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I

THE PROBLEM OF MUNICIPAL TORTS

MUNICIPAL government in the United States is big business. In 1946, the 397 cities having a population of 25,000 or more spent a total of nearly 3 billion dollars for general governmental expenditures.[1] In 1947 the total increased by 17 per cent to $3,477,000,000.[2] Of that amount, 2½ billion were actual operational expenses for such activities as public safety, public health, sanitation, hospitals, local street and highway maintenance, and schools.[3] Since the figures do not include the amounts expended in connection with municipal water works or municipal street railways,[4] they lend weight to the assertion that our municipal governments are today engaged in a variety of activities which, in the aggregate, are of considerable magnitude.[5]

These activities are, of course, designed to improve the welfare of the inhabitants of the respective communities. That they might be more successful, that the activities might be broadened in their scope, and that the areas of activity differ materially from place to place may be admitted. Our only concern here is that cities do engage in numerous activities, and with the inevitable consequence that some individuals will suffer harm as a result. It is from this fact and its consequence that the problem of municipal tort liability arises. The agents and

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[1] BUREAU OF CENSUS, COMPENDIUM OF CITY GOVERNMENT FINANCES IN 1946 at p. 2 (1947). It may be noted that the 397 cities accounted "for well over a third (35.2%) of the general revenue of all local governments in the United States and over one-half (52.8%) of all local public debt. Of the general revenue of all 16,220 municipalities in the nation, the 397 largest received 81.9%; they accounted for 86.3% of total city debt." Id. at 2.

[2] BUREAU OF CENSUS: SUMMARY OF CITY GOVERNMENT FINANCES IN 1947 at p. 6 (1948).

[3] Id. at p. 7. The figure does not include all of the money spent for schools, because in some cities school finances are handled through separate independent corporations.

[4] Id. at p. 3. The operating revenue derived from such enterprises in 1946 was about $763,000,000. COMPENDIUM OF CITY GOVERNMENT FINANCES IN 1946 at 3 (1947).

[5] By way of comparison with private enterprises which are spread across the country and operate a large number of plants, it may be noted that F. W. Woolworth's limited price variety stores had a total operating revenue in 1947 of only $593,359,194. MOODY'S INVESTMENT REPORTS (INDUSTRIALS) 2254 (1948). Westinghouse Electric's operating revenue for 1947 was only $814,660,605. Id at 1675.

employees of the city succeed in a large measure in their efforts to improve the welfare of the inhabitants, but inevitably, either through human carelessness or even carefulness, either through active wrongdoing or through non-action when action is required, or, perhaps, through exercise of judgment which eventually proves to have been mistaken, they will cause damage to some member of the community whom they were trying to help. A policeman, trying to preserve peace and order by arresting an escaping felon, fires a bullet intended to halt the flight.[6] Regardless of the care he may use, the bullet may injure an innocent passerby.[7] The driver of a firetruck, hastening to carry equipment which will prevent a devastating conflagration, may hit a car or a pedestrian.[8] The garbageman, trying to assist in preserving the health of the community, may negligently park his truck in such a way that injury results.[9] Or, the city may attempt to dispose of accumulated garbage by burning it in an outlying area only to find that the smoke and fumes prevented use of a nearby school.[10] The attendant at a municipal swimming pool may negligently open the gates which drain the pool with resultant injury to bathers.[11] Injury may arise not because the swimming pool attendant was negligent, but because the city council ordered the floor of the pool to be so constructed that it was necessarily unsafe when the pool was used for diving.[12] The city council constructs a municipal water plant and conscientiously decides that the water mains need be only eight inches in diameter. Subsequently, it is discovered that the amount of water thus made available is insufficient to serve the area and that the main should have been twelve inches in diameter.[13] These, and innumerable

[6] Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933). See also State v. St. Louis, 174 Mo. 125, 73 S.W. 623 (1903) (policeman injured child while attempting to kill a bull loose in a populated area); Looney v. Sioux City, 163 Iowa 604, 145 N.W. 287 (1914) (policeman wrongfully shot his prisoner); Jones v. New Orleans, 143 La. 1073, 79 S. 865 (1918) (negligent shooting in protecting property); Whitfield v. Paris, 84 Tex. 431, 19 S.W. 566 (1892) (negligently shot bystander while attempting to kill unmuzzled dog).

[7] If negligent, liability is, of course, clear.

[8] See 110 A.L.R. 1117 (1937).

[9] E.g., Boyd v. Knoxville, 171 Tenn. 401, 104 S.W. (2d) 419 (1937). See generally, for injuries resulting from carrying out this municipal activity, 14 A.L.R. 1473 (1921), 60 A.L.R. 101 (1929), 110 A.L.R. 1117, 1127 (1937); 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2nd ed., §§2807, 2840 (1928).

[10] Smith v. Ann Arbor, 303 Mich. 476, 7 N.W. (2d) 752 (1942).

[11] Mola v. Metropolitan Park District, 181 Wash. 177, 42 P. (2d) 435 (1935).

[12] Hair v. Lynchburg, 165 Va. 78, 181 S.E. 285 (1935).

[13] Stansbury v. Richmond, 116 Va. 205, 81 S.E. 26 (1914). Cf. Willson v. Boise City, 20 Idaho 133, 117 P. 115 (1911) (where no injury would have resulted had it not been for the construction of the public improvement) and King v. Granger, 21 R.I. 93, 41 A. 1012 (1898) (where injury resulted from action of the city which overtaxed existing facilities).

other cases which might be recounted, indicate the nature of the problem: how far should a municipality be compelled to respond in damages to individuals who suffer harm as a result of activities undertaken by the municipality?

II

THE CURRENT DOCTRINE OF MUNICIPAL IMMUNITY

No attempt will be made to trace the history of the doctrines which are currently applied in the United States. One author has stated that they arose as a result of "a combination of misguided logic and misapplied precedent."[14] Be that as it may, at the present time, courts of this country are attempting to delineate the area of municipal responsibility by application of a verbal formula which may be stated quite simply: a municipal corporation is liable for torts committed by its agents in the performance of private, proprietary, corporate or ministerial functions but, in the absence of statute, is not responsible for torts committed in the performance of governmental functions.[15] The governmental functions are sometimes referred to as public functions or political functions, and the same general idea is sometimes expressed by the courts with the statement that the municipal corporation is immune from liability when it is acting as an agent of the state. This classic statement of a so-called principle may well be regarded as the distinctive characteristic of the doctrine relating to municipal liability; it is this particular aspect that I shall discuss primarily. It is a rare judicial opinion which does not, at a very early point, pay lip-homage to that formula, proceed from that point to classify the particular function being performed and then conclude that liability or immunity follows from that classification. Those who appreciate the tautology that may be involved in such reasoning know that lawyers and judges alike may be prone to decide first whether liability *should* be imposed (a decision reached by considering such factors as the extent of the injury, the palpability of the neglect which occasioned it, whether the

[14] Barnett, "The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations," 16 ORE. L. REV. 250 (1937).

[15] This distinction has been reiterated in so many cases and by so many textwriters and commentators that citation of authority is hardly necessary. A criticism of the doctrine is found in Seasongood, "Municipal Corporations: Objections to the Governmental or Proprietary Test," 22 VA. L. REV. 910 (1936) and Borchard, "Government Liability in Tort," 34 YALE L. J. 129, 229 (1924-5).

imposition of liability would seriously hamper the ordinary administration of the city's business, whether the harm resulted from non-feasance or misfeasance, from a carefully considered legislative act or from the carelessness of an employee) and then express their result by classifying the function as governmental or proprietary. The actual opinion thus represents an inversion of the mental process by which the decision was reached, and all too frequently it omits any real statement of the factors which influenced the court to impose liability or to grant immunity. When one reads any opinion, it is usually appropriate to inquire whether the city is immune because the function is governmental or whether the function is governmental because the city should be immune.

The results of such a doctrine have been rather startling. With few exceptions, the same function has been called governmental by the courts of one state, and proprietary by those of another.[16] No further proof should be required to demonstrate that there is nothing inherent in particular functions by which they can be classified.[17] Too often, courts review their own decisions and come to the same conclusion as did the Illinois court: "All that can be done with safety is to determine each case as it arises."[18] Many specific distinctions may be cited which have resulted from a mechanical application of the formula. In Bay City, Michigan, an employee of a telephone company was killed because of negligence of the city's agents in maintaining electric wires. The city's electric light plant furnished direct current for the purpose of lighting the streets and public buildings. It sold alternating current to inhabitants for use in their homes. It was held that since the injury resulted from negligence in maintaining the wires carrying alternating current, which was sold for profit, the city was liable. The court stated, however, that the city would not be liable "for the negligence of its . . . agents . . . when furnishing the service for lighting its public streets."[19] Thus we distinguish between governmental electricity and proprietary electricity. In Georgia, when a city engages in furnishing water to its inhabitants, it is generally said that it acts in a private, proprietary capacity, and is therefore liable for the negligence of its agents. Yet, when an employee negligently left open a box leading to the water

[16] See Borchard, op. cit., supra, note 15. For collection of cases on various types of functions see 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., c. 53 (1928); 14 CORN. L.Q. 351 (1929).

[17] See infra, p. 45 for a discussion of refinements.

[18] Roumbos v. Chicago, 332 Ill. 70, 163 N.E. 361 (1928).

[19] Hodgins v. Bay City, 156 Mich. 687, 121 N.W. 274 (1909).

pipes which supplied water to a pool in a public park, the court declared that there was no liability.[20] We must, then, distinguish between proprietary manholes and governmental manholes. The tendency of courts to emphasize the element of profit being made by the municipal corporation leads to speculation as to what the result might be where the city, as a community enterprise, collects certain kinds of garbage without charge, but makes a charge for collection of other kinds. No doubt it might be argued that a distinction must be made between proprietary garbage and governmental garbage.[21]

Certain refinements have been introduced by the courts to alleviate the harshness which results from the doctrine of municipal immunity. Without attempting to elaborate upon them, I shall point out some such refinements which are in more or less general use. First, if the conduct of the city is such that it can be said to be a nuisance, most courts will compel the city to cease its conduct and to respond in damages for injuries to property which may have resulted.[22] There is some authority that personal injuries must be compensated for if they arise as a result of the maintenance of a nuisance.[23] A Florida decision even permitted recovery against a city for damages arising out of the conduct of the fire chief speeding to a fire on the ground that his conduct constituted the maintenance of a nuisance on the public streets.[24] Second, several courts have discovered that in carrying out some broad governmental functions, municipal employees may be performing only "ministerial" acts, and have compelled the city to assume the burdens which flow from the negligent performance of such acts. Thus, while activities of the police force may generally be governmental, the man who drives the car to deliver the policemen to their respective beats is performing a ministerial act.[25] Third, there is some inclination on the part of the courts to distinguish negligent conduct of agents from negligent maintenance of property, and impose liability upon the city for the lat-

[20] Autrey v. City Council of Augusta, 33 Ga. App. 757, 127 S.E. 796 (1925). Cf. City Council of Augusta v. Cleveland, 23 Ga. App. 522, 98 S.E. 738 (1919).

[21] For cases dealing with municipal liability for torts in which some notable distinctions are drawn, see: Ashbury v. Norfolk, 152 Va. 278, 147 S.E. 223 (1929); Louisville v. Hehemann, 161 Ky. 523, 171 S.W. 165 (1914); Montain v. Fargo, 38 N.D. 432, 166 N.W. 416 (1917); Nashville v. Mason, 137 Tenn. 169, 192 S.W. 915 (1916).

[22] E.g., Oklahoma City v. Tytenicz, 171 Okla. 519, 43 P. (2d) 747 (1935); Windle v. Springfield, 320 Mo. 459, 8 S.W. (2d) 61 (1928); Capozzi v. Waterbury, 115 Conn. 107, 160 A. 435 (1932).

[23] Hoffman v. Bristol, 113 Conn. 386, 155 A. 499 (1931). Contra: Virovatz v. City of Cudahy, 211 Wis. 357, 247 N.W. 341 (1933).

[24] Maxwell v. Miami, 87 Fla. 107, 100 S. 147 (1924); Tallahassee v. Kaufman, 87 Fla. 119, 100 S. 150 (1924).

[25] Jones v. Sioux City, 185 Iowa 1178, 170 N.W. 445 (1919).

ter neglect even though the property is devoted to a so-called public or governmental purpose.[26] Fourth, the courts have permitted cities to assume some responsibility for harm to individuals, by allowing them, under a power to pay equitable claims, to make an appropriation directly to the injured individual or indirectly by reimbursing the employee who has been personally charged with liability.[27] This method of handling tort claims, however, is not only cumbersome and time-consuming, but leaves the question of responsibility to be settled by the whim of the city council rather than by the establishment of general principles of law.[28]

The foregoing refinements do not cut the underbrush cleanly away. Indeed, whenever a court makes an attempt to break completely away from the doctrines of immunity, and perhaps succeeds in a particular case, there is usually a quick withdrawal from such advanced position.[29]

[26] E.g., Kies v. City of Erie, 169 Pa. 598, 32 A. 621 (1895).

[27] Most, though not all courts, will now concede that such expenditures constitute a proper use of municipal funds and are not to be classed as forbidden gratuities. Illustrative of cases in which the city has reimbursed its officials against whom judgment has been rendered are: Sherman v. Carr, 8 R.I. 431 (1867); Hixon v. Sharon, 190 Mass. 347, 76 N.E. 909 (1916); State v. St. Louis, 174 Mo. 125, 73 S.W. 623 (1903). Direct contribution was upheld in Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933). See 42 YALE L.J. 241 (1932).

An analogous question arises when the city attempts to appropriate funds to employ counsel to defend actions brought against city officials. See Corsicana v. Babb (Tex. Civ. App.) 266 S.W. 196 (1924), criticized in 23 MICH. L. REV. 666 (1925); Leonard v. Middleborough, 198 Mass. 221, 84 N.E. 323 (1908), 21 HARV. L. REV. 625 (1908); 130 A.L.R. 736 (1941).

[28] That the city, even though authorized to appropriate money for defense of its officials, cannot be compelled to pay, see Gormly v. Town of Mt. Vernon, 134 Iowa 394, 108 N.W. 465 (1906); Sherman v. Carr, 8 R.I. 431 (1867), "It would seem . . . to be wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city. . . ." Cf. Barnert v. Paterson, 48 N.J.L. 395, 6 A. 15 (1886); Wiley v. Seattle, 7 Wash. 576, 35 P. 415 (1894).

On the national level, the desire to eliminate settlement of tort claims through private legislation (at great expense of legislators' time) seems to have been one of the dominating factors which led to the adoption of the Federal Tort Claims Act. 60 Stat. L. 842 (1946), 28 U.S.C.A. (1948) §§2671-2680. It was included in the Legislative Reorganization Act of 1946, 60 Stat. L. 812, and S. REP. 1011, 79th Cong., 2d sess., p. 25 (1946) indicates that the committee was aware of the inefficiency of handling private claims by legislation: "This method of handling individual claims does not work well either for the government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved." As to the number of claims handled in this way prior to the Federal Tort Claims Act, see Holtzoff, "The Handling of Tort Claims Against the Federal Government," 9 LAW AND CONTEM. PROB. 311 (1942); S. REP. 1400, 7th Cong., 2d sess., p. 30 (1946).

[29] For example, Fowler v. Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919) overruled in Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922); Miller v. Manistee County Road Commrs., 297 Mich. 487, 298 N.W. 105 (1941) overruled in Mead v. Mich. Public Service Comm., 303 Mich. 168, 5 N.W. (2d) 740 (1942). The Michigan legislature later abolished the defense of "governmental function" in automobile negligence actions against the state. Act No. 237, Pub. Acts of 1943, amended by Act No. 87, Pub. Acts of 1945; Mich. Comp. Laws (1948) §691.141.

Real progress can be made in a revaluation of the problem only through legislation.[30] On the credit side of the ledger, some notable steps have been taken in recent years. On the national level, the federal government in 1946 adopted the Federal Tort Claims Act[31] which opened the courts to a substantial number of litigants theretofore dependent upon the willingness of Congress to make special appropriation. On the state level, New York has enacted legislation[32] which for a while seemed destined to eliminate the possibility of cities finding immunity on the ground that a governmental function is involved.[33] The courts, however, still seeking an appropriate safeguard against municipal bankruptcy, have reinstated the distinction in a different form.[34] No other state has gone so far, but many states have waived their immunity in particular areas of activity.[35] Thus, the widespread use of the automobile awakened legislators to the realization that harm might result from the use of vehicles and that the loss should be borne not by the injured party but by the community as a whole. Statutes waiving immunity in this limited area have appeared quite frequently.[36] So, too, while the maintenance of streets and sidewalks is frequently classified as a local or ministerial function so that liability is imposed without statutory assistance,[37] there are statutes which have specifically waived the immunity in this area of activity.[38] There is some indication that a large percentage of the injuries suffered by individuals as a result of municipal activities, arise from proprietary activities, or from the operation of motor vehicles and from defective streets.[39] It might be argued

[30] Lloyd, "Municipal Tort Liability in New York—A Legislative Challenge," 23 N.Y. UNIV. L.Q. 278 (1948); Borchard, "Proposed State and Local Statutes Imposing Public Liability in Tort," 9 LAW AND CONTEM. PROB. 282 (1942).

[31] 60 Stat. L. 842 (1946), 28 U.S.C.A. (1948) §§2671-2680.

[32] Sec. 8, Court of Claims Act, N.Y. Laws (1939) c. 860, §8.

[33] Bernadine v. New York City, 294 N.Y. 361, 62 N.E. (2d) 604 (1945); Schmid v. Werner, 188 Misc. 718, 72 N.Y.S. (2d) 361 (1947).

[34] See Steitz v. Beacon, 295 N.Y. 51, 64 N.E. (2d) 704 (1945) and Murrain v. Wilson Line and New York City, 270 App. Div. 372, 59 N.Y.S. (2d) 750 (1946), affd. 296 N.Y. 845, 72 N.E. (2d) 29 (1947). See Lloyd, "Le Roi Est Mort; Vive Le Roi," 24 N.Y. UNIV. L.Q. 38 (1949); 161 A.L.R. 367 (1946).

[35] See Tooke, "The Extension of Municipal Liability in Tort," 19 VA. L. REV. 97 (1932).

[36] E.g., Cal. Stat. (1931) c. 122, §1714½; Ill. Laws (1931) p. 618, §1; N.Y. Laws (1940) c. 687, §50b; Wis. Laws (1929) c. 77. See 85 A.L.R. 696 (1933); 89 A.L.R. 394 (1934).

[37] See 25 AM. JUR., Highways §348. A criticism is found in Borchard, "Government Liability in Tort," 34 YALE L.J. 229 (1925). For good discussion of the tactics of the Illinois court in imposing liability when a "street" injury is involved, see Green, "Freedom of Litigation: III," 38 ILL. L. REV. 355 (1944).

[38] See 25 AM. JUR., Highways §349, n. 16.

[39] Warp, "Tort Liabilities of Small Municipalities," 9 LAW AND CONTEM. PROB. 363 (1942).

that nothing further need be done. To me it seems that the exact opposite conclusion should be drawn: that if most of the responsibility has been accepted without serious impairment of municipal activities, there is no excuse for not completing the eradication of the doctrine of immunity.[40]

III

SOCIAL ETHICS OF THE DOCTRINE OF IMMUNITY

For more than a generation, commentators and textwriters have relentlessly and unanimously urged that the government assume a greater responsibility in tort,[41] and much of their discussion has been directed particularly toward the immunity of the municipal corporation.[42] The social climate which fostered the growth of absolutism and the divine right of kings in England has long since been tempered with the warm winds of humanitarianism and individual freedom. The changes which have occurred in the last century with respect to the imposition of liability upon private corporate enterprises of any kind are well-known. Workmen's compensation laws have replaced the old theories which permitted the corporate organizations to escape liability under the fellow-servant rule or the doctrine of assumption of risk. Liability may now be predicated without fault merely on grounds that potential injuries to individuals must be calculated as a part of the cost of doing business, and must be paid for by the business enterprise.[43] There is widespread acceptance of a philosophy that those who enjoy the fruits of the enterprise must also accept its risks and attendant responsibilities. Unemployment compensation laws have their foundation in a theory that the entire community must share the burdens of

[40] This does not imply that the governmental-proprietary dichotomy can be ignored in all areas. E.g., the power of the federal government to tax state activities has, until recently at least, involved the same distinction. How far the distinction remains valid is questionable in the light of New York v. United States, 326 U.S. 572, 66 S. Ct. 310 (1946).

[41] Many leading articles are cited in Repko, "American Legal Commentary on the Doctrines of Municipal Tort Liability," 9 LAW AND CONTEM. PROB. 214 (1942). See especially: Borchard, "Government Liability in Tort," 34 YALE L.J. 1, 129, 229 (1924-5); 36 YALE L.J. 1, 757, 1039 (1926-7); 28 COL. L. REV. 577, 734 (1928); Harno, "Tort Immunity of Municipal Corporations," 4 Ill. L.Q. 28 (1921); Tooke, "The Extension of Municipal Liability in Tort," 19 VA. L. REV. 97 (1932); Green, "Freedom of Litigation: III," 38 ILL. L. REV. 355 (1944).

[42] See particularly Borchard, "Government Liability in Tort," 34 YALE L.J. 129 (1924) and Green, "Freedom of Litigation: III," 38 ILL. L. REV. 355 (1944).

[43] The theory of workmen's compensation laws is discussed in HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS pt. 1 (1944); HOBBS, WORKMEN'S COMPENSATION INSURANCE, c. 3 (1939); 1 SCHNEIDER, WORKMEN'S COMPENSATION, 3rd ed., c. 1 (1941). That the philosophy may constitutionally be applied to municipal tort liability, see Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933) and cases cited therein.

an economy which does not always supply an outlet for the services of all those who have services to supply. There is today at least some agreement that not all of the unemployed are those who are shiftless and incompetent.[44]

Why, then, has not the same social philosophy been adopted in the field of municipal government? Is there any sound reason we should refuse to acknowledge that the cost of obtaining governmental services includes the cost of injuries which arise from governmental activities? Functions commonly regarded as governmental are undertaken for the benefit of all members of the community. Should not all members of the community assume a proportionate share of the responsibility for the injuries which result from the carrying out of those functions? For example, everyone wants and expects an efficient police department charged with the responsibility of enforcing agreed standards of conduct. Inevitably our representatives in the police department will visit harm upon some innocent members of the community. Must the injured citizen contribute that additional amount toward the preservation of the police department, or shall the entire community assume the responsibility for that loss suffered by one of its members? Few persons will insist upon complete retention of the doctrine of immunity when the proposition is phrased in these terms.

IV

THE LIMITS OF GOVERNMENTAL LIABILITY

Before we accept a change of philosophy, it is necessary to determine whether the reasons given for the present doctrine merit substantial consideration. If valid reasons exist for granting immunity, corrective legislation must take them into account. At the outset, it should be noted that almost no court attempts directly to state a reason for the common assertion that the municipal corporation is not liable for torts arising out of the performance of those functions called governmental. The reason seems to rest in the antiquity and frequent reiteration of the assertion. Usually the reason must be determined indirectly by examining the criteria which the court uses in distinguishing governmental functions from proprietary functions. Insofar as a certain criterion is used as a basis for classifying the particular function as governmental, it must be understood as a reason for granting immunity to the municipality. Only infrequently does the court attempt a direct

[44] BEVERIDGE, UNEMPLOYMENT, A PROBLEM OF INDUSTRY, c. 1 (1931).

justification of the underlying principle. Those statements which do purport to justify the immunity of the state have their origin in the maxim "The King can do no wrong." The concept of sovereignty and the prerogative of the king seem to lie at the root of the spreading tree of governmental irresponsibility.[45] So eminent a jurist as Justice Holmes has denied that immunity of the sovereign is solely a result of a misconception of history. "A sovereign is exempt from suit," he said, "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."[46] I shall not dwell on this justification. It is clear that it does not reach the heart of the problem of determining whether the government has caused harm for which compensation should be made. It merely asserts that since the government makes the rules as to what conduct is wrong, its own conduct cannot be wrong. To such fiction, I cannot subscribe.

There is another justification for immunity which is frequently expressed. It is the argument that if the municipality is made liable for the torts of its agents it will interfere with the proper carrying out of municipal functions.[47] Thus, it may be argued that if the city is liable for each false arrest made by its police officers, it will lead officers to be unduly timid with a resultant lax enforcement of the law. If this conclusion were sound, it would furnish some justification for immunity. It is not clear, however, just why municipal operations will be hampered.[48] It would seem that the imposition of liability for torts would tend in just the opposite direction—to lead to a more careful selection of public officials. In a recent New York case,[49] a policeman, though reprimanded three times for excessive drinking, was kept

[45] Professor Borchard's able research leaves little room for doubt on this score. 34 YALE L.J. 1, 129, 229 (1924-5); 36 YALE L.J. 1, 757, 1039 (1926-27); 28 COL. L. REV. 577 (1928).

[46] Kawananakoa v. Polyblank, 205 U.S. 349 at 353, 27 S. Ct. 526 (1907). See also The Western Maid, 257 U.S. 419 at 433, 42 S. Ct. 159 (1922).

[47] Coolidge v. Brookline, 114 Mass. 592 (1874). In the leading case of Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788) the court stated that it is better that an individual should sustain an injury than that the public should suffer an inconvenience.

[48] In many cases, where the city seeks to reimburse an official who has been subjected to personal liability or to employ counsel to defend such official, the opposite conclusion is reached. Thus, in Cullen v. Carthage, 103 Ind. 196 at 200, 2 N.E. 571 (1885) the court concluded: "If it should be understood that the marshall of the town is left without support from the governing body, to defend himself against all manner of suits that might be instituted against him, the vicious and violent might, by a succession of annoying suits against him, greatly cripple the enforcement of the ordinances."

[49] McCrink v. City of New York, 296 N.Y. 99, 71 N.E. (2d) 419 (1947).

on the force, and while off duty and intoxicated, killed an innocent resident of the community. In imposing liability, the court declared that the city "may not with impunity retain in service an employee from whose retention danger to others may reasonably be anticipated."[50] Will such holding lead to deterioration of the police force? It is more likely that the potential liability thus imposed will operate to compel the discharge of dangerous or incompetent individuals. Indeed, in the long run, imposition of community responsibility would probably compel the citizenry to take a more active interest in municipal affairs generally. If so, better and not poorer government will result.

A third attempted justification rests upon the proposition that since the city derives no financial return from its governmental functions, it may not therefore pay any claims for harm resulting from them. In many cases, the absence of any revenue and profit is emphasized as a reason for classifying the function as governmental with a resulting immunity.[51] There may be instances of governmental subdivisions which are devoid of any assets or power to obtain money.[52] But is absence of profit a reason for denying responsibility? It would seem the greater political unit which is conducting its affairs through the medium of that subdivision should assume responsibility.[53] No one would suggest that the private individual should be responsible for negligent driving only when he is driving on an errand which will net him a profit or at least some revenue. Liability results equally from the careless driving of a commercial truck or of a pleasure car. The delivery boy and the Sunday driver are treated equally. The community derives equal benefit from the profit-making water works and from the police force. As a justification for immunity, the distinction is unsound.

Courts sometimes distinguish between those powers exercised for the benefit of the general public and those exercised for the local benefit

[50] 296 N.Y. 99 at 106.

[51] Cases are numerous. See 38 AM. JUR., Mun. Corps. §575.

[52] Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788).

[53] Cf. Bernardine v. City of New York, 294 N.Y. 361, 62 N.E. (2d) 604 (1945) where the court denies that the state by waiving its own immunity and that of its civil subdivisions has possibly laid itself open to responsibility for the wrongs of employees of the subdivision. The court states that "any viewpoint of that kind would be vain, since the argumentation that had been contrived as a front for the doctrine of governmental immunity did not survive the renouncement of that doctrine." Id. at 366. In other words, the court says that while the city may have been said to be acting as agent of the state in performing governmental duties, that statement was but a cloak to shelter the city within the state's immunity. When the immunity is gone, the fictional cloak disappears. But see Sanders v. State, 76 N.Y.S. (2d) 817 at 819 (1947) ". . . our jurisprudence may yet spread the ever widening waiver of governmental immunity from tort liability to the point where the State will be held to answer in damages for the acts of the employees of its civil divisions."

of the city. A complete answer as to the validity of such a distinction is made by Professor Borchard, who says: "The fact is that all functions performed by a municipality are for the public benefit, otherwise they could hardly be undertaken with public funds or by public officers. And it would seem to make little difference whether the group in whose name the officer acts or speaks is large or small. . . ."[54]

One final argument should be noted. It is frequently urged that in the exercise of judicial or discretionary functions the city should not be liable, whereas the negligent performance of ministerial functions should result in liability.[55] Here is the first premise which has an element of validity.

No society, so far as I am informed, has yet assumed the role of an insurer against all harm resulting from the turning of the wheels of government. When the city council determines that food which is unfit for human consumption must be destroyed, someone may suffer a loss, and few would suggest that in thus acting to preserve the health of the citizenry the municipality must pay for the destruction. When the city council reasonably determines that a zoning ordinance is required to foster proper municipal development and to prevent the onset of slum areas, few would say that the city must grant compensation to all those who may suffer loss. But those activities are nothing more than a determination of legislative policy, familiar examples of the police power, and, within the bounds of constitutional restrictions, that activity must be substantially unfettered. The actual process of legislating means, in part at least, determining the goals which will best serve the community as a whole, and the methods of achieving those goals. That is the obligation of the legislative body. It owes no duty to the individual except as the individual comprises part of the community. It may well be suggested, therefore, that no liability should ensue merely from the basic governmental action of determining legislative policy.[56] Quite different, however, is the case in which, after the city council determines that the existence of a particular condition is dangerous to public health, an over-zealous, an incompetent, or a

[54] 34 YALE L.J. 129 at 136 (1924).

[55] Many cases espousing this distinction are collected in 6 MCQUILLIN, MUNICIPAL CORPORATIONS, 2nd ed., c. 53, §2799 (1928).

[56] The term "discretionary function" is thus used here as synonymous with "legislative policy determination." It must be confessed that it is not always so narrowly construed in the cases which apply the distinction. See, e.g., Hines v. Charlotte, 72 Mich. 278, 40 N.W. 333 (1888) (failure to enforce ordinance held to be discretionary function); Rehmann v. Des Moines, 204 Iowa 798, 215 N.W. 957 (1927) (wrongful revocation of building license classified as discretionary function).

vengeful inspector destroys property in the guise of carrying out the legislative policy. Here the actual activity does not further, but rather hinders, interests of the community. Here a loss is suffered not in support of the will of the community, but because the person selected to enforce the will of the community acted negligently or perhaps wilfully to harm a member. Here, liability should be clear.[57]

Closely allied to the distinction between discretionary and non-discretionary activities is another distinction sometimes referred to by the courts. It is a distinction between discretionary and mandatory powers. Some courts will impose liability where the city has failed to exercise a "mandatory" power. Thus, where the charter grants a power to the municipality which can be said to impose a duty on the city to act, the city may be liable for a failure to act. Such mandatory obligations are thus subsumed under the category "non-discretionary functions" since the city cannot be said to be able to exercise discretion about something which the state has directed it to perform.[58] In some cases, however, it has been held that when the mandatory duty relates to a "governmental function" the liability of the city is limited to failure to act, and it will not be liable for negligence in performing the duty.[59] Indeed, some cases indicate that if the duty to act is imposed by the legislature, that is reason in itself for granting immunity to the city for negligent performance.[60]

Of all the lines thus drawn by the courts in support of municipal immunity,[61] then, only one constitutes a legitimate boundary which may be established in fixing the area of governmental responsibility. There may be, however, "inarticulate major premises" which also con-

[57] Judicial opinion is otherwise. It is a legislative matter to decide to build a city hospital, but it is not a legislative matter to place a patient of a city hospital in such a position that he contracts smallpox and dies. Yet the city is immune. Shawnee v. Jeter, 96 Okla. 272, 221 P. 758 (1923). It is a legislative matter to decide whether the streets should be sprinkled, but it is not a legislative matter to operate the sprinkler negligently. Yet the city is immune. McCrary v. Rome, 29 Ga. App. 384, 115 S.E. 283 (1923). It is a legislative matter to decide whether garbage collection shall be undertaken, but it is not a legislative matter to run the garbage wagon into a ladder injuring a workman. Yet the city is immune. Behrmann v. St. Louis, 273 Mo. 578, 201 S.W. 547 (1918).

[58] Johnston v. Chicago, 258 Ill. 494, 101 N.E. 960 (1913); Consolidated Apartment House Co. v. Baltimore, 131 Md. 523, 102 A. 920 (1917); Springfield Fire & Marine Ins. Co. v. Keeseville, 148 N.Y. 46, 42 N.E. 405 (1895).

[59] Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927). Cf., however, Harlan v. Parsons, 202 Ky. 358, 259 S.W. 717 (1924).

[60] See 34 HARV. L. REV. 66 (1920).

[61] The reasons discussed do not by any means represent all of the distinctions which courts have made, but it is believed that they do substantially cover the basic criteria which have been advanced.

stitute boundaries, and which require attention in determining a statutory basis for liability of the municipality. I should consider that a second boundary to be established in imposing tort liability must be this: a liability which is reasonably likely to result in municipal bankruptcy must be avoided.[62] One might go further: if there is any substantial possibility that imposing liability for a particular loss will bankrupt the city and cause cessation of all its services, then such liability must be avoided.[63] I am thinking now, for example, of imposing liability for fire loss resulting, perhaps, from a failure of the municipal fire department.[64] A conflagration might cause losses the payment of which would bankrupt the community. It has been suggested that such danger "is more apparent than real"[65] and it has also been suggested that we actually have no statistical data from which to make a determination.[66] We must either speculate or find the facts, and I thoroughly agree with Professor Lloyd when he urges that state legislative bodies are peculiarly fitted to make both the factual and policy determinations which are necessary preliminaries to establishment of a boundary for the area of liability which will properly safeguard the continuity of municipal services.[67]

While I am inclined to believe that the limits suggested above, that is, limits which will preserve freedom of legislative policy determination and which will insure the continuity of municipal services, would be sufficient, I am not prepared to say that a third limitation should not be considered. It is this: a limitation which will relieve the city from liability in some cases of non-feasance as distinguished from misfeasance.

[62] See Lloyd, "Municipal Tort Liability in New York—A Legislative Challenge," 23 N.Y.UNIV.L.Q. 278 (1948).

[63] Alternatively, a method must be devised which will spread the cost and the risk of such loss so that imposing liability will not cause the cessation of services. Perhaps the state could assume responsibility above certain amounts. Perhaps insurance programs could be devised to build reserves for such disasters as may occasionally arise.

[64] The danger of extensive loss in this instance has led many courts to extend immunity to the city. E.g., Springfield Fire & Marine Ins. Co. v. Keeseville, 148 N.Y. 46, 42 N.E. 405 (1895); Steitz v. Beacon, 295 N.Y. 51, 64 N.E. (2d) 704 (1945); Hughes v. State, 252 App. Div. 263, 299 N.Y.S. 387 (1937). There is an additional reason why liability should not be assumed for fire losses, even when the inefficiency or negligence of municipal agents is a causal factor. Private insurance against such loss is readily available at a cost which is generally not prohibitive for the individual owner.

In considering whether potential risk would endanger municipal finances, one might wonder whether the assumption of liability from damage resulting from mob violence would not constitute a heavy potential risk. Yet, such risk has not prevented the passage of numerous statutes assuming such liability.

[65] Warp, "Tort Liability Problems of Small Municipalities," 9 LAW AND CONTEM. PROB. 363 at 366 (1942).

[66] Lloyd, "Le Roi est Mort: Vive le Roi," 24 N.Y.UNIV.L.Q. 38 (1949).

[67] See supra, n. 63.

Such a distinction is difficult to make,[68] and if adopted might lead to an empirical treatment akin to that achieved under the governmental-proprietary dichotomy. It seems clear to me that if the city has been given discretionary power to establish, for example, a sewer system, no liability should result merely because the council chooses to refrain from exercising its discretion. Immunity in such case would flow from the limitation first suggested above—a limitation that would exclude liability for conducting the basic legislative process. It is equally clear to me that certain kinds of non-feasance should result in liability. For example, if the street department negligently fails to act to replace a red traffic light, and an accident occurs as a result, liability should follow.[69] But I am not so certain that the city should be liable for a loss resulting from a burglary, even though it could be demonstrated that the burglary would have been prevented had the police department assigned two patrolmen to the area rather than one and that any reasonable care in the police department would have resulted in the assignment of two men.[70] A failure to give police protection may under those circumstances be regarded as negligent omission, yet I hesitate to assert that the city should pay the loss.[71]

I can only suggest that when legislative action is contemplated, such a boundary to the area of liability must be considered.

There is, of course, a final boundary which must be marked. It consists of procedural safeguards to the city. Unless the city is to be imposed upon by stale claims, without any adequate opportunity to make a reasonably prompt investigation of alleged harms, requirements for giving notice to the city must be established.[72] The malingering claimant must be identified and thwarted. Perhaps administrative machinery for prompt non-judicial settlement of minor claims will be required.[73] Perhaps a special court must be established to avoid pos-

[68] Moore, "Misfeasance and Non-Feasance in the Liability of Public Authorities," 30 L. Q. REV. 276, 415 (1914).

[69] In New York, after a statute waived the governmental immunity, the state was held liable when the state traffic commission failed to replace a light.

[70] Cf. the reluctance of the New York court to impose liability upon New York City for failure to supply adequate police protection to prevent injury during a melee occurring at a municipal pier. Murrain v. Wilson Line and New York City, 270 App. Div. 372, 59 N.Y.S. (2d) 750 (1946), affd. 296 N.Y. 845, 72 N.E. (2d) 29 (1947).

[71] How far my reluctance is a result of a long conditioning process from reading assertions that failure of police protection is not a basis for liability because that is a governmental function, I cannot determine. Perhaps, also, I am influenced by the ease with which the individual may secure commercial insurance at reasonable cost.

[72] See suggested statutes in Borchard, "Proposed State and Local Statutes Imposing Public Liability in Tort," 9 LAW AND CONTEM. PROB. 282 at 299 (1942).

[73] David and French, "Public Tort Liability Administration: Organization, Methods, and Expense," 9 LAW AND CONTEM. PROB. 348 (1948); Fuller and Casner, "Municipal Tort Liability in Operation," 54 HARV. L. REV. 437 (1941).

sible jury prejudice, or else liability must be limited to actual damages.[74] Those are but details which must not be avoided or ignored if the pendulum is not to swing from the side of excessive irresponsibility to the side of excessive expenditures. They are details, however, which must be developed elsewhere and tailored to the individual needs of the community.

V

CONCLUSION

With the ever-increasing scope of municipal government activities, the possibilities of harm to the individual are correspondingly greater. The present legal doctrines which purport to define the area within which the municipality shall make recompense to the individual harmed are inadequate in at least two respects. First, they fail to achieve even an approximate degree of consistency in application because the distinction between governmental and proprietary functions is not founded upon any inherent quality of the various activities, but rather is generally used as a means of expressing a conclusion that immunity or liability should result in a particular situation. Second, the doctrines, as applied, do not correspond to current ideas of justice because they require the individuals who are harmed to bear a disproportionate part of the cost of enterprises undertaken for the benefit of the entire community. Adequate reformation can be achieved only by legislation. Legislation, like an efficient incinerator, can destroy completely the effect of the decisions which now perpetuate the doctrine of immunity. It must be legislation which will shift the basic approach to the problem; instead of having a general governmental immunity with certain exceptions, a general governmental responsibility with limited exceptions is needed. Those exceptions are to be determined not by reference to an outmoded dogma that "The King can do no wrong," but by reference to social interests which will be served by granting immunity. I have suggested what seem to me to be the fundamental interests to be protected by granting immunity: the preservation of freedom to determine policy; the preservation of continuity of municipal services; and possibly, the preservation of some discretionary power in municipal officials to refrain from taking affirmative action even though particular individuals may demand it. The list may be incomplete, but it may be sufficient to stimulate a realistic redetermination of the area in which municipalities are to assume responsibility for their torts.

[74] Fuller and Casner, "Municipal Tort Liability in Operation," 54 HARV. L. REV. 437 (1941).