CAPACITY TO BEAR LOSS AS A FACTOR IN THE DECISION OF CERTAIN TYPES OF TORT CASES

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INTRODUCTION

Is the ability—the economic capacity—to sustain the loss one of the major factors in the decision of cases? This question might be asked with reference to litigation in various types of factual situations, without suggesting that it is the only basis upon which cases are decided. It is proposed in this paper to examine a number of decisions, representing certain types of cases frequently arising in the field of torts, in which damages have been recovered notwithstanding theories or doctrines which in many instances of the same sort have been referred to by the courts as reasons for denying recovery. If the plaintiffs are being permitted to recover in tort cases, and such recovery is allowed or approved by appellate courts, notwithstanding the doctrines which are invoked to the contrary, why is this so? What factors enter into the process of judgment with sufficient power to defeat the application of the traditional rules of law? If the law is against the plaintiff, how and why does he have judgment?

During a part of the Nineteenth Century, and until relatively recent years, there was much legal writing as to the nature of law, which indulged in speculation as to whether judges, in the process of deciding cases, make law or declare law. This inquiry,
by contrast with much of the writing of today, might not unreasonably be compared to the conundrum as to which came first, the hen or the egg. But the question will not down as to why the judges do decide one way rather than the other in a particular case. Indeed, is not this question kept ever open by the activities of the courts themselves? Can one browsing through the decisions upon a particular topic over a considerable period escape the observation that frequently a case is decided in a certain way, whereas other cases—so similar as to be referred to as "on all fours" with it—have been decided the other way? Are there many situations as to which the rule is so well settled that no contradictory decisions can be found? Does the fact that "the rule appears to be well settled" on a particular point today offer any assurance that it will remain so?

A case arises for judgment, and no precedent is brought to the attention of the court, of sufficiently direct application to the precise fact situation to be considered controlling. The court delivers an opinion giving a rationalization of that decision. Does that opinion express and weigh and evaluate all the factors which enter into it? To do so would be impossible. All the factors which operate upon the conscious mind of the judge might conceivably be referred to, but they usually are not. Even so, is it not indeed impossible to determine from the opinion what other factors may have subconsciously influenced the decision? The factors present in the minds of judges making decisions are not constant. Professor Green has suggested a classification of them as applied to the determination of duty in negligence cases—a classification including types of factors which are presumably among the most constant. He names them as follows: (1) The administrative factor, (2) the ethical or moral factor, (3) the economic factor, (4) the prophylactic factor, and (5) the justice factor.¹

¹ Green, The Duty Problem in Negligence Cases (1928) 28 Col. L. Rev. 1014, (1929) 29 Col. L. Rev. 255. See also Green, The Rationale of Proximate Cause (1927) 3. See also, in general, ibid. c. 4.

In the Columbia Law Review article, supra, Mr. Green has indicated the duty problem as being the fundamental determination which the judge must make in a negligence case. As he puts it, the court must determine whether the state affords its protection to the plaintiff's interest here involved, as against the hazard which has, in the instant case, so violated that interest as to cause damage.
There are many contributing factors in the process of judging that cannot be named, but certain ones which appear frequently may be noted as suggesting classifications. It is submitted, however, that capacity to bear loss is one factor in determining the existence of a duty on the part of the defendant in at least some negligence cases, and an endeavor will be made to show that this is so. Very rarely is this expressly referred to, and only occasionally by inference, but it is believed that it nevertheless speaks with a still small voice in the results which have been reached in a number of cases.

The factors which enter into passing judgment do not all tend toward the same end; they represent divergent, even conflicting, interests. There has been frequent reference in the last few years to the “balancing of interests”. In every case there are the interests of the parties, which are at least in some respects in conflict, and there is the social interest. Judging involves a reconciliation of these interests. Indeed, what is law but a scheme of social control which aims by its judgments to reconcile interests? Hence the function of judging is not performed solely with reference to the particular facts and parties. The decision of a case involves the more complex process of considering the factors which will dispose of the particular case as satisfactorily as possible, without violating the sanctions by which society controls its members—not only formal legal sanctions as administered in the courts, but custom, etc. The societal sanctions tend to indicate, though not always clearly, what interests are to be protected, and a standardization of legal duty then comes into existence. The process is simply this: as repeated fact situations arise, the court aids itself in weighing and applying the factors which must enter into its decision by reference to past decisions. So, in time, duty becomes standardized as to that situation. When other fact situations somewhat less similar arise, the court, faced with a conflicting consideration, again refers back and rationalizes another opinion by analogy. Thus generalizations develop.

It seems to the author that this tendency toward standardization

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² Pound, The Spirit of the Common Law (1921) 189. "There is a strong and growing tendency, where there is no blame on either side, to ask in view of the exigencies of social justice, who can best bear the loss."
of duty is society's effort at a natural selection of those interests which it desires to protect. As yet it has great imperfections. This process of growth or development of standards of duty by analogy has a great weakness. As one stone is fitted to another, it may fit snugly against its immediate neighbor and yet the whole may constitute anything but a symmetrical pattern.

Another weakness of this selective effort at standardization is that it proceeds by analogy and induction toward something static, in a social environment which is not static. A rule of law expressing a duty in particular cases is built up by syllogism, upon premises founded in social sanctions, and before it is complete its premise is carried away by the ebb or flow of social philosophy, which creates and protects one interest only to discard and condemn it at a later period.

But what has all this to do with the suggestion that capacity to bear the loss is a factor in the decision of certain types of tort actions? Perhaps this, that “capacity to bear the loss” is just another phrase—another word-symbol. Justice, society's conscience, or whatever it is, conforms like the shape of the jelly fish or the color of a chameleon to the stimuli which reach it. The “humanitarian” social conscience of today is apparently much more concerned with the poor devil who gets injured by our modern devices than was the social conscience of the Victorian period. So it is that the social concept of what is the end or purpose of law seems to be changing, and a new concept finds its place in the law, as the courts determine new duties calculated

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3 What has happened in the last two or three decades in the master and servant cases is an excellent demonstration of this. See Mr. Green's discussion of this, (1929) 29 Col. L. Rev. 255-263.

4 The mechanization of life has created dangers unknown and unanticipated in the period when the rules or formulas of the law were being cast into the forms in which they have come down to us, and when the courts were stating the generalities about duty, which have subsequently been referred to as “principles” and which later courts have employed deductively in the decision of similar cases. However, the impinging of the social consciousness upon the judge as a man has and does modify his conservatism and his traditional adherence to stare decisis. The changing point of view has come not only because of new hazards in life, but because there are new economic and political concepts. It is in part a reaction to representative government, to more widespread education, and to general prosperity. We have the greatest prosperity for the whole mass of the people ever known in history. There is a general sense of well-being and an expansiveness of spirit that wants to share the general prosperity with the other fellow, rather than leave him unaided after an accident.
to protect interests not previously recognized as protected by existing rules of law. That is to say, from time to time judgments are given in favor of plaintiffs who have suffered harm through the operations and activities of other persons or groups, and who are enabled in this way to shift the burden of the loss incurred.  

Since cases indubitably are being decided from time to time with results contrary to earlier cases where the objective situation is equivalent, and, since social duty concepts are so changing as to bring this about, is it fair to suppose that such a factor as capacity to bear the loss may be contributory to the formulation of new rules of legal duty?

It is now proposed to go more particularly into some specific cases in an effort to discover some of the factors which have entered into the decision of tort cases and to determine whether there may be discerned in the opinions any indication that some account was taken of capacity to bear the loss involved. If there is any guiding principle as to who can best bear loss, it would seem to be that it is the party who can absorb it with the least injury to himself and in such a way as will produce a minimum of consequential problems of social adjustment for himself or his dependents. References to this may be noted in many cases and will be pointed out in connection with the cases later discussed.

The defendant upon whom is placed the burden of a money loss in a tort action may distribute the loss by insurance or by adding it to the cost of carrying on his business; in either

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6 This study must necessarily refer to instances in which the judge has apparently taken into account the capacity to bear loss. Few would doubt that the jury is frequently influenced by this consideration. The trial judge has expressed his reaction to this as well as to the other factors which make up his concept of the duty involved in the case, when he determines whether or not the issue shall go to the jury, when he rules on motions in the trial, when he instructs the jury, and when he rules on motions for judgment, new trial, etc. The appellate court is confronted with the same problem of judging when the case reaches it on review.

case it is distributed ultimately upon society. In so far as society approves this distribution of loss, it would seem that it is admitting its ultimate responsibility for injuries which arise out of a civilization of increasing social interdependence.\(^8\)

As has already been stated, one does not find in the reported decisions very frequent reference to the distribution of risk or capacity to bear loss as a basis for the result reached. Occasionally it may be rather clearly inferred from statements in an opinion, but usually it must be read from the result itself, by comparing that result with the conclusions expressed in other cases involving objectively equivalent fact situations. The courts have rationalized their decisions in most of these cases by resort to various of the accepted theories, doctrines, and formulas. Without abandoning what Professor Green calls "the theology of negligence",\(^9\) they have found it possible to place responsibility on defendants for harms unimagined by the judges who first formulated these doctrines, although the doctrines invoked were the rationalization of decisions which denied recovery and left the loss with the plaintiff who had sustained it.\(^10\)

\(^8\) In many ways society assumes responsibility for the mistakes, accidents, and misfortunes which have come to be ascribed to imperfect social adjustment. This appears as "welfare legislation", and publicly supported institutions for various types of handicapped or "under opportunitied" persons, especially children. These are supplemented by privately supported institutions and societies for relief, prevention, and propaganda; by state and city departments of preventive medicine, crime prevention and fire prevention departments, and there is widespread support of, and participation in various "drives", "campaigns", and other schemes in aid of the social work organizations.


\(^10\) Is not social evolution in various lines of thought accomplished by processes of this sort? It may be observed that in recent years various religious denominations, with orthodox creeds and articles of faith which are still formally subscribed to, have found room within their folds for men and women whose personal beliefs would have made them anathema to both church and state when those creeds were formulated.

No better illustration of this curious mental process could be found than the one Dean Pound has borrowed from *Mark Twain's Tom Sawyer*. In *The Spirit of the Common Law*, supra note 2, at 166, Dean Pound tells us how Tom Sawyer insisted on digging Jim's way to freedom with a case knife; but, when he was sufficiently discouraged with this process, he was willing to use a pick axe as long as it was called a case knife. Then, by way of comment, he gives us this brilliant paragraph:

"Tom Sawyer had made over again one of the earliest discoveries of the law. When legal tradition prescribed case knives for tasks for which pick axes were better adapted, it seemed better to our forefathers, after a little vain effort with case knives, to adhere to principle but use a pick axe. They granted that
That the courts are imposing a stricter standard of duty upon manufacturers and dealers in case of injury to consumers of their products, may be readily observed. The writer has endeavored in a previous article to show that this development has brought a new duty standard within the traditional negligence formula of "due care under the circumstances", and, at the same time, demonstrates the tendency of the courts to distribute the loss when harm results to consumers or users of defective products. This is accomplished when the injured consumer recovers money compensation from the manufacturer or dealer, who in turn must adjust his business to absorb this charge. It would appear that, by decisions in cases of this type in recent years, the courts are establishing new standards of social responsibility for manufacturing in much the same way as was done with common carriers some years earlier. Among tort cases of this type, McPherson v. Buick Motor Co. is familiar as one of the decisions indicating judicial recognition of a newer social consciousness as to the duties of manufacturers.

The decisions in McPherson v. Buick Motor Co. and other cases involving manufacturers have, of course, been readily ration-
alyzed in terms of the established formulas of the law of negligence, but they do, nevertheless, define duties not regularly recognized a few years earlier. This is typical of the somewhat epoch-making decisions which attract marked attention as being the first, or at least the first well-expressed, judgments in which certain fact situations are judicially recognized in explicit language, as involving conduct on the defendant’s part which has come to be so clearly regarded as anti-social by contemporary standards as to demand legal responsibility for its consequences. It is also noteworthy that a great many of the modern tort decisions of this sort involve fact situations totally unknown to judges, juries, or anyone else a generation or more ago; and it is only as the relation of these things to society becomes apparent through experience, that the correct “social engineering” will be worked out for handling the “stresses and strains” upon the legal structure which their incorporation therein involves. Thus, we find in the books today a large and increasing number of decisions which show judicial recognition of the social necessity of imposing a very exacting degree of responsibility upon the manufacturers of machinery for the proper functioning thereof, because of the many and disastrous harms which may result from an improper functioning.

Before the days of mechanical locomotion, the number of injuries to persons travelling on highways was negligible as compared with present conditions. The occasional injury of a pedestrian run over by a vehicle, or of a passenger thrown from a poorly-built carriage, was not frequent enough to constitute a

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25 In view of the controversy as to whether negligence is objective or subjective the word “conduct” is perhaps not broad enough. It is not intended to confine its meaning to that which is objective, nor on the other hand to affirm that negligence may include subjective elements. See Edgerton, Negligence, Inadvertence and Indifference; the Relation of Mental States to Negligence (1925) 39 Harv. L. Rev. 849. Seavey, Negligence—Subjective or Objective? (1927) 41 Harv. L. Rev. 1; Terry, Negligence, op. cit. supra note 14, at 40.

26 Proximate cause as a legal theory is not a part of the present inquiry. Before the defendant will be held responsible there must of course be a causal connection in fact, and the court, by its decision in favor of the plaintiff, or by determining that the case should go to the jury, must have held that there is a legal duty sufficient to constitute legal cause in the particular case. See Green, The Rationale of Proximate Cause, supra note 1; Bingham, Some Suggestions Concerning “Legal Cause” at Common Law (1909) 9 Col. L. Rev. 16; Book Review (1927) 41 Harv. L. Rev. 939; also Green, Are There Dependable Rules of Proximate Cause? (1928) 77 U. of Pa. L. Rev. 601.
social phenomenon. The fact that injured persons must bear losses did not loom large enough in the public opinion to be a social problem.17

The extent to which the person who is responsible for the operation of a machine may be liable to him who is hurt by the machine is still uncertain. Evidences of a tendency to shift and distribute the loss are appearing from time to time in diverse forms. This tendency may take the form of a greater development of liability without fault. The courts may find it just as easy to place a legal responsibility upon the man who brings a dangerous force upon the highway, in the form of an automobile weighing thousands of pounds and capable of going eighty miles per hour, to keep it under control at his peril, as to fix this degree of responsibility upon the man who brings upon his land a substance which, if it escapes from his control, turns into a dangerous force.16 Or this tendency may produce legislation requiring every car operated on the public highway to be covered by liability insurance.19 This has already been judicially declared a proper exercise of the police power.20

That this whole approach to the problem is quite the antithesis of the individualism which characterized the law in the Eighteenth and Nineteenth Centuries, will be very generally realized, particularly if the policy of distributing loss is reduced

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17 The development of legal rules as to responsibility in tort for defective vehicles has accompanied the evolution of machine transportation. It may be traced in outline through three cases: Winterbottom v. Wright, 10 M. & W. 109 (Eng. 1842), which is the foundation of the doctrine that a coach manufacturer is not liable to a user of his product injured by a defect therein, in the absence of privity of contract; Huset v. Case Threshing Machine Co., 120 Fed. 865 (C. C. A. 8th, 1903), in which is traced the gradual attenuation of the rule through its exceptions; and finally McPherson v. Buick Motor Co., supra note 14, where it is abandoned in favor of a direct application of a duty theory worked out in terms of negligence, completes the story.

18 Fletcher v. Rylands, L. R. 3 H. L. 330 (Eng. 1868); and see Bohlen, The Rule in Rylands v. Fletcher (1910) 59 U. of Pa. L. Rev. 298, 373, 423.

19 See articles by Marx, supra note 7.

20 Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925); Opinion of the Justices, 81 N. H. 566, 129 Atl. 117 (1925). These statutes were not intended to increase or change the basis of legal responsibility of automobile owners, but only to secure against financial irresponsibility, see Note (1925) 35 Yale L. J. 110.

W. O. Douglas, in his article, supra note 7, at 591, discussing various applications of liability insurance as a risk-shifting device, says of it: "It has such flexibility that it can be used whenever a court decrees liability."
to such terms as compulsory insurance, providing compensation
to all persons injured by automobiles, irrespective of fault. It
will follow from this that the many careful drivers will bear an
equal burden with the careless ones who actually cause injury.
This would indeed be a socialized, as contrasted with individual-
ized, justice. Changes such as this come about only when they
are recognized as social necessities. The fundamental problem
is not one of law, but of social adjustment, with law used as one
of the means for its accomplishment.

After all, as already implied in this article, certain factors,
not in terms referred to as propositions of law, are nevertheless
considered by courts in deciding cases. Consciously or uncon-
sciously, social policy and contemporary ethical and political
philosophy are factors which play some part in the decisions of
cases in the courts. This has not only been referred to by com-
mentators on jurisprudential questions, but is also recognized in
those decisions which refer to public policy.²¹

Probably the great outstanding step in the process of shifting
loss arising from personal injury has been the enactment of legis-
lation dealing with workmen's compensation. Various statutes
and decisions have accomplished like results in other types of
situations. In particular have railways, both by statute and deci-
sions, been required to bear losses which the "theology of negli-
gence" alone had not placed upon them.²² The same process is
perhaps not so nearly complete in connection with any other en-
terprise, but it has progressed to varying degrees in connection
with some types of physical harms to interests of personality.
Thus, line upon line, precept upon precept, a rule of law comes
into full recognition and a new social policy has won its way.

²¹ Pound, Functions of Legal Philosophy, 35 et seq.; Cardozo, The
Nature of the Judicial Process (1921); Cardozo, The Growth of the
Law (1924).

²² "The philosophical habit of the day, the frequency of legislation and
the ease with which the law may be changed to meet the opinions and wishes of
the public, all make it natural and unavoidable that judges as well as others
should discuss the legislative principles upon which their decisions must always
rest in the end, and should base their judgments on broad considerations of pol-
icy, to which the traditions of the bench would hardly have tolerated a reference
fifty years ago." Holmes, The Common Law (1881) 78.

Rev. 256, n.
CHARITIES

The rule that charities are not liable for the torts of their servants, at least toward beneficiaries, is still well established; but, as I have previously tried to show,23 the theories underlying this rule are wholly illogical. Newer ones, which have been advanced in recent years to account for certain exceptions which destroyed the value of the earlier theories, are equally unsatisfactory. A few decisions have recognized the inherent injustice of the old doctrine and have imposed liability; some expressly recognizing the social desirability of distributing the loss in such cases.24

MUNICIPAL CORPORATIONS

The question of governmental liability in tort, in its various aspects, has been minutely examined and discussed by Professor Borchard in a series of rather recent articles,25 and the same topic is the subject of an article by Mr. Barry.26 In cases where the ordinary rules of tort liability have come into conflict with the law of municipal corporation, the courts for the most part have denied recovery for physical injuries to person or property, inflicted by the agents or servants of a governmental agency. A municipal corporation, in such cases, is said by the courts to be a governmental agency or not a governmental agency, according to the function in the performance of which the harm was done. Here is one field in which, according to strict legal tradition, capacity to bear loss has been permitted to play no part in the question of whether or not liability should be imposed. Indeed, not even fault is considered. Once granted that the harm arose in connection with the performance of a governmental function,

24Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 175 N. W. 699 (1920); Geiger v. Simpson M. E. Church, 174 Minn. 380, 219 N. W. 463 (1928); Glavin v. Rhode Island Hospital, 12 R. I. 411 (1880) (specifically overruled by act of legislature); dissent in Bachman v. Y. W. C. A., 179 Wis. 178, 191 N. W. 751 (1923).
26Barry, The King Can Do No Wrong (1924) 11 Va. L. Rev. 349.
the courts have declared that there could be no recovery. It has made no difference, of course, that the negligence of the servant of the municipality occurred strictly within the scope and course of the master’s affairs. Nor has it made any difference that negligence was admitted. The presence or absence of fault on the plaintiff’s part has been entirely immaterial. Indeed, probably the majority of cases in which this point has been decided have been determined upon demurrer to the plaintiff’s declaration.

The doctrine of governmental immunity from liability for tort has become firmly intrenched in precedent, and it will only with difficulty be overthrown. However, so monstrous has it become in this age,27 that, notwithstanding the continuance of certain factors of the judicial process in its favor, it has failed to stem the tide of changing moral and ethical concepts which has turned so strongly in the opposite direction. The result is that many cases have been decided in recent years in which municipalities have been held liable for injuries to property and person, which could very reasonably have been brought within the usual reasons for immunity. In short, the moral and justice factors are preponderating over the administrative factor in the application of the judicial process to these cases; so that the injured citizen who has been run over by a negligent and financially irresponsible municipal servant, instead of being thrown out of court on the ground that the city garbage hauler is exercising the royal prerogative and performing a governmental function, is occasionally permitted to tell his troubles to a jury of his fellows.28 As a recent writer has said:

27 Borchard, 28 Col. L. Rev. 734, concludes on page 775 with this sentence: “Whether that responsibility is justified upon grounds of private law or public law seems immaterial. The important point is, that in the light of the far greater advances in theory and practice evident in Europe, we at least might be prepared to take the mild step of instituting government responsibility in tort.”

28 Pound, op. cit. supra note 2 at 185: “Indeed fundamental changes have been taking place in our legal system almost unnoticed, and a shifting was in progress in our case law from the individualist justice of the 19th century . . . to the social justice of today. . . . Eight noteworthy changes in the law in the present generation, which are in the spirit of recent ethics, recent philosophy and recent political thought, will serve to make the point. . . . Seventh, we may note an increasing tendency to hold that public funds should respond for injuries to individuals by public agencies; that the risk of injuries to individuals inherent in the operations of government are not to be borne exclusively by the luckless individual on whom loss happens to fall.”
"The result is that it is impossible to formulate any general rules as to what will, and what will not, impose liability on a municipal corporation."\textsuperscript{29}

There are hundreds—probably thousands—of cases which deny the liability of a governmental agency for the negligent acts or omissions of its employees. Such was the almost universal rule until the last few decades, and even today there are many cases reported each year from courts of last resort in which the orthodox result is still reached. These cases rest their result on the usual theory that the city, county, etc., was exercising a governmental function, and hence, as the Connecticut court said, "enjoyed governmental immunity from liability for the act of alleged negligence."\textsuperscript{30} The use of the word "enjoyed" in this connection is doubtless intended to be taken in its more colorless sense, but one can easily shudder at the thought of that impersonal ogre, the state, or the municipal corporation, in its enjoyment at the sight of the babies drowned in the swimming pools of Kansas\textsuperscript{31} and Connecticut,\textsuperscript{32} or blown up with dynamite caps in the municipal stone quarry of Kentucky.\textsuperscript{33} But, instead of looking at the many cases which uphold governmental immunity from responsibility, it is proposed to look at some of the recent cases, comprising a growing list, in which the courts are finding the way to rationalize decisions in favor of persons injured by governmental enterprises of one sort or another.

Defective highways are the source of a great deal of litigation in which governmental agencies, municipal corporations and quasi-corporations are sued for physical injuries to person or property.\textsuperscript{34} There is surely nothing less governmental about the

\textsuperscript{29}Note (1927) 4 Wis. L. Rev. 244.
\textsuperscript{30}Hannon v. The City of Waterbury, 106 Conn. 13, 136 Atl. 876 (1926).
\textsuperscript{31}Warren v. The City of Topeka, 125 Kan. 524, 265 Pac. 78 (1928).
\textsuperscript{32}Hannon v. The City of Waterbury, supra note 30.
\textsuperscript{33}White v. The City of Hopkinsville, 222 Ky. 664, 1 S. W. 1068 (1928).
\textsuperscript{34}The word "municipalities" is used herein as referring to both incorporated and unincorporated local governmental units, of general or special powers. It is recognized that the prevailing rule makes a municipality which has been incorporated liable in tort for defective highways and for torts arising out of its activities which are said to be "non-governmental", or "corporate", or "business" functions. Counties and other quasi-corporations, on the other hand, are, by the
function of maintaining streets, roads, bridges, and the like, than in carrying on hospitals, schools, parks, playgrounds, street cleaning, garbage removal, and many other activities in which cities are nowadays commonly engaged. Yet as to injuries arising from defective ways, legal responsibility is generally recognized. In some jurisdictions there is common law liability in this respect, and, where this is not so, it is rather generally imposed by statute.35

Various theories have been announced as explaining this special rule as to defects in highways,36 none of which can be very satisfactorily reconciled, in point of legal theory, with the general rule of nonliability. In the article by Professor Borchard,37 this feature of the problem of municipal tort liability is discussed and many cases collected. It seems worth noticing that in the early history of municipal corporation law most of the tort actions against municipalities had to do with defective ways, for the simple reason that the municipalities of that time did not engage in the majority of the functions now regularly undertaken. The city of earlier times did not maintain fire departments or hospitals. Street cleaning, garbage disposal, and ash removing was done at the expense of individuals or not at all. The opportunities for a city’s employees to come in contact with the inhabitants, under circumstances involving the possibility of harm, were few. The simplicity of community life was such that seldom was a citizen injured by the instrumentalities operated by the city. The relation of the citizen to his local government was close. He was in very truth a part of it. His friends and neighbors were both its governors and its servants. Its revenues were small, and it had no money with which to pay judgments in case they might be recovered against it.

This social need for the rule of nonliability no longer exists. The cities are on a firm basis and are charged with tremendous

35 Borchard, Governmental Liability for Tort (1925), 34 Yale L. J. 229, 250 n. for collected cases. See 7 McQuillin, op. cit. supra note 34, § 2900.
36 Shigley v. Waseca, 106 Minn. 94, 118 N. W. 259 (1908).
37 Supra note 25.
powers; and they are engaged in many activities which constitute a menace to the rights of the individual, and under certain circumstances deprive him of his safety of person and property. Under more primitive conditions the traditional sovereign immunity did not so often nor so severely outrage justice, and so it was not noticeably repugnant to social conscience.

Probably the social morality of the day approved the statement of Ashhurst, J., in *Russell v. Men of Devon*, in 1788, in holding a county not liable for injuries resulting from a defective bridge, when he said: "... it is better that an individual should sustain an injury than that the public should suffer inconvenience." So when *Russell v. Men of Devon* was decided, and for a century thereafter, there were factors entering into the decision of tort actions against municipalities which, under the philosophy of the day, naturally enough preponderated over the interest of the injured plaintiff. The factor of administrative difficulty was doubtless enough to settle *Russell v. Men of Devon*. At that time there was the economic difficulty of giving judgments against public corporations unable to pay them, and this continued until their powers in relation to finances had been worked out more fully. Finally, the whole concept of social responsibility to the individual handicapped by injury was undeveloped. This concept had no place in the individualistic philosophy of the Georgian and Victorian periods of English law.

The modern state has assumed the responsibility of alleviating the misfortunes of the handicapped. It cares for the sick; it seeks to prevent disease; it grants mothers' pensions; and it provides special occupational training for the handicapped citizen, whether he be blind, deaf, or dumb. It even supplies entertainment and recreation. It does all these things for its people who are under par and unfit for the economic struggle, without asking, "Did this man sin, or did his father before him?" Yet such

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58 Note (1920) 7 Va. L. Rev. 383, 389.
59 16 East. 305 (Eng. 1788). The remark from the opinion of Ashhurst, J., must, however, be regarded as dictum, since the opinion points out that the men of Devon were not a corporation and hence could not be sued as such; further, that they had no corporate or common funds which could be used to pay a judgment in such a case.
is the conservatism of the law that it will not compensate the citizen who is injured and maimed for life by the negligence of its servants. Not only does the city refuse to compensate the victims of its negligence, but it maintains a staff of legal representatives equipped to resist the efforts of its citizens to collect compensation through the courts.

Since it is generally settled that municipal corporations are liable for injury due to defective highways, that type of case will not be considered in detail at present, although it may be interesting to examine cases dealing with injuries in connection with sidewalks or other premises, as to which the abutting owner, as well as the city, may be sued, in order to determine whether there is any greater tendency to impose liability in case the city is the defendant, than when the private owner is sued. Another interesting question arises when a defective highway combines with an instrumentality performing a traditionally governmental function, to produce a personal injury.

In Cone v. Detroit the plaintiff's decedent was killed by the overturning of a fire truck which struck a hole in the pavement. The deceased was standing in a recessed store entrance at the time. The issues of fact were found in favor of the plaintiff and judgment was given in her favor. The defendant city, on appeal, raised the point that the accident was really a consequence of the performance of the governmental function of fire prevention. The court dismissed this contention briefly, simply pointing out that the plaintiff had based her case, not upon any negligence in the operation of the fire truck, but solely upon the question of negligence in the manner of keeping the street.

The interesting thing about this case is that the court, had it been of the opinion that the plaintiff should not recover, had at least three chances so to decree. It might have held that this was not a foreseeable consequence of the defective pavement; that is, that the hole in the pavement was too remote a cause, and

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40 191 Mich. 198, 157 N. W. 417 (1916). The liability for injuries due to defective streets was based upon a statute which extended the duty of maintaining safe streets to persons on the highway. It is pointed out by the court that the plaintiff was in the doorway of a store and not really on the street, but as that point had not been raised in the record the court refused to consider it.
that the operation of the fire truck was an intervening independent cause, and, as this was governmental, the plaintiff could not recover. Or, it might have pointed out that under the statute the duty which the city owed to travellers, in regard to the safe maintenance of the street, was limited to persons on the street; and hence that, even though the hole in the pavement was the proximate cause of the injury, the deceased, standing where he was, did not come within the duty imposed by the statute. But the court held that the statute clearly protected the interest violated here, and imposed a duty on the city to keep the streets in such condition as to protect travellers from the hazard of having fire trucks upset upon them. It treated the recessed entrance to a store as a part of the highway, so as to bring the personal safety of persons standing there within the protection afforded by the statute, as against the hazard of vehicles overturning due to a defect in the street.

The duty of the city being of such a nature, and the jury having found the causal connection in that the evidence showed the hole to be deep enough to throw the fire truck, the plaintiff's case is made out. Hence it is immaterial that the vehicle happened to be a fire truck rather than a privately owned business truck, and the city is made responsible, not for its truck, but for its street.41

It is almost universally said that a quasi-corporation, such as a county, is entirely immune from tort liability except as affected by statutes. In spite of this rule an occasional decision imposes liability.

In Young v. Juneau County42 the plaintiff alleged that his building had been destroyed by fire started by sparks from a steam

41 That a city is liable to a fireman thrown from a fire truck by reason of a hole in the street, see Coots v. City of Detroit, 75 Mich. 628, 43 N.W. 17 (1889), wherein it was held that the statutory duty to keep streets in a safe condition extends to firemen. Also that plaintiff as an employee of the city fire department did not assume the risk of defective streets.

Similarly as to a volunteer fireman, see City of Austin v. Schlagel, 257 S.W. 238 (Texas 1924). In finding this duty owed to a volunteer who jumped on the wagon the court said he was an invitee. There was a dictum that the city would not be liable where an injury was due to the negligence of the driver of the fire wagon.

42 192 Wis. 646, 212 N.W. 295 (1927). See Note (1927) 4 Wis. L. Rev. 244.
shovel belonging to the defendant county and used in taking gravel from a pit owned by the county and adjoining the plaintiff's property. The plaintiff also alleged that the defendant was negligent in using a defective boiler not properly equipped. The county, relying on the rule of governmental immunity, demurred. This was overruled in the trial court, and the order was affirmed by the Wisconsin Supreme Court. The opinion quotes from Professor Borchard's article, and by inference indicates a disposition to be dissatisfied with the orthodox rule of nonliability. However, without openly repudiating the orthodox rule, the court finds a way to rationalize a decision consonant with its sense of justice under the circumstances. It says, quoting from a prior decision:

"The decisions of this court fully sustain the principle that, while a municipality is not held liable for damages resulting from mere performance of governmental functions, such exception applies only when the city's relation to the injured person is governmental, such as a traveler on the highway, but not when the relation to the injured one is that of a proprietor."

The court also says:

"It is not necessary to hold that the defendant maintained a nuisance. If as an adjoining proprietor it violated a legal duty owing by it to the plaintiff, liability follows just as in the case of Bunker v. Hudson".

The court points out that the case is decided differently than it would have been upon the precedents in most other jurisdictions, and shows its hand when it says:

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44 Matson v. Dane Co., 172 Wis. 522, 179 N. W. 774 (1920). The court, by its language here quoted, would seem to have abandoned or overlooked for the moment the distinction between a true municipal corporation and a county, since it uses a reference to one as authority for applying the same rule to the other.
45 122 Wis. 43, 99 N. W. 448 (1904), was an action against a city for piling earth in building a grade so that the earth used in the filling extended upon the plaintiff's property. It is well settled that an appropriation of the property of another by either a municipal corporation or a quasi corporation, or even by the state itself, is not governed by the rules applying to torts generally, but is treated as a "taking" of private property for public use without compensation. See 43 C. J. 1126 et seq.; 6 McQUILLIN, supra note 34, at §§ 2871-2886.
CAPACITY TO BEAR LOSS IN TORT CASES

"We see no reason in justice or morals why a group should not be liable to one to whom its agents have done injury when a member of the group would be liable if he had done the same injury to another member of the group. Multiplication of the number of those who are responsible for a wrong ought not to establish immunity. . . . The trend of statute and decision seems to be in the right direction".40

The whole tone of Judge Rosenberry's opinion, the citation of actions involving cities as authority in a case against a county, the ignoring of the usual distinction, the references to Professor Borchard's articles, indeed, some of the specific language employed, all point to the outraged sense of justice which impelled the court to this result. The group referred to by the court, has, by its servant, caused the loss; the group surely can best bear that loss.

It would be hard to find another recent case dealing with the tort liability of a city which has enjoyed more notoriety than Fowler v. Cleveland,47 decided in Ohio in 1919, in which the city was held liable for injuring a person who was run down by a negligently driven fire engine returning from a fire. As pointed out by Jones, J., in the dissenting opinion, this result was contrary to almost all of the previous decisions in this country. That the operation of a fire engine is a governmental function has always been given as the reason for denying recovery in such cases.48 There were, however, a few decisions showing a tendency to break away from this rule. One of these was Opocensky49

40 In the Juneau Co. case the court refers to the Michigan case of Alberts v. Muskegon, 146 Mich. 210, 109 N. W. 262 (1906), in which it was held that city was not liable for burning the property of an abutting owner by sparks from a roller with which its employees were repairing a street. In that case recovery was denied because of the governmental immunity theory. The Wisconsin court refers to the Michigan case as representing the "opposite" doctrine, and, in speculating as to its own doctrine, says: "We recognize that the rule as established in this state, if pushed to the extreme limits might produce curious results. Suppose, by the explosion of a road roller operating upon the streets because of negligent management of it by the municipality's servants, a traveller's load of hay is set on fire and an adjoining proprietor's building is ignited. Apparently in one case there would be liability and not in the other because of the difference in the relationship of the two injured parties to the municipality."

47 100 Ohio St. 158, 126 N. E. 72 (1919), 9 A. L. R. 131 (1920).

48 See Note (1920) 9 A. L. R. 143, and especially Frederick v. Columbus, 58 Ohio St. 538, 51 N. E. 35 (1898), expressly overruled by the Fowler case.
v. South Omaha, decided in 1917. In this case an automobile belonging to the fire department, while being driven by a city employee on city business, ran into another car and injured the plaintiff. The court overruled the city's demurrer, and, without discussing specifically the rule of governmental nonliability, said that the city automobile, not being on emergency business, violated an ordinance by exceeding twelve miles per hour. This reasoning might have been sufficient to justify recovery against the employee who was driving, but the opinion ignores the doctrine of municipal nonliability. In Lafayette v. Allen the city was held liable to an employee of the fire department who was injured by the explosion of a defective fire engine while it was being used to pump water into a city-owned cistern. This decision does not refer to a city's traditional immunity, and, from what appears in the report, it is impossible to learn whether it was raised in the record. In Walters v. The City of Carthage the city was held liable to the plaintiff who was injured by a defective fire house door which fell upon him as he was passing on the sidewalk.

In the last mentioned case and in Fowler v. Cleveland the court said that running a fire department was a ministerial function and not within the saving rule. The Fowler decision was rested upon the ministerial function theory, but, throughout the majority opinion, Justice Johnson shows that he is lead to over-rule an explicit local authority, because he has been moved by considerations of justice as between the parties in the particular case. Justice Wannamaker, concurring, went farther and proposed abolishing the theory of municipal nonliability, even in cases of nonfeasance. He relied on arguments referring to the Ohio constitution, the Declaration of Independence, and even Biblical teachings as set forth in the New Testament. Justice Jones, dissenting, on the other hand, after appealing to the same provisions of the Ohio constitution, indicated that he is for doing justice, according to the ideas of his predecessors as to what con-

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49 101 Neb. 336, 163 N. W. 325 (1917).
50 81 Ind. 166 (1881).
51 36 S. D. 111, 153 N. W. 881 (1915).
52 Frederick v. Columbus, supra note 48.
stitutes justice. Justice Johnson notes that in the particular case the fire apparatus was returning from its call. Justice Jones, in so far as he considers policy in support of his view, treats the entire operation of fire departments as a function involving the need for haste in the interest of public safety.

It may be noted that in none of the three cases last mentioned was the apparatus on its way to a fire, or engaged in extinguishing a fire, when the injury occurred. There are several other cases which hold the city liable for injuries due to fire department buildings, employees, or apparatus, where not incidental to direct performance of their fire-extinguishing service.\textsuperscript{53}

Referring to the fact that the engine was returning from its fire call in the \textit{Fowler} case, the opinion says, in connection with the majority rule in such cases:

"It would seem to be clearly a case in which the reason of the rule having failed the rule itself should be set aside as to such injuries."\textsuperscript{54}

The Ohio court, when the \textit{Fowler} case was decided, on July 8, 1919, included Nichols, C. J., and Jones, Matthias, Johnson, Donohue, Wanamaker, and Robinson, JJ. All the members of the court except Justice Jones concurred in the result, Justice Wanamaker giving his own opinion, as has been referred to. On December 29, 1922, the \textit{Fowler} case was overruled in \textit{Aldrich v. Youngstown},\textsuperscript{53} in which Justice Jones wrote the opinion, which was concurred in by Justices Robinson and Matthias, who were with the majority in the \textit{Fowler} case, and by Chief Justice Marshall and Justices Clark and Hough, who had come upon the court in the meantime. Justice Wanamaker dissented, upholding the results of the \textit{Fowler} decision and reiterating his former position, again invoking the constitution and advising his colleagues to look to their oaths as judges. He italicized the references therein to the duty to "administer justice . . . according to the best of his ability and understanding", and then calls particular attention to the italics, concluding with this statement:

\textsuperscript{53} See Note (1920) 9 A. L. R. 143, 156.
\textsuperscript{54} \textit{Supra} note 47, at 165.
\textsuperscript{55} 106 Ohio St. 342, 140 N. E. 164 (1922); Note (1923) 27 A. L. R. 493.
"The soundness of a decision must be judged by the degree in which it is rooted in reason and righteousness. A judgment that does not contribute to justice is fatally at fault."

The opinion of the court expressly repudiates the *Fowler* case, and affirms what had been the rule prior to 1919,56 that the operation of a police power department, like a fire department, is a municipal function. In its syllabus the court says:

"A municipal corporation is not, in the absence of a statutory provision, liable in damages to one injured for the negligent acts of its police department, or any of its members."

Although the point was not referred to in *Aldrich v. Youngstown*, the police patrol was answering a call when it injured the plaintiff. The fire engine was returning when it hit the plaintiff, Fowler, in the other case.57

The story of the conflict between the old and the new, between judgment by adherence to ritualistic formula and precedent, on the one hand, and by the exercise of the power of judging by a broad and acknowledged consideration of the social factors behind legal doctrines, on the other, has not been told in its relation to negligent fire engines, without some mention of the Florida cases. In *Kaufman v. Tallahassee*,58 in 1922, the plaintiff was knocked down by the trailer of a fire department truck. Without having before it any allegation as to whether the truck was an-

56 Frederick v. Columbus, *supra* note 48, overruled by Fowler v. Cleveland, *supra* note 47.

57 Note (1920) Col. L. Rev. 772, 775: "Would not the desired result be attained if the liability of a municipality for torts were the same as that of a private corporation with one exception—where an outstanding policy ... demands the exemption of the city. Under such a rule a fire engine might be driven to a fire with such speed as to amount to recklessness without imposing on the city a liability for resulting injuries. Yet it would by no means follow that one injured by the same engine *returning* from the same fire would be without a remedy. As the law stands today, the city would be deemed to be exercising a governmental function in both cases, although no policy operates to exempt it from liability in the latter case. To apply the same rule to both cases simply because both injuries resulted from the acts of the same city department seems to be a most unreasonable conclusion."

58 84 Fla. 634, 94 So. 697 (1922), 30 A. L. R. 471 (1924) (pedestrian struck by fire chief's automobile). It does not appear whether it was going to or from the fire.
swering a fire call or not, the court reversed an order of the trial court sustaining a demurrer. Along with its comment upon the "duty which the city owes to the people", and some reflection upon the changing and expanding purposes and undertakings of city governments, the court, casting about for a good orthodox legal reason for holding the city responsible, and thus not only vindicating outraged justice, but preserving its traditional conservatism, happily hits upon the point that the defendant has the commission form of administration and hence is not really a city in the sense of government, but only in the nature of a coöperative business enterprise. The question came up in Florida again two years later. The defendant, the city of Tallahassee, encouraged by the fact that in its opinion the court had cited Fowler v. Cleveland, and noting that the Ohio court had changed its mind, brought up a second appeal, together with a similar situation from Miami; and in both cases the defendant city was held liable. In Maxwell v. Miami the court said:

"Whether the operation of a fire department by the city may be technically denominated a corporate or a governmental function, the rule in this state is that a municipality is liable . . . for injuries caused by negligent operations or conditions upon the streets that amount to a nuisance. . . . The operation upon the public streets of an automobile as a part of the fire extinguishing equipment of a city, is not such an essentially or exclusively governmental function as to exempt the city from liability for injuries to persons lawfully using the streets, when such injuries are solely caused by the grossly negligent manner in which the auto is driven. . . ."  

68 Fla. 119, 100 So. 150 (1924). In this second appeal the court said nothing about a commission form of government, but quoted as set forth above, from the Miami case, and in both cases referred to the manner in which fire equipment was alleged to be driven habitually in Miami and Tallahassee as a "nuisance", which it was the duty of the city to prevent and for the consequences of which it was responsible. The court referred to the Aldrich case in Ohio and indicated that it was not interested in what might be the rule in Ohio or any other jurisdiction.  

69 Fla. 107, 100 So. 147, 33 A. L. R. 682 (1924). One of several cases all arising out of the same accident and heard together with the same result in each.  

61 The opinion as to police department cars is similar to that in respect to fire department vehicles. Aldrich v. Youngstown, already referred to, says they pertain to a governmental function, and hence no responsibility. To the same effect in Hanson v. City of Fargo, 54 N. D. 487, 209 N. W. 1002 (1926), 47
The great weight of authority treats the activities which have been under discussion as governmental and, for the most part, denies municipal responsibility for injuries arising in their operation. However, as has been indicated, a considerable number of cases have refused to apply the rule, and may be observed that these are recent cases. A somewhat recent annotation on the subject states: "Different theories are invoked according to the circumstances, to justify the result in particular cases; but there seems to be implied in the cases a dissatisfaction with the results of the application of the general criterion in cases involving the negligent operation of automobiles, due, perhaps, to the feeling that the conduct of the city employees in that regard does not partake distinctively of the governmental functions of the particular municipal department to which they belong." 82

This is all very true so far as it goes, but why do the courts invoke different theories? Why are they dissatisfied with the results of applying the old rule? Is it not because, in the law as in everything else, new days bring new duties? Here, as in all negligence cases, the court has before it the duty problem first of all. Is the plaintiff protected in the interest here violated, as against the particular hazard? Is the individual, pedestrian, or driver protected by any rule of law against the hazard of fire trucks, police patrols, and the like, in view of the manner in which they are driven and in the usual instance must be driven? What are the interests involved? On the one hand there is the interest

A. L. R. 816 (1927). On the other hand, it was held in Jones v. Sioux City, 185 Iowa 1178, 170 N. W. 445 (1919), not to be a governmental function to use city-owned automobiles to carry police patrolmen from the police station to their beats, and the city was held liable; also in Oklahoma City v. Foster, 118 Okla. 129, 247 Pac. 31 (1926), 47 A. L. R. 822 (1927), to a detective injured while riding in the side car of a city motorcycle negligently sent out of the city garage with defective brakes, on the ground that the city's chief of police was not exercising a governmental function in superintending the city garage. Also in New York, in Kelly v. City of Niagara Falls, 131 Misc. 934, 229 N. Y. Supp. 328 (1928), the city was held liable for negligent injury of plaintiff by a city car driven by a policeman on duty.

A note in (1928) 28 Col. L. Rev. 1111, after commenting on the usual strictness of New York courts in construing legislation which suggests having the effect of extending municipal tort liability, says: "The instant case may perhaps best be explained as a judicial recognition of the better policy of compelling tax-payers to share the burden of inevitable motor accidents rather than having the person who is injured due to no fault of his own, bear the entire loss."

82 Note (1927) 47 A. L. R. 829.
in the safety of pedestrians and all users of the public ways—for whose use they exist. On the other hand there is the interest in public safety to be subserved by a rule of law which justifies, for the operation of police or fire fighting equipment, a manner of using the streets which is perhaps never safe and not ordinarily necessary. There is the public interest in the prevention of fire, tending to justify speed. There is the interest in preventing accidents enroute to the fire, operating to justify caution. This conflict of interests has been repeatedly recognized and is referred to as a public policy. The tendency of the cases to be more liberal with the injured plaintiff and less open to arguments of precedent, when the fire engine or the patrol wagon is returning from a call, is a response to a natural distinction. It is a judicial reaction to the factor of justice and prevention of harm. There have been references in some of the cases to the economic factor of an undesirable financial burden likely to be imposed upon the state or municipality, but it seems evident that this is not prominent and has not been discoverable in any of the more recent cases. The disposition of the courts is to hold municipal corporations liable upon the same terms as private corporations for the operation of their vehicles and machinery. When recovery is not allowed, the reason universally given is not referred to any of the other factors, but always to the precedent difficulty. The Ohio court, so far, as has been noticed in the recent cases, is the only one which has turned back; and, as has been pointed out, in the earlier Fowler case the car was returning from its emergency call, and in the later case, in which recovery was denied, it was answering the emergency. This may be why the two judges who concurred in both cases were able to do so. It is difficult to see how they could have concurred with the reasoning in both cases.

In surveying the cases which seem to show a tendency to extend the tort liability of the various governmental agencies, it will be found that the operation of various vehicles is only one of many types of city, county, and government activity which is producing a volume of litigation. In connection with many city undertakings will be found cases evidencing the dissatisfaction with the old rule of municipal immunity.
STREET CLEANING AND WASTE REMOVAL

The municipal collection of ashes and garbage, the sprinkling and cleaning of streets, and many other operations carried on by the city and involving the use of the streets and the operation of city owned vehicles over the streets, all have produced their quota of litigation. They have been held to be governmental functions and recovery has been denied in a great list of cases; they have been held to be ministerial functions in other cases and recovery has been allowed for injuries arising in connection with their performance. Sometimes the cases allowing recovery call the function municipal, as distinguished from governmental; sometimes it is called corporate; sometimes it is found to constitute a nuisance.

RECREATIONAL FACILITIES

As to parks and playgrounds, the recreational facilities afforded by cities, there seems to be less disposition upon the part of courts to hold that the city is performing a governmental activity and is hence immune from tort liability. The cases which do apply the immunity rule are not of particular interest in connection with the present inquiry unless it be from a quantitative standpoint. These seem to agree in their argument that the maintenance of parks and playgrounds is a governmental function. They frequently endeavor in such opinions to lay down a test for determining what is governmental. Whether this is because the judges are touched by a feeling that it is unfortunate for the plaintiff and hence they must justify their position, or whether they wish to lay down a criterion for their successors, is difficult to determine.83 At any rate, if a court decides to deny recovery

83 Hannon v. The City of Waterbury, supra note 30; and Note (1928) 57 A. L. R. 402, is an example of a labored effort to lay down a rule for determining what is, and what is not, a governmental function. Warren v. City of Topeka, supra note 31, Note (1928) 57 A. L. R. 555, on the other hand, is a case in which the city was held not liable for the death of children, patrons of a municipal swimming pool, who were permitted to enter the pool and were drowned at a time when no life guard was on duty. In this case the court attempted no rationalization of this result, but merely referred to previous cases and said such was the law, without inquiring into such considerations as justice, social policy, or even the so-called "principles" of the law. In this case recovery was denied even as against the concessionaire who was operating the pool under lease from the city as well as against the corporation. Here is a strong illustration of a case where the preponderant
to a person injured on public recreational premises, where the action is based on negligence, a basis of rationalization is at hand in the time-tried old formulas.

The interesting cases are those in which the courts are unwilling to rest on this formula. For example, in *Burton v. Salt Lake City* the Utah Supreme Court reversed the order of a lower court which had sustained a demurrer to a complaint based upon the death of plaintiff's decedent through the negligence of the city, in connection with a city swimming pool and bath house. The court was faced with its own rather recent decision that fire departments are owned and operated in a governmental capacity, and also parks and playgrounds; but it finally succeeded in persuading itself that, since the plaintiff alleged that the city maintained its bath house for profit, and the defendant demurred, therefore the city of Salt Lake was not performing a governmental function. The many cases holding the city exempt from liability under similar circumstances make no point of the fact that a charge was made, and even point out expressly that the charge, being merely for maintenance, is entirely immaterial. It will be interesting to note whether the entering wedge in Utah will be driven home by future decisions or withdrawn by later conservatives, as happened in Ohio.

In *Augustine v. Town of Brant* the court, holding the city liable in connection with a bathing beach, had to surmount two obstacles. In the first place, it was necessary to determine whether maintaining a bathing beach was a governmental function, and, if this were answered in the negative, whether the maintenance of a park was, for a municipality, an *ultra vires* act. It is usually held that a municipality is not liable for tort in connection with *ultra vires* undertakings. The New York Court of Appeals disposed of the *ultra vires* argument by saying that, factor in judging is the administrative simplicity of following unquestioningly the prior decisions.

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64 69 Utah 186, 253 Pac. 443 (1926), 51 A. L. R. 364 (1927).
65 Rollou v. Ogden City, 66 Utah 475, 243 Pac. 791 (1925).
66 Alder v. Salt Lake City, 64 Utah 568, 231 Pac. 1102 (1924).
68 Fowler v. Cleveland, *supra* note 47.
69 249 N. Y. 198, 163 N. E. 732 (1928).
while the defendant town went beyond its powers in acquiring and equipping the park lands, nevertheless, as to maintaining parks, it was not wholly without its powers, because maintaining parks is within the corporate municipal powers. Having successfully passed the objection that the acquisition of the swimming place was ultra vires, Judge Pound was able to rely on earlier New York decisions holding that a park is not a governmental function in the case of a city and found no difficulty in extending the theory to a town in the present case. But the real reason for this decision appears in the concluding paragraph, where the court said:

"The modern tendency is against the rule of non-liability. Liability for highway negligence has been imposed by statute upon towns and counties. "The establishment of a town park may incidentally benefit the public health but that fact does not make . . . a governmental function. A wise public policy forbids us to recognize the town of Brant as acting as a sovereign when it maintains its park. It acts as a legal individual voluntarily assuming a duty . . . when it assumes such a duty it also assumes the burdens incident thereto." 70

Here again is a decision furnishing a wedge which may open the judicial minds of some of the jurisdictions,71 so that we shall

70 Italicis are the author's.
71 Most of the cases hold that a city is not liable for wrongs committed in the course of an ultra vires undertaking, see Radford v. Clark, 113 Va. 199, 73 S. E. 571 (1912) (unauthorized operation of quarry; injury due to blasting); Pacey v. North Birmingham, 154 Ala. 511, 45 So. 663 (1907) (unauthorized operation of electric light plant).

Even though the function is not governmental as indicated by the case last cited, the courts seem to have taken this view for the most part. Could any rule of law be more outrageous to the concept of justice than a holding that where a city has the legal authority to build and operate an electric plant, but extends its line beyond the city limits, it is not liable for the injury or death of a traveller along the highway, where such line is down, due to its negligence. Yet that is what has been held as late as 1926, in Hyre v. Brown, 102 W. Va. 505, 135 S. E. 656 (1926), 49 A. L. R. 1230 (1927), and in Woodward v. The City of Seattle, 140 Wash. 83, 248 Pac. 73 (1926). The City of Seattle, owning and operating a street railway, as an improvement to this service acquired and operated motor buses. The plaintiff was injured by the negligence of a driver. It was held that, as the operation of motor buses was ultra vires, the plaintiff's action must be dismissed. The court admits the injustice of the result when it says in conclusion: "While it may be that these views will deprive appellant of a remedy against any save those who are financially unable to respond, yet the larger good of a settled rule as to the powers of a municipality must prevail."
shortly be rid of the unjust, unreasonable, antisocial consequences of the ultra vires doctrine as applied to negligence cases. Such decisions can be supported by no other theory than that one wrong (ultra vires) is a license to commit another wrong without legal responsibility.

If judicial decisions are to be supported by social sanction, they must express a vision on the part of the judges which can see through and beyond the scholastic metaphysics of the law's technicalities. Such decisions as that of Judge Pound in the New York case, while not expressing all the factors which contribute to the process of judgment, nevertheless reveal that the process of judging is still in the control of the judge, and has not been entirely surrendered into the dead hands of a precedent or formula of words. In short, here is a court exercising the high function of the law—passing judgment. Law cannot be more than an expression of the sanctions of society to human relations, and society is not content that it shall be less. Can it be that society sanctions a principle that a city is not legally responsible, where its members are killed or injured by its negligent servants, because those servants had been set to a task which the city had no authority to undertake, or that its members may be killed by the dangerous machines that the city has wrongfully placed in the hands of its negligent servants? 72

It is submitted that Holcomb, J., dissenting, expressed not only better law but better common sense, when he said: "Had appellant bought a ticket entitling him to transportation in part over this bus line and been refused carriage or ejected from the bus or something of that kind, the city probably could rightfully have interposed the plea of ultra vires under our statute, but where, as here, appellant was injured by the instrumentality used by respondent in its traffic system, through negligence, i.e., an act or omission of the municipality, it seems to me that it is stretching the doctrine of ultra vires to a very great extent to hold that the municipality is not liable." This distinction between tort and contract as a basis for a defense of ultra vires is made by Miller, J., in Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055 (1886).

72 In admiralty law the fact that the tort was ultra vires is no defense. The "Major Reybold," 111 Fed. 414 (E. D. Pa. 1901). In Salt Lake City v. Hollister, supra note 71, there is a dictum to the effect that municipal corporations should be held liable notwithstanding ultra vires.

It is well settled that the rule exempting municipal corporations from tort liability for negligence does not apply in admiralty. Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212 (1900) is the leading case. Accord: Thompson Navigation Co. v. Chicago, 79 Fed. 984 (N. D. Ill. 1897); Texas Co. v. City of New York, 290 Fed. 382 (C. C. A. 2d, 1923). These were cases involving fire boats owned by municipal corporations. The Supreme Court, however,
There are a great many cases dealing with the liability of the city for injury due to defective park and playground apparatus, a few of which will be referred to. In *Warden v. Grafton* the West Virginia court, after considerable discussion of a number of cases holding opposite views as to whether parks are a governmental function, permitted recovery by a child injured on a slide in the city park. The court specifically mentions justice as one of the factors in the case. Yet this is the same court which the next year found *ultra vires* an insuperable obstacle to recovery in *Hyre v. Brown*. The opinion concludes with a reference to the "movement, etc." toward a duty of reasonable care, "which we think is the more wholesome and equitable rule." The Wyoming court, in one of the most scholarly opinions to be found on this point, finally held the city liable for a defective playground swing, on the rather unsatisfactory ground that the injured child was an invitee. It could not call a playground a governmental activity and hold the city liable, nor was it a business activity, so the court said that in running a playground the city was acting as a substitute for a charitable or benevolent body, and hence must use as much care as a private charity. Hence this reached a contrary conclusion where the defendant was the state itself. In *re State of New York*, 256 U. S. 490, 41 Sup. Ct. 588 (1921). In *Harris v. Dist. of Columbia*, 256 U. S. 659, 41 Sup. Ct. 610 (1921), the Supreme Court said that the Workman case was not to be taken as authority for the repudiation by the federal courts of the doctrine of municipal immunity as a whole but was to be strictly confined to admiralty cases.


"Then there is the justice of compensating the plaintiff for his injuries," and, as was said in *Barnes v. Dist. of Col.*, 91 U. S. 540 (1875), commenting on *Bailey v. Mayor of New York*, 3 Hill 531 (N. Y. 1842): "The struggle in the New York case was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it."

102 W. Va. 505, 135 S. E. 656 (1926), 49 A. L. R. 1230 (1927).


In *Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040 (1913), the "Merry-go-round" in the city park was installed by a private charitable organization known as the "Civic Improvement League," with the consent of the city. It had become defective through wear and the plaintiff was injured. Held, city is liable.
capacity to bear loss in tort cases

Case would not be authority for holding a city liable for negligent acts of misfeasance by its servants, but only for the nonfeasance of failing to provide a safe place. Is it then as easy to fix liability upon a municipal corporation for nonfeasance as for misfeasance? In general the city is not made responsible for loss or injury due to failure to perform a governmental function. That is to say, even where a municipal corporation is liable for

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Most of the tort actions which have been brought against municipalities for injuries in connection with schools would appear to involve the condition of school buildings and equipment. The rule here has been for the most part, as might be expected, that there is no liability, the result usually being rested upon the ground that education is a governmental function. Hill v. Boston, 122 Mass. 344 (1877) is usually regarded as the leading case. In that case it was held that the city was not liable for injury due to an unsafe stairway in the school building.

That rule has been applied in recent cases. See Gold v. Baltimore City, 137 Md. 335, 112 Atl. 588 (1921), in which it was held that the city was not liable for injury to a child through the fall of a door in a school building, on the ground that education is a governmental function. The same rule was applied in Jakey v. Board of Education, 113 Misc. 572, 185 N. Y. Supp. 88 (1920). But in Herman v. Board of Education, 234 N. Y. 196, 137 N. E. 24 (1922), the New York Court of Appeals held the school board liable to a pupil who was injured by an unguarded buzz-saw in the manual training department. The case was distinguished from one relying on respondeat superior, and was decided on the theory that the board could be held liable for its own corporate act in providing a machine which in its condition was dangerous. This result was reached ostensibly without surrendering allegiance to the doctrine of immunity in case of governmental functions. But it certainly cannot be reconciled with the cases, running back to Hill v. Boston, supra note 73, which exempt the corporation from liability in case of injuries arising out of the condition of the school building and its equipment. Another buzz-saw case reaches the opposite result in England, in Smerkinich v. Newport Corp., 76 J. P. 454, 10 L. G. R. 959 (Eng. 1912); although in England the general rule seems to be to hold the corporation liable for the negligence of either the corporation or its agents. Ching v. Surrey County Council, [1910] 2 K. B. 735 (where the plaintiff caught his foot in a hole in the pavement of the school play ground). See other English cases cited Note (10) 9 A. L. R. 912 (child's fingers caught in door); Marvis v. Carnarven Co. Council, [1910] 2 K. B. 840. In the State of Washington, school districts are made liable by statute. See Redfield v. School Dist., 48 Wash. 85, 92 Pac. 770 (1907). But, as to athletic equipment, see Stovall v. School Dist., 110 Wash. 97, 188 Pac. 12 (1920).

The New York court might be expected to decide for the defendant in an action based upon injury to a pupil by the negligence of its servants, in view of the distinction taken in the Herman case. Board of Education v. McHenry, 166 Ohio St. 357, 140 N. E. 109 (1902), held the city not liable to a person injured by the negligence of the school dentist to whose treatment he was required by the school authorities to submit. In England, on the other hand, in Smith v. Martin, [1911] 2 K. B. 775, the corporation was held liable to a child who caught fire and was injured while trying to tend a stove at the teacher's direction. It was held negligence upon the part of the teacher to ask the plaintiff to tend the fire. In this case Fletcher Moulton, J., does not even refer to the doctrine of nonliability in the case of a public corporation, but deals only with the question whether the teacher could be said to be within the scope of her authority in giving the order to the plaintiff.
its wrongs, that liability is usually based on the negligence in the manner of doing the act in question or, as in the case just referred to, negligence in the failure to maintain in a safe condition premises which it has thrown open to the public. On the other hand, suppose a citizen is robbed, or his home burns, or he acquires smallpox from an unquarantined neighbor, or suppose that only an inadequate or poorly conducted school is available for the education of his children. Is the city liable in tort for the loss or injury suffered by the citizen because he was not afforded perfect protection by the city in the exercise of its police powers?

Without a detailed presentation of cases on this point it is sufficient to say that the state and its agencies, under the decisions in the past, have not been held legally responsible for failure to supply this type of service.\(^7\)

If we approach the question of responsibility in cases of this type from the point of view of policy, capacity to bear loss, or social necessity, it is obvious that we are dealing with a very different problem from that encountered in cases of negligent misfeasance by city employees or negligent failure to keep premises in repair. So generally does it appear to be recognized that

\(^7\) McQuillin, op. cit. supra note 34, § 2801. In Sanger v. Kansas City, 111 Kan. 262, 266 Pac. 891, 23 A. L. R. 294 (1922), it was held that a city is not liable in damages to one who is robbed on the streets even though several persons take part in the "hold-up." Liability is imposed by statute in a great many jurisdictions for injuries due to mobs, and the plaintiff in the instant case invoked this statute. The lower court gave judgment for the plaintiff, but this was reversed, one member of the court dissenting. It is submitted that the case correctly decided that the statute in question did not protect the interest here involved as against this particular hazard.

The leading case on this question of liability for mob violence is Darlington v. Mayor of New York, 31 N. Y. 164 (1865). Cases are collected in Notes (1923) 23 A. L. R. 297 and (1921) 13 A. L. R. 751-779.

In Maryland there is a group of cases holding municipalities liable for failure to make and enforce ordinances against various uses of the public streets which tend to make them dangerous; e. g., in Hagerstown v. Klotz, 93 Md. 437, 49 Atl. 836 (1901), the city was held liable for injury due to nonenforcement of an ordinance against bicycle-riding on sidewalks. See also cases collected in 43 C. J. 954, n. 7 (c), and Note (1900) 47 L. R. A. 294 for cases contra.

There is also a considerable body of cases dealing with the liability of cities for injury due to failure to prevent various acts on the public streets, particularly coasting. These decisions appear to be almost evenly divided in number as to their result. As to all these cases which can be in any way connected with the duty to maintain safe streets, and which hold the city liable, it is to be noted that any logic in the rule of nonliability is thrown aside. Cases on coasting are collected in (1927) 40 A. L. R. 1439; Borchard, 34 Yale L. J. 270, n.
the city is under no legal obligation to furnish protection against crime, fire, disease, etc., that but few cases have dealt with it.

The administrative difficulty attendant upon the application of a rule of liability here is obvious. To show that A was robbed because of the negligence of the city police force, or that B contracted an infectious disease because the city health officer was negligent, involves the type of litigation in which courts have been hesitant to give relief, even without the obstacle of the special rules which favor governmental agencies. It has been said either that the consequences are too remote, or that the damages are too speculative, or some other formula has been employed; but, whatever the reasons given in particular opinions, it is plain enough that policy is against recovery in such cases, and, even though the sociological jurisprudence of the present day does tend to favor shifting the loss to the community for direct negligence in the affirmative conduct of municipal servants, it has not as yet reached the point of insuring against such ever-present, but elusive, risks as these.

It has been most emphatically asserted that cities, counties, and like agencies are not liable for injuries arising out of the conduct of activities relating to the public health. This is so, even of private charities. There is not only the principle, that "the king can do no wrong", but also the hesitancy to burden the good samaritan and discourage charity, which has to be overcome before recovery can be had against cities in connection with their health protection agencies. This has been adhered to for the most part in recent cases. Two recent cases, however, have held a city liable to patients in the city hospital injured by the negligence of its employees. The Oklahoma court takes the position that, in running a hospital at which paying patients are received, a city is acting in a quasi-private function.

"However, this conception of a city hospital as private is not generally supported by authority. Also the fact that the plaintiff in a particular case is a paying patient does not

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80 Franklin v. Seattle, 112 Wash. 671, 192 Pac. 1015 (1920), 12 A. L. R. 247 (1921); see also Note (1927) 49 A. L R. 379, for further cases.

81 City of Shawnee v. Rousch, 101 Okla. 60, 223 Pac. 354 (1924); City of Pawhuska v. Black, 117 Okla. 108, 244 Pac. 1114 (1926).
seem to the present writer as extremely important, inasmuch as the cases exempting hospitals from liability do not make a distinction on this ground. 82

These cases are in line with the increasing tendency to hold municipalities liable in tort even in connection with their governmental functions. A recent writer, commenting on one of the Oklahoma cases, says 83:

"The Oklahoma case imposes the responsibility of any profit making corporation. This, it is submitted, best serves the welfare of society. The modern tendency, through various forms of insurance,—workmen's compensation acts and the like—is to shift the burden from the innocent victim to the community." 84

It is impossible to review in one article all the interesting recent cases which illustrate this risk-shifting policy. They arise from time to time in connection with all the many functions of the modern city. There are other aspects of the governmental agency involved in situations out of which injuries arise which should be briefly referred to as indicating the disposition of the courts to extend liability.

When the state itself, rather than a local governmental unit such as a city or county, is guilty of a tort, can recovery ever be had? It is, of course, well understood that the state cannot be sued without its consent. Therefore, one who is injured by the negligence of a state employee on state business is without legal remedy unless a statute so provides. 85 As a matter of practice

82 Feezer, Tort Liability of Charities (1928) 77 U. of Pa. L. Rev. 191, 197, n. 10.
83 Note (1924) 34 Yale L. J. 316.
84 See also Marx, The Curse of the Personal Injury Suit and a Remedy, supra note 7; see also (1929) 29 Col. L. Rev. 55 (note last paragraph).
85 Note (1921) 13 A. L. R. 1268, in which the state was held liable under a consent statute for the death of children, following vaccination with a serum from the state laboratory, claimed by the plaintiff to have been contaminated. See in the opinion a discussion of the theory of a state's immunity from suit. Consent statutes appear to have been strictly construed. See Note (1921) 13 A. L. R. 1268; also cases collected by Prof. Borchard in his articles in 34 and 36 Yale L. J. It has been held in New York that the establishment of a court of claims does not make the state liable to suit for the torts of its servants. Smith v. New York State, 227 N. Y. 405, 125 N. E. 841 (1920). Accord: Dietrich v. Palisades Park Commission, 114 Misc. 425, 187 N. Y. Supp. 454 (1921).
it is customary in such cases to appeal to the legislature for an appropriation for the compensation of the victim.

There are a great number of cases involving various incorporated quasi-state bodies, such as state fairs, whose governing bodies are boards appointed by the governor or legislature, and which receive an appropriation from the state. There are decisions both for and against liability among those cases. Inasmuch as these agricultural societies and the like run as a business, charging for their services in various ways, it would seem no stretch of legal principles to hold them liable as private corporations.88

The tort liability of the city in connection with the operation of a business enterprise, such as a gas plant, light plant, or street railway, for the negligence of its employees is so completely settled as to require no comment. What about the case of a business owned by the federal or state government? The Shipping Board has been fruitful of a mass of litigation,87 and the United States Government owns and operates many other business enterprises, including several railroads. In *Panama Railway v. Curran* 88 it appeared that the plaintiff was injured by slipping on the floor of a station commissary building upon which an employee had negligently put oil. The United States owned all the stock in the corporation except directors' qualifying shares, and the directors had been required to deposit with the Secretary of the Treasury irrevocable powers of attorney authorizing the Secretary to transfer their shares; this being provided for in the Act of Congress authorizing taking over the road. It was held that the railway was liable, because the court found that the statute relating to it showed the intention of Congress to preserve its corporate entity.89

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84 Borchard, 34 Yale L. J. 1, 25, n.
85 Ibid., 22 et seq.
86 256 Fed. 768 (C. C. A. 5th, 1919).
87 Tort liability in such cases seems to depend chiefly upon construction of the statute involved, and a contrary result was reached in Ballaine v. Alaska Northern Ry., 259 Fed. 183 (C. C. A. 9th, 1919), 8 A. L. R. 995 (1920).
88 As to state-owned railways, see Western & Atlantic Ry. v. Carlton, 28 Ga. 189 (1858). The state owned a railway and had passed a statute providing that claims not settled otherwise could be the basis of a suit against the manager.
A study of other types of tort cases than those dealing with municipal corporations may yield a richer find of material indicating that the courts are influenced by capacity to bear loss in determining legal duty. In the municipal corporation cases all the usual obstacles tending to restrict recovery to situations coming within the various doctrines of the law of negligence must be surmounted, even if the courts overrule the city's demurrer, which will be supported by the argument for its traditional immunity as government. If we search the cases involving injuries through negligence in conducting electric light plants we shall find numerous cases in which the "theology of negligence" will furnish the interesting features of the case, and since such undertakings are business functions it will be immaterial whether the electric plant is municipally or privately owned. It is proposed to consider these types of cases in a later article continuing the discussion here introduced. It is only when the negligence issue is settled, when an individual or a private corporation would be held legally responsible for the injury, that the governmental immunity becomes the real issue. Of course if the city can successfully demur on the ground of its governmental immunity, the negligence issue need not be considered.

If the courts are willing to go the extreme length of disregarding so strongly intrenched a doctrine as the one founded on the expression "the king can do no wrong", we may well expect to find them working out the duties necessary to hold defendants liable in connection with the greatly increased hazards which our mechanical civilization has created.

While the old rule is still applied in the majority of the cases, the significant thing is that there are cases which are finding ways around it, or repudiating it, in order to do the manifest justice which the case demands, and furthermore these cases are recent. Moreover, when the rule was departed from in the last century, the departure was always rationalized and due homage paid to the old rule. If the plaintiff was relieved, it was by the

In this case the court said that when a state goes into business it assumes business liabilities, and held the state liable in a tort action for personal injury which was brought against the manager under the statute. Similar interpretation of a similar statute is found in Arnstein v. Gardner, 134 Mass. 4 (1882).
“case knife” method, in name at least, if not in fact. More and more cases are frankly admitting that it is time to discard the “case knife” entirely both in word and action; for, as has been said by the United States Circuit Court, through Justice Learned Hand:

“The profession of the law . . . is charged with the articulation . . . of the successive efforts towards justice; it must feel the circulation of the communal blood or it will wither and drop off. . . .”

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90 Supra note 10.