety.

Of course where statutes give a cause of action and thereby waive the common law immunity of the county, different inquiries arise. Hence, the familiar rule of narrow construction of a statute in derogation of the common law was used by the court in denying recovery to a plaintiff18 suing under a mob-violence enactment.19 The Court construed the statute to authorize recovery from the county only when the mob offered violence because of a supposed violation of the law. Since the violence was an outgrowth of private disagreements in a labor dispute and no law was supposed violated, the plaintiff was held not to have brought himself within the enactment, even though the literal terms of the statute were broad enough to provide a remedy against the county. It is believed that the narrow construction was justified since it could not have been the intent of the legislature to make the county an insurer against all violent action by groups of persons where the county officials have no opportunity to prevent the violence.

A variety of reasons are assigned for the doctrine of irresponsibility of the county. "A county is said to be a quasi-corporation with corporate capacity for specific ends; being involuntary in that its creation is without the . . . concur-

of the state for governmental purposes."20 Counties are therefore different from cities which have some of the attributes of voluntary corporations. Thus a faulty exercise of the police power resulting in injury is *damnum absque injuria.*21 And the rule *respondeat superior* does not apply to a county,22 nor is the county liable for acts of her Board of Commissioners wholly outside of powers conferred upon such boards by law.23 The Indiana court then has adopted the reasoning of the early American cases, particularly of Massachusetts, and has grounded the results reached on vague ideas of necessity in preserving untrammeled the governmental functions of the county.24 Just how the exception of liability of the county for maintaining a nuisance can be explained is not clear unless it is attributed to judicial whim. In any case, it is apparent that any change in the law in this area must come through statutorily imposed liability. The courts are too enmeshed in the doctrines of immunity to extricate themselves or even to refrain from extending the present rules.25

III. TOWNSHIPS AND SCHOOL DISTRICTS

By analogy to the decisions that the state and counties are not responsible for the torts of their officers and agents, it has become the accepted rule that townships likewise enjoy immunity. In *Yeager v. Tippecanoe Township*,26 the first Indiana case concerning tort liability of a township, it was held that this subdivision of the state was not liable for an

20. McDermott v. Delaware County, 60 Ind.App. 209, 212, 110 N.E. 237 (1915). In holding that the county was not liable for negligently failing to keep the court house steps free of ice and snow and in repair, the court added that the members of the Board of Commissioners were likewise not liable. Their liability must come as individuals and here in an act of nonfeasance they acted as a Board and not as individuals.


23. Fountain County v. Warren County, 128 Ind. 301, 27 N.E. 133 (1890); Browning v. Owen County, 44 Ind. 11 (1878).


26. 81 Ind. 46 (1881); Hamilton County v. Noblesville Township, 4 Ind.App. 145, 30 N.E. 155 (1892).
injury caused by an obstruction on a public highway. The Court reasoned that the decisions in Indiana holding cities liable for defects in streets and alleys and counties liable for disrepair of bridges were based upon a principle of obligation to discharge a duty. Since there was not such a duty imposed on the township to keep the public highways in repair, there could be no liability. Subsequent cases have expanded the original doctrine so that when a duty is imposed on a township to make road repairs and the township trustee fails to do so, the maxim *respondeat superior* does not operate to render the township responsible.\(^{27}\)

Similarly, the courts regard school corporations in this state as involuntary corporations organized solely for the public benefit and as agents of the state. A further rationale is offered in that school districts have no fund out of which damages can be paid nor do they have authority to raise such a fund.\(^{28}\) In addition, a trustee of a township in charge of school buildings who exercises poor judgment in selecting plans for a school building is not liable for injuries resulting therefrom. He is acting in an official capacity, not as an individual, and the immunity of the school district clothes him with cognate irresponsibility.\(^{29}\)

The same statute\(^{30}\) which authorizes the State to purchase insurance against liability of servants and agents of the State, authorizes purchase by counties, school corporations, and townships. Here again the statute probably cannot be construed to have waived the immunity of the various subdivisions of the State since the instrumentalities themselves are not insured against liability.

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28. Frese v. School City of Crawfordsville, 142 Ind. 27, 41 N.E. 312 (1895); Forrester v. Somerlott, 88 Ind.App. 61, 163 N.E. 121 (1928). Cf. Yelch v. Trustees of Purdue University, 210 Ind. 538, 1 N.E.2d 1009 (1938) decided under a statute later repealed. See also Vernill v. School City of Hobart, 222 Ind. 216, 52 N.E.2d 619 (1944).


30. Supra n.7.
IV. MUNICIPAL CORPORATIONS

The liability of municipalities, cities, and towns is filled with confusion and plagued with gossamer distinctions. Various explanations have been offered for the lack of symmetry; most likely it is due to the courts' trying to avoid the harshness of the doctrine that the "King can do no wrong."

Indeed the historical precedent of non-liability of the municipal corporation is subject to criticism. As pointed out above the first American case of Mowrer v. Leicester followed closely the reasoning of the English court in Russell v. Men of Devon although in the English case a county was involved which had no fund out of which to pay a judgment. In the American case a town was involved which is not considered an involuntary corporation created only for governmental purposes as is the case where counties are concerned. However, the early Indiana cases found the Massachusetts doctrine acceptable.

Generally speaking, the Indiana cases require affirmative answers to all of the following inquiries in order to fix liability on a municipal corporation charged with a tort:

1. Was the duty violated connected with a private or corporate function as distinguished from a governmental duty?
2. Was the negligent person a servant or agent or employee of the municipality?
3. Was the act giving rise to the tort committed within the scope of authorized corporate powers of the municipality, i.e., not ultra vires?
4. Was the offending servant or employee acting within the scope of his authority? If not, was the act of the employee later ratified by the municipality?
5. Was the municipality guilty of negligence and was the plaintiff free from contributory negligence? In other words, does application of ordinary tort principles render the municipality responsible?

31. See, e.g., Chattin, "Tort Liability of Municipal Corporations in Indiana" 10 Ind. L. J. 329, 342 (1935) where the writer suggests that a balancing of the interests in each case has been the determinative factor.
32. Supra n.10.
33. 9 Mass. 247 (1812).
35. Stackhouse v. City of Lafayette, 26 Ind. 17 (1866); Ross v. City of Madison, 1 Ind. 281 (1848).
The Indiana Courts have applied these rules with varying elasticity, apparently seeking to alleviate the harshness of non-liability for governmental acts but there has been no definite trend away from the fiat of non-liability in Indiana. 36

In connection with the first inquiry of whether the function performed was corporate or governmental, serious objection is warranted. The judicial rationale for immunity in the performance of governmental functions is that when a city or town is acting in such capacity, it is but an arm of the sovereign state. Since the state is not subject to suit, the city as its appendage is likewise immune. The answer to this is that a state enjoys immunity because of a lack of remedy against it since the state is not subject to jurisdiction of its courts unless it consents to suit. 37 But a city or town is not in the same position. Courts have jurisdiction over these instrumentalities and no statutory consent to suit is required. 38

A related justification is that in the pursuit of governmental functions, the municipal agents or employees are acting as agents of the immune state. Under this view, the rule of respondeat superior does not apply to impose liability on the municipal corporation. The principal or master is found to be the State which is immune from suit. But the critics 39 point out that this is a departure from usual agency rules of law in that the fact of agency relationship is not normally determined by the character of the service or function in which the tort was committed, but rather by the control and direction exercised over the agent or employee. The

36. There have been attempts to break away from the rule of immunity in other states. Maxwell v. Miami, 87 Fla. 119, 100 So. 150 (1924); Kaufman v. Tallahassee, 84 Fla. 624, 94 So. 697 (1922); Cone v. Detroit, 191 Mich. 198, 157 N.W. 417 (1916); Augustine v. Town of Brant, 249 N.Y. 198, 163 N.E. 732 (1928); City of Pawhuska v. Black, 117 Okla. 108, 244 Pac. 1114 (1926); Young v. Juneau County, 192 Wis. 646, 212 N.W. 295 (1927). In Fowler v. Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), a distinction was made between injuries inflicted by a fire department on the way to a fire (governmental function) and those occurring on a return trip. It was decided that the rule of immunity did not apply on the return trip. However, this step toward increased liability was quickly retraced and Ohio is now back in line. Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

37. Supra n.2.


39. Id. at 34. See also Borchard, "Governmental Liability in Tort" 34 Yale L. J. 129 (1925).
direction and control is almost always centered in the municipal corporation and not in the State and normal application of the rules of agency would disclose the city as principal or master.

Another position frequently taken by the courts is that immunity for governmental functions is necessary to prevent diversion of public funds to private or unauthorized purposes. A variant of this explanation is that unless there is immunity in some functions the municipal corporation could not properly perform all its functions and would hesitate to assume new activities, because of the fear of being held liable for negligent performance of these activities. Once again, the commentators are critical and believe such a stand as this is a philosophy of risk allocation contrary to that which inspired the Workmen's Compensation laws and other social legislation.40

The distinction between governmental and proprietary functions is difficult of application. As new and wider variety of municipal functions has developed, no satisfactory or logical test for classification has been evolved.41 Strange indeed is a rule that allows recovery when a person is struck by a truck used by the municipal lighting plant but denies recovery when struck by a police car. Or, more strikingly, an injury resulting from negligence in failing to maintain a water pipe connection may be compensable but not so if an unrepaired fire hose is the cause of injury.42

40. Rosenfield, "Governmental Immunity from Liability for Torts in School Accidents" 5 Legal Notes on Local Gov't 358 (1940); Fuller and Casner, "Municipal Tort Liability in Operation" 54 Harv. L. Rev. 437 (1941).


While the distinction between public and private functions as affecting liability for negligence . . . is generally recognized, a great deal of confusion arises when attempt is made to determine in what capacity the municipality was acting in committing the particular tort complained of." Kokomo v. Loy, 185 Ind. 18, 23, 112 N.E. 994 (1916). Here the plaintiff was injured while attempting to unload a cannon under the direction of an agent of the defendant city. The court reasoned that the city, as a corporation, acquires an individuality distinct from the sovereign power of the state and therefore the city could be found liable. The control by the city over its parks was rather arbitrarily compared with a city's power over streets where liability has been sustained.

42. Aschoff v. Evansville, 34 Ind.App. 25, 72 N.E. 279 (1904). The plaintiff's cellar was flooded by a bursting water pipe connection when firemen were fighting a fire. The court found negligence in
One of the traditional tests has been to determine whether the function out of which the tort arose was one from which the municipality derived pecuniary compensation or profit. If so, the municipality is said to have acted in a proprietary manner; but if the function is one of the duties imposed on the municipality by the state, the city is said to have acted in a governmental capacity. The criticism is that in other situations where tort law is applied, the presence or absence of pecuniary profit of the tortfeasor is not a determinative factor.

The local benefit test has also been utilized by the courts in arriving at the choice between governmental and proprietary functions. That is, if the function inures to the advantage of the public generally, it is governmental; if the benefit is peculiarly to the municipal community, it is a proprietary function. But realistically the fact is that all municipal functions are for the public benefit, otherwise they could not be financed with public funds and any benefit to a particular locality is also a benefit to the state. The inconsistency of this doctrine is seen in cases involving the functions of police and fire departments, which certainly are of at least immediate benefit to the municipality but the strength of historical precedent is felt by the court and there is virtually complete unanimity in classifying police and fire departments as governmental functions and the following determination of non-liability.\(^43\) The furnishing of utilities falls into the proprietary classification—the profit or local benefit being stressed—and the municipal supplier is not immune from suit. When the municipality is charged with negligence failing to keep the water system in repair and that the water system was proprietary in nature. However, the court added that had the fire hose broken, recovery would have been denied because the hose was part of a governmental function of the city, and not part of the waterworks.

Also it is stated that a city is under no legal duty to light its streets. But its failure to do so may be considered in determining negligence in permitting an obstruction at a given point. Shreve v. Fort Wayne, 176 Ind. 347, 96 N.E. 7 (1911); East Chicago v. Gilbert, 59 Ind.App. 613, 108 N.E. 29 (1915). And an early case finds the city liable for installation of a sewer “of such incapacity that every sane man knows in advance that it will not afford any relief....” Indianapolis v. Huffer, 30 Ind. 235 (1868). But Rozell v. Anderson, 91 Ind. 591 (1883) decides that a city cannot be held liable for errors of judgment concerning capacity of a sewer. Cf. North Vernon v. Voegler, 103 Ind. 314, 2 N.E. 821 (1885).

\(^43\) Indianapolis v. Butzke, 217 Ind. 203, 26 N.E.2d 754 (1940).
concerning streets, sidewalks, and bridges, generally immunity is denied in Indiana. In regard to construction and maintenance of sewers and drains, the Indiana courts with but a few deviations hold the municipality to liability when due care is not exercised. Likewise there can be liability in cases involving parks, swimming pools and places of recreation. But in school accident cases, education is called a governmental function and liability is denied. The same result is reached in regard to public buildings such as hospitals and court houses. 44

The second inquiry concerns the agency relationship when a municipality is sued for injuries inflicted by its alleged servants or employees. If the negligent employee is regarded as a servant of the state, then of course the liability of the municipality is precluded. However, the rationale usually proceeds on a different tack. Since the usual tests of whether the municipality had control of the employee, whether the municipality could direct the work being done, and whether the employee was acting within the scope of his employment, 45 would generally result in a determination that the municipality was the employer, the courts fall back on the ground of character of the function involved. 46 Thus even if the injured person can establish that the negligent actor was in fact and law employed by the municipality, was subject to the control and direction of the city, and was acting within the scope of his authority, his cause of action may be defeated by the doctrine of dual capacity of the municipality.

The rule commonly known as ultra vires, that there is no corporate liability when the act complained of is outside of the

44. Many of the cases arising under the various activities are cited in Chattin, "Tort Liability of Municipal Corporations in Indiana" 10 Ind. L. J. 329 (1935).
45. McQuillan, "Municipal Corporations" (2d ed. 1937) §2824.
46. Michigan City v. Werner, 186 Ind. 149, 114 N.E. 636 (1916); Wayne v. Curtis, 73 Ind.App. 640, 126 N.E. 699 (1920). The last cited case, after reciting the familiar and automatic rule of nonliability of the municipality for negligence of its officers in enforcing police regulations, proceeds to define "police power" as extending to all matters affecting the peace, health, order, morals, convenience, comfort, and safety of the public. Under such a broad definition, it is hard to envisage what phase of ordinary activity of the municipal officers is not included in the immunity under police powers. Cf. Indianapolis v. Cauley, 164 Ind. 304, 73 N.E. 691 (1905) where the defendant city was held liable for injuries caused by negligence of incompetent employees selected by the city.
character of some valid legislative enactment applicable to it, is adhered to in Indiana.\textsuperscript{47} However, few Indiana cases have considered \textit{ultra vires} as a ground for non-liability. The reason may be that non-responsibility can be grounded on the before mentioned theories of the actor being a servant of the state or the broader ground of immunity of the municipality in performance of governmental duties. Nevertheless, \textit{ultra vires} remains in the background of the judicial thinking of the courts when a municipality is charged with negligence.\textsuperscript{48}

The inquiry of whether the employee was acting within the scope of his authority when an injury occurred is of course related to the problem of the general aspects of master and servant law. Thus the municipal employer is held blameless for an officer's unlawful arrest of a citizen since the officer is said to be "acting" for the public and is not an agent of the city\textsuperscript{49} even though the officer admittedly is paid from the corporate coffers. Moreover, the doctrine of ratification seems to find little application in Indiana. When the corporate officers exceeded the authority of the city of Huntington and graded a road outside the corporate limits, the city was found not liable for an injury caused by material left near the road by the workmen.\textsuperscript{50} The continued use and maintenance of the road apparently did not constitute ratification of the originally extra-legal act.

Leaving aside the confusion resulting from application of the rules of classification of function, the usual aspects of normal tort law must be considered by the court in determining the liability of the city. Negligence cannot be imputed to the city if the act or omission of the agent or employee did not violate a duty owed to the plaintiff. Of course, the negligent act must have been the proximate cause of the resulting harm. And, as in normal tort cases, contributory negligence bars the possible recovery of the plaintiff.\textsuperscript{51}

\textsuperscript{47} Leeds v. Richmond, 102 Ind. 372 (1885); Shelby County v. Deprez, 87 Ind. 512 (1882); Shelby County v. Castetter, 7 Ind.App. 309, 34 N.E. 687 (1893).

\textsuperscript{48} Huntington v. Thomas, 86 Ind.App. 401, 157 N.E. 286 (1927).


\textsuperscript{50} Huntington v. Thomas, 86 Ind.App. 401, 157 N.E. 286 (1927).

\textsuperscript{51} Harper, "Torts" (1933) §4.
In the cases where the courts are disposed to find that a governmental function is involved and hence that the municipality is not liable for its action, inquiry into the ordinary tort principles, above noted, is generally forestalled. Yet ordinary tort principles might well deny liability of the city when so-called governmental functions are involved. Analysis of a few cases may better illustrate this. In *Wheeler v. Plymouth*\(^{52}\) the defendant city gave permission to persons to fire gunpowder within the corporate limits. Damage to property of the plaintiff resulted from the negligence of the licensees and the city was held not liable. It seems doubtful if an individual, not clothed with immunity, could be found responsible in such a case unless he were negligent in giving permission, for to hold otherwise would make him an insurer of the licensee's action. And in the case arising out of a fire department vehicle accident,\(^{53}\) the reviewing court did not consider the evidence at all as to the possibility of plaintiff having been guilty of contributory negligence, but simply stated the rule of governmental immunity to preclude recovery. In another case, the city of Anderson was held not to be liable when the wall of a burned-out private building extending partly into a public alley collapsed on the plaintiff's building.\(^{54}\) Although the ground of decision in the case was confused, it would seem difficult on ordinary tort principles to find that the city owed a duty to the plaintiff. Liability was precluded in another case\(^{55}\) where a railroad company, granted a right of way by the city, constructed an insufficient culvert over a river. Although the court found no liability on the ground that the city received no benefit and hence was not acting in a proprietary capacity, even applying general tort principles it would seem harsh to impute the act of the railroad company to the city.

On the other hand, *Michigan City v. Werner*\(^{56}\) illustrates that where the question is adjudicated according to usual tort concepts, the city will not always be found liable. In that case, the plaintiff jumped off a bridge which had been neg-

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54. Anderson v. East, 117 Ind. 126, 19 N.E. 726 (1889).
55. Stackhouse v. Lafayette, 26 Ind. 17 (1866).
56. 186 Ind. 149, 115 N.E. 636 (1916).
ligently raised by a servant of the city. The upper court remanded the case for consideration of the plaintiff's contributory negligence. In another case, the defendant city through its agents opened a ditch alongside the plaintiff's way from which noisome odors arose. After assuming that the city was entitled to a presumption that it would soon remedy the situation, the court finally grounded the decision of non-liability on the city's reasonable, careful acting under the circumstances.

Thus it appears that the *ratio decidendi* of municipal immunity is not completely warranted. The courts voice objections to holding municipalities accountable to the same extent as individuals because of the fear that corporate funds would be exhausted by suits brought by injured persons, and because of the feeling that the city would retreat into a shell of inaction for fear of being rendered responsible for negligent performance of corporate functions. But it is believed that the danger is overestimated—municipalities are not held to a greater degree of carefulness than other corporations or individuals.

In view of the inequities arising under court handling of municipal liability, legislative action seems to be the most feasible remedy for the situation. A 1945 Act takes a long step toward stabilizing the law of municipal tort liability. The Act provides for liability of the municipality when injury to a person or property is caused by negligent operation of a motor vehicle owned by a municipal corporation and operated by a member of the police or fire departments in performance of his duties as such a member. In one instance the words "municipal corporation" are used; in another the designation is "municipality." Townships and counties may

57. Cummins v. Seymour, 79 Ind. 491 (1881). In Roll v. Indianapolis, 52 Ind. 547 (1876), there is further illustration that determination of non-liability often is based on the character of the function involved when the holding could be grounded on other foundations. There the city constructed a sewer in front of the plaintiff's shop, gave him the right to tap it, and assessed him one half the cost. The plaintiff sued when his basement was flooded due to failure of the sewer. The city was held guiltless for judicial errors in its ordaining powers; but the plaintiff had exceeded his right to tap the sewer by letting in foul material and further, there was a proviso in the permit whereby any inhabitant tapping a sewer agreed to save the city harmless. Thus the court preferred to brush aside the contract and estoppel aspects and rest the decision on the available grounds of immune governmental action.

be included in these terms. In other statutes the legislature has specifically defined "municipal corporation" to include counties and townships. However, this statute contains no definition section. In any case, the 1945 Act represents a salutary and desirable shift in policy and a resultant narrowing of the area of irresponsibility in activities traditionally declared governmental.

The 1941 Act concerning the purchase of insurance, discussed above in connection with the state, is also applicable to the municipal corporation. It provides that in no event shall the state or municipality be liable in any amount in excess of the maximum amount of valid insurance in full force and covering the motor vehicle involved in the accident causing the loss or damage. Conceivably, although not at all likely, this provision could be used to destroy the liability now imposed upon a municipality. The municipality apparently could purchase ridiculously small policies and insulate itself against liability for a greater amount. In effect, then, the already constricted areas of liability of municipalities could be further narrowed by application of the statute to proprietary functions, where municipalities have been held responsible the same as individuals. On the other hand, the statute might be construed to waive immunity of the municipalities even as to traditionally governmental activities since prior to its passage expenditures for liability insurance were disapproved as an improper use of public funds on the ground that there was no liability of the municipality. However, this would not give literal interpretation to the words of the enactment which provide for the insuring of the officers and employees of the municipality and not the municipality itself.

60. Ibid.