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Municipal Tort Liability in North Dakota

Robert W. Holte

NOTE

MUNICIPAL TORT LIABILITY IN NORTH DAKOTA

The primary end of Government is the protection of the persons and property of men.—Lord Macaulay

INTRODUCTION AND PURPOSE

The modern city has a rather curious dual character.[1] As a political body the municipal corporation is an organ of government and charged with governmental functions and responsibilities.[2] On the other hand it is an incorporated body, capable of much the same acts as private corporations.[3] This idea that municipalities are at one and the same time a corporate entity and a governmental institution has left the law in a hopeless tangle of disagreement and confusion with regard to tort liability.[4] The situation has prompted the South Dakota Supreme Court to agree with the declaration that:

> On no subject, perhaps, is there more confusion among the decisions than that of municipal liability for torts. The rule of governmental immunity is subject to a great number of exceptions, many of which are purely arbitrary and without any relation to the grounds upon which the courts please to base the general rule. The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation.[5]

In seeking solutions, American judicial expression has suggested extreme stands.[6] One pioneering suggestion was the desirability of holding the municipality liable in tort in all cases,[7] and a

1. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957).
2. *Id.* at 132.
3. *Id.*
4. W. PROSSER, LAW OF TORTS § 125, at 1004 (3rd ed. 1964). *See also* Comment, 41 N.C. L. REV. 290, 291 (1963).
5. Ring v. City of Mitchell, 64 S.D. 67, 263 N.W. 893, 894 (1935) quoting Annot., 75 A.L.R. 1196 (1931).
6. Note, *Municipal Tort Liability—A Proposal*, 23 IOWA L. REV. 392, 395 (1938) [hereinafter cited as *Municipal Tort Liability*].
7. Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72, 78 (1919). This case was subsequently overruled by Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

squarely opposite view was taken by the South Carolina Court in *Irvine v. City of Greenwood*,[8] denying recovery in all cases except where allowed by statute. Because of the unprecedented novelty of the former and the manifest injustice of the latter, neither has been commonly accepted.[9]

The purpose of this note is to examine municipal tort liability in North Dakota, to determine the direction the courts appear to be headed, and to present conclusions and recommendations. Special effort has been made to reflect the case law in North Dakota against Chapter 40-42 of the North Dakota Century Code, "Claims for Injuries on Streets," which is the primary section on municipal tort liability.

GOVERNMENTAL IMMUNITY

Some writers assume that the origin of the doctrine of governmental immunity is a direct outgrowth of the divine right of the king who could do no wrong.[10] But insofar as municipal or county or local district communities are concerned, it is generally agreed that the application of the immunity doctrine grew out of *Russell v. Men of Devon*[11] which involved a tort action against an unincorporated county. Among various bases for the decision in *Russell* was the Court's opinion that it was better for an individual to sustain an injury than for the public to suffer inconvenience, since the facts established that the county was not incorporated, and thus there was no corporate fund from which satisfaction could be made.

The doctrine of governmental immunity was first brought into this country by *Mower v. Inhabitants of Leicester*.[12] In *Mower* the county was incorporated, could sue and be sued, and there was a corporate fund from which a judgment could be satisfied. The Massachusetts Court, however, chose to ignore these differences and adopted the rule of the *Russell* case which became the general American Rule.[13]

Although the doctrine of governmental immunity had become quite firmly established in the United States, it was not long before the waters became clouded with the so-called distinction between "governmental" and "proprietary" functions. The distinction between these two functions was first declared by a New York Court in 1842.[14] Under this distinction, municipalities are generally not held

8. 89 S.C. 511, 72 S.E. 228 (1911).
9. *Municipal Tort Liability, supra* note 6, at 395.
10. Haney v. City of Lexington, 386 S.W.2d 738, 739 (Ky. 1964).
11. 2 T.R. 667, 100 Eng. Rep. 359, 362 (1788).
12. 9 Mass. 247 (1812).
13. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457, 459 (1961).
14. Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

liable for negligence in the discharge of their governmental functions, but immunity from liability is not extended to municipalities in the exercise of their proprietary functions. Until 1955 this distinction was still accepted in every jurisdiction except South Carolina,[51] which refuses to find any common law liability at all, and Florida,[16] which holds that cities under a commission form of government are subject to the same tort liability as private corporations. In 1917 the North Dakota Supreme Court took cognizance of the doctrine of governmental and proprietary functions when it stated:

> We are also satisfied that in disposing of its garbage and in letting the contract in question the city of Fargo was acting in its governmental, and not in its private or corporate, capacity.[17]

In 1922 in *Trenton v. State of New Jersey*[18] it was stated that:

> The basis of the distinction (between governmental and proprietary functions) is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. . . .[19]

Although there is no established rule as to which functions are governmental and which are proprietary

> it is generally accepted that police, fire and educational functions are governmental, while the water works and light plants are proprietary. Liability usually also attaches to actions arising out of the functions related to streets and sidewalks.[20]

Considerable confusion has arisen as to which functions are to be considered governmental and which proprietary.[21] An example

15. *See* Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).
16. *See* City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150 (1924).
17. Mountain v. Fargo, 38 N.D. 432, 166 N.W. 416, 417 (1917).
18. 262 U.S. 182 (1922).
19. *Id.* at 191-92.
20. B. VAN DER SMISSEN, LEGAL LIABILITIES OF CITIES AND SCHOOLS FOR INJURIES IN RECREATION AND PARKS, 6, 7 (1968) [hereinafter cited as VAN DER SMISSEN]. *See also* MUNICIPAL TORT LIABILITY, *supra* note 6, at 392, 394.
21. J. Spencer, *Municipal Immunity for the Torts of Police Officers in South Dakota*, 11 S.D. L. REV. 87, 89 n.13: "*Compare* Blakemore v. Cincinatti Metropolitan Housing Authority, 74 Ohio App. 5, 57 N.E.2d 397 (1943) (off-street parking held governmental function) *with* Cleveland v. Ruple, 130 Ohio St. 465, 200 N.E. 507 (1936) (off-street parking held to be a proprietary function). *Compare* Spellman v. Caledonia, 117 Wis. 254, 94 N.W. 27 (1903) (flood control and protection held to be a governmental function) *with* Bardin v.

of the kinds of problems which would arise is found in an early Michigan case, *Hodgins v. Bay City*,[22] where the plaintiff's husband was killed by contact with an electric wire. An important factor was the type of current the wire was carrying. The deceased was a city lineman who was working on a light pole that carried two wires. He was killed by contact with the wire carrying alternating current, which the city sold for profit. The other wire carried direct current used to light the city streets. The court found that selling electricity to the public was a proprietary function and held the city liable. However, the Court also took the opportunity to point out that the lighting of city streets was governmental, and had the deceased come in contact with that wire there would have been no recovery.[23] The apparent lack of logic in this distinction forecast the problems that would face courts in searching for a base upon which to rest decisions.

In seeking a basis for distinctions courts have raised other doctrines. Some courts have referred to the differences between mandatory and permissive duties:

> [W]here the corporation exercises powers and privileges, which are permissive and not mandatory, . . . then the municipality acts in a proprietary or private capacity.[24]

However, most courts do not recognize the permissive-mandatory distinction for tort liability. A governmental function is more often determined by its character than whether the function performed was mandatory or voluntary. It is of no consequence that the duty may be undertaken voluntarily and not under compulsion of statute.[25]

Another distinction which has been raised is that between discretionary and ministerial duties. Where the act involves personal deliberation, discretion or judgment, it is said to be discretionary or judicial in nature; but if the act is absolute, certain, involving a set task, wherein the employee is left no choice of his own it is

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Portage, 79 Wis. 126, 48 N.W. 210 (1891) (flood control held to be a proprietary function). *Compare* Roberts v. Mayor and Alderman of Savannah, 54 Ga. App. 375, 188 S.E. 39 (1939) (operation of a public building held to be governmental) *with* Leeds v. Atlantic City, 13 N.J. Misc. 868, 181 A. 892 (1935) (operation of a public building held to be proprietary). *Compare* Hannon v. City of Waterbury, 106 Conn. 13, 136 A. 876 (1927) (public swimming pool held to be governmental function) *with* Orrison v. City of Rapid City, 76 S.D. 145, 74 N.W.2d 489 (1956) (public swimming pool held to be a proprietary function of the city). *Compare* Chickasha v. Daniels, 123 Okla. 73, 251 P. 978 (1926) (cleaning streets held proprietary function) *with* Tulsa v. Wheetley, 187 Okla. 155, 101 P.2d 834 (1940) (cleaning city streets held to be a governmental function). *See also* [C.] Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, 102 (1932)."

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

23. *Id.* at ——, 121 N.W. at 276.

24. Sapula v. Young, 147 Okla. 179, 296 P. 418, 438 (1931). *See also* Florey v. Burlington, 247 Iowa 316, 73 N.W.2d 770 (1955); Piasecny v. Manchester, 82 N.H. 458, 136 A. 357 (1926).

25. *See* VAN DER SMISSEN, *supra* note 20, at 26-28.

ministerial.[26] The South Dakota Court in *Norberg v. Hagna*,[27] in citing another case, said:

> [M]unicipal corporations have certain powers which are discretionary or judicial in character, and also certina powers which are ministerial. They will not be held liable in damages for the manner in which they exercise in good faith their discretionary powers of a public character, but are liable for damages caused by their negligence when their duties are ministerial.[28]

There has been little discussion in the North Dakota Supreme Court over what constitutes ministerial duties. However, in the case of *Montain v. Fargo*,[29] Justice Grace, in a strong dissent, declared:

> The garbage contract in question relates more particularly to the removal of garbage from private property. . . . If the municipality, therefore, undertakes to perform this private duty for the convenience, protection, and health of the municipality, and considers it can do it in a better way and manner than the private property owner could do, in the removal of such refuse the municipality is acting and doing such work mostly in behalf and for the convenience and comfort of the inhabitants of such city, . . . the performance of such service by the city is not a governmental but a ministerial duty. If the city . . . does the same in a negligent manner so as to cause an injury to some person, it cannot escape liability. . . .[30]

REQUIREMENTS OF NOTICE

Section 40-42-01 of the North Dakota Century Code[31] deals with the requirements of notice for municipal tort actions. It requires that notice of the injury must be filed in the office of the city auditor within 90 days after the happening of such injury describing the time, place, cause and extent of the damage or injury.

The North Dakota Supreme Court has held that this statutory requirement of notice is mandatory, and the presentation of adequate notice is a condition precedent to any recovery.[32] It has also stated that the purpose of this requirement is to enable the governmental body to investigate the circumstances of the injury when the evidence is fresh and the facts are still relatively clear in the minds of the parties and the witnesses.[33]

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26. *Id.*
27. 46 S.D. 568, 195 N.W. 438 (1923).
28. Walter v. City of Carthage, 36 S.D. 11, 153 N.W. 881, 882 (1915).
29. Mountain v. Fargo, 38 N.D. 432, 166 N.W. 416 (1917).
30. *Id.* at 451-52, 166 N.W. at 421-22.
31. N.D. CENT. CODE § 40-42-01 (1968).
32. Aune v. City of Mandan, 167 N.W.2d 754, 757 (N.D. 1969).
33. *Id.* at 758.

With regard to the extent of injuries, however, the North Dakota Supreme Court has held that the notice required in making or filing a claim is a remedial matter and the statutory provision should be liberally construed in favor of the claimant. There must, however, be a substantial compliance with the provisions of the statute.[34] In *Hooge v. City of Milnor*[35] the North Dakota Supreme Court shed some light on what would be required for "substantial compliance" with regard to the extent of the damage or injury. It held that notice to a city of a death claim, which apprised the city of the death and the circumstances which, it is claimed, caused the death, would constitute substantial compliance. However, the court pointed out that if the claim were for physical injury short of death, the notice must state the extent of the injury for which compensation is sought, which would require specific reference to the injury.

Section 40-42-04 of the North Dakota Century Code[24] states that a claimant shall not be permitted to prove any time, place, cause, manner, or extent of the injury differing from that specified in the claim filed with the city. Thus in *Trost v. City of Casselton*[37] the North Dakota Supreme Court reversed the trial court's verdict for the plaintiff on the grounds that at the trial undisputed evidence located the obstruction and injury 100 feet distant from the place designated in the complaint. It should be pointed out, however, that in the later case of *Johnson v. City of Fargo*[38] a variance of 6 feet was allowed with regard to the location of the place of the injury. This would seem to indicate that since a major reason for the requirement of notice is to allow the city an opportunity to investigate, a large error may deprive the city of this opportunity whereas a small error may still afford the city this chance while evidence is still fresh.

Section 40-42-04 of the North Dakota Century Code provides:

> No action shall be maintained . . . for damages or injuries . . . unless it shall appear that the claim upon which the action is brought was filed . . . nor unless the governing body of the municipality did not audit and allow the same within sixty days thereafter.[39]

In *Aune v. City of Mandan*[40] the North Dakota Supreme Court stated that the purpose of this statutory period delaying the com-

34. *Id.* at 757-58.
35. 56 N.D. 285, 217 N.W. 163 (1927).
36. N.D. CENT. CODE § 40-42-04 (1968).
37. 8 N.D. 534, 79 N.W. 1071 (1899).
38. 15 N.D. 525, 108 N.W. 243 (1906).
39. N.D. CENT. CODE § 40-42-02 (1968).
40. Aune v. City of Mandan, 167 N.W.2d 754 (N.D. 1969).

mencement of an action after notice is given is to allow the governmental body time to investigate the case and possibly negotiate a settlement, rather than being subjected to the annoyance and expense of needless litigation. However, in *Pyke v. City of Jamestown*[41] the Court held that if the city auditor fails to notify the city council of the claim, it is a neglect of a duty which is owed to the city and not a neglect of a duty which he owes to the claimant.

In addition to the statutory period delaying the commencement of an action after notice is given, Section 40-42-03 of the North Dakota Century Code[42] provides that after notice has been filed with the city any action maintained must be brought within six months. The *Aune* case was determined on the grounds that the plaintiff did not bring her suit within this allotted time. Aune contended that the city was estopped to plead the statute of limitations because of the alleged actions of its various agents, who the plaintiff claimed had requested further time to study the claim. The North Dakota Supreme Court, however, citing Sections 31-11-06 and 31-11-05(4) of the North Dakota Century Code[43] held that private persons cannot waive the statutory rights given a municipality by legislative action.

SIDEWALKS

One of North Dakota's earliest municipal tort liability actions was the territorial case of *Larson v. Grand Forks*[44] which dealt with city liability for accidents occurring on their sidewalks. In this case the plaintiff brought suit for damages sustained when an awning overhanging a public sidewalk fell, breaking his leg. The Supreme Court of Dakota declared:

> The defendant is a municipal corporation, and, as such, empowered by its charter, through its officers, to provide for keeping the sidewalks clean and free from obstructions or accumulation, and to take charge of the streets in such city, and it is its duty to see that they are in a condition at all times that people may travel along the walk in perfect safety, and that there should be no obstructions to such

41. 15 N.D. 157, 107 N.W. 359 (1906).
42. N.D. CENT. CODE § 40-42-03 (1968).
43. N.D. CENT. CODE § 31-11-06 (1968):

> When a party, by his own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission.

N.D. CENT. CODE § 31-11-05(4) (1968):

> Anyone may waive the advantage of a law intended solely for his benefit, but a law established for a public reason cannot be contravened by a private agreement.

44. 3 Dak. 307, 19 N.W. 414 (1884).

> travel, and for this purpose it may levy and collect taxes to defray such expenses. This duty is not confined entirely to obstructions upon the walk, but also applies as well to everything hanging over the walk that may render such travel unsafe. If the city officers, or those to whom this duty belongs and to whom it is assigned, neglect such duties, and a person is injured in consequence of such neglect, the city is liable for damages. This is in conformity with the act of this territory, which provides that *every person who suffers detriment from the unlawful act or omission of another may recover, from the person in fault, compensation therefor in money, which is called damages.*[45] (*Emphasis added*).

However, at least by 1915 North Dakota recognized two categories of city liability for sidewalk actions—one for defects in sidewalks and another for conditions accounted for by the accumulation of snow and ice.[46] In *Anderson v. City of Jamestown*[47] the Court said:

> The rules relating to the liability of a city for personal injuries sustained on account of defects in sidewalks are well settled in this state. There is a duty incumbent upon the city to exercise reasonable care to make and maintain its streets and walks reasonably safe for the purposes to which they are respectively devoted, and for the use of persons traveling thereon in the usual modes, by day or by night, and who are themselves in the exercise of reasonable care. And after the city has received notice of the existence of a defect, an obligation arises to exercise reasonable care to restore the street or sidewalk so that it may again be reasonably safe for travel. . . . [A]s regards other defects, . . . actual knowledge on the part of the city is not necessary . . . notice may be either actual or constructive.[48]

With regard to conditions caused by the accumulation of snow and ice the Court further stated:

> However, there is, in this state, no liability for injuries sustained by reason of accumulation of snow and ice upon a sidewalk unless actual knowledge of the defective, unsafe, or dangerous condition of such sidewalk . . . was possessed . . . 48 hours previous to such damage or injury, and actual knowledge of the condition can in no case be presumed from the fact of the existence of the condition, but such knowledge must in all cases be proven as an independent fact.[49]

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45. *Id.* at 313, 19 N.W. at 416.
46. *See* N.D. CENT. CODE § 40-42-05 (1968). The source of this statute is Ch. 70 ,§ 1, [1915] N.D. Sess. Laws 82.
47. 50 N.D. 531, 196 N.W. 753 (1923).
48. *Id.* at 535-36, 196 N.W. at 754.
49. *Id.*

As might be expected, individuals have been more successful in North Dakota in suits against cities for injuries received from defective sidewalks than in those in which the injury was received because of the accumulation of ice and snow upon sidewalks.

Of nine cases[50] dealing with defective sidewalks, the plaintiff recovered against the defendant city in all but two.[51] And in one of these, *Gagnier v. Fargo*,[52] in which the plaintiff was injured in a fall from a bicycle caused by a defective sidewalk, the court held that if a city permits persons to ride bicycles on their sidewalks then:

> A person riding a bicycle has a right to assume that the walk is in safe condition for pedestrians to use, and, if he is injured when the walks are in such condition, he cannot complain, and he must bear the loss, as he assumed the risk.[53]

Another case in which the plaintiff did not recover was *Braatz v. City of Fargo*.[54] In that case the plaintiff while walking along a city sidewalk became frightened by the whistle of a bicycle rider, and she stepped off the sidewalk into the drainage gutter, receiving personal injuries. The North Dakota Supreme Court in citing a New York Court of Appeals case, *Beltz v .City of Yonkers*,[55] stated:

> It is scarcely necessary to repeat here, what has often been said before, that a city is not responsible for every accident that may happen in its streets resulting in personal injury. . . . But when an accident happens by reason of some slight defect from which danger was not reasonably to be anticipated and which according to common experience, was not likely to happen, it is not chargeable with negligence.[56]

Of four cases[57] involved in actions against cities for injuries sustained as a result of icy or snow laden sidewalks, in only one case[58] has the plaintiff been successful. In *Jackson v. City of Grand*

50. Larson v. Grand Forks, 3 Dak. 307, 19 N.W. 414 (1884); Maloney v. City of Grand Forks, 73 N.D. 445, 15 N.W.2d 769 (1944); Hooge v. City of Milnor, 56 N.D. 285, 217 N.W. 163 (1927); Anderson v. City of Jamestown, 50 N.D. 531, 196 N.W. 753 (1923); Braatz v. City of Fargo, 19 N.D. 538, 125 N.W. 1042 (1910); Pyke v. City of Jamestown, 15 N.D. 157, 107 N.W. 359 (1906); Gagnier v. Fargo, 11 N.D. 73, 88 N.W. 1030 (1902); Coleman v. City of Fargo, 8 N.D. 69, 76 N.W. 1051 (1898); Chasey v. City of Fargo, 5 N.D. 173, 64 N.W. 932 (1895).
51. Braatz v. City of Fargo, 19 N.D. 538, 125 N.W. 1042 (1910); Gagnier v. Fargo, 11 N.D. 73, 88 N.W. 1030 (1902).
52. 11 N.D. 73, 88 N.W. 1030 (1902).
53. *Id.* at 78-79, 88 N.W. at 1033.
54. 19 N.D. 538, 125 N.W. 1042 (1910).
55. 148 N.Y. 67, 42 N.E. 401 (1895).
56. Braatz v. City of Fargo, 19 N.D. 538, 125 N.W. 1042, 1043-44 (1910).
57. Malherek v. City of Fargo, 49 N.D. 522, 191 N.W. 951 (1922); Ellingson v. City of Leeds, 40 N.D. 415, 169 N.W. 85 (1918); Jackson v. City of Grand Forks, 24 N.D. 601, 140 N.W. 718 (1913); Trost v. City of Casselton, 8 N.D. 534, 79 N.W. 1071 (1899).
58. Jackson v. City of Grand Forks, 24 N.D. 601, 140 N.W. 718 (1913).

Forks,[59] the plaintiff was allowed recovery for personal injuries which resulted from a fall on a slippery sidewalk. In this case the walk in question had not been cleaned at any time during the winter and the snow and ice had been permitted to collect and remain upon the sidewalk. Some warm weather had caused the snow to soften and the trampling of pedestrians had caused it to form in mounds and humps. The North Dakota Supreme Court stated:

> The general rule, and, we believe, the better rule, . . . is that the liability should be based upon negligence and upon what is reasonable under the circumstances, paying attention to the climatic conditions. . . . The municipality under this rule is bound merely to exercise reasonable care and diligence to render the sidewalk safe. Where the sidewalk is properly constructed, the mere fact that it is rendered slippery by the presence of ice or snow will not, in itself, render the city liable for resulting injuries. Where, however, snow or ice is suffered to remain for a long time until it forms into mounds or ridges, and becomes, itself, an obstruction, as it were, to the sidewalk, . . . the municipality may be held liable. It will be held liable, if not for the accumulation, then for not using reasonable means, . . . to prevent the danger.[60]

It may be of interest to point out, however, that the *Jackson* case was decided in 1913, two years prior to the adoption of the statute which declares in part:

> All municipalities in this state shall be *exempt* from *all liability* to any person for damages for injuries suffered or sustained by reason of the accumulation of snow and ice upon the sidewalks within the municipality unless *actual knowledge* of the defective, unsafe, or dangerous condition of the sidewalk . . . shall have been possessed . . . at least forty-eight hours previous to the damage or injury. . . .[61] (*Emphasis added*).

It would appear that the language of this statute would today preclude a recovery in a situation similar to the *Jackson* case. And in *Malherek v. City of Fargo*[62] the North Dakota Supreme Court held that, although another individual, Mr. Loucks, testified that he had fallen on the same icy sidewalk earlier the same day as the plaintiff, and had reported it to the police, the statute called for forty-eight hours actual notice.

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59. 24 N.D. 601, 140 N.W. 718 (1913).
60. *Id.* at 618, 140 N.W. at 723.
61. *See* N.D. CENT. CODE § 40-42-05 (1968). This statute was adopted by Ch. 70, § 1, [1915] N.D. Sess. Laws 82.
62. 49 N.D. 522, 191 N.W. 951 (1922).

STREETS

Actions against municipalities in North Dakota by individuals seeking damages for injuries received in accidents on city streets may be divided into three sub-categories: Obstructions; Dead End Streets; and Operation of City Vehicles.

With regard to obstructions it was held in *City of Grand Forks v. Allman*[63] that:

> The streets of a city are made and maintained at public expense for the use of its citizens and others who may lawfully pass over them, and a duty is cast upon a city to exercise all reasonable supervision, care, and precaution to maintain them in a reasonably safe condition so as to avoid, as far as possible, injury to the traveling public. . . .[64]

As with sidewalk use, it has been held in North Dakota that knowledge of an obstruction prior to an accident does not necessarily preclude recovery. In *Ouverson v. City of Grafton*,[65] where the plaintiff was aware of the obstruction in the street prior to the accident, the North Dakota Supreme Court, citing *Turnpike Co. v. Jackson*,[66] stated that one does not have to forego travel on a highway merely because he knows it is dangerous. His knowledge of the defect in the highway is only one circumstance to be considered with other circumstances in determining whether he used reasonable care.

Belt v. City of Grand Forks[67] concerns an action with regard to dead end streets. In the *Belt* case an accident occurred at the intersection of South Washington Street and Ninth Avenue South. South Washington runs north and south. The streets on the east side of South Washington do not match up with those on the west side. Those on the west side are about ninety-seven feet north of those on the east side. The accident happened when the plaintiff's husband, driving west on Ninth Avenue South, drove his car straight across South Washington and failing to notice the jog of South Ninth Avenue, drove into a shallow ditch, with the plaintiff suffering personal injuries. At the intersection in question there was no highway sign indicating the necessity of a turn at the intersection nor a dead end warning sign. The North Dakota Supreme Court stated, however, that a city is not chargeable with liability " . . . for failure to maintain barriers, lights or warning signs or notices at the point of an offset or jog in a street, where the same could

63. 153 F. 532 (8th Cir. 1907).
64. *Id.* at 534.
65. 5 N.D. 281, 65 N.W. 676 (1895).
66. *Id.* at 285, 65 N.W. at 679.
67. 68 N.W.2d 114 (N.D. 1955).

not constitute a dangerous situation to a prudent driver. . . ."[68] The Court maintained that it is sufficient under the ordinary standard of care for a city to maintain its streets free from defects or from creating extraordinary or unusual hazards.

It would appear that the Court in the *Belt* case places too much emphasis on whether or not a driver is prudent. In general, the city's liability should rest upon whether the situation is dangerous or presents an unusual hazard. It could well be that the prudence of a driver may in part be measured by his ability to observe signs and warnings placed upon the streets for his convenience and safety.

The last category of street actions involves the operation of a city vehicle. In *Hanson v. Berry*[69] a policeman for the city of Fargo was charged by one Hanson of driving an automobile owned by the city at an excessive rate of speed, about 35 miles per hour, driving upon the left-hand side of the street without having the vehicle under control, and with knowledge that the automobile was unequipped with proper brakes.

The *Hanson* case presented the Court with two issues. With regard to the first issue the North Dakota Supreme Court held that a city is not liable for the negligent acts of its agent while operating an automobile on the streets thereof when the agent is acting in the course of performance of a governmental duty. In citing Dillon on Municipal Corporations it stated:

> Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation . . . is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened. . . .[70]

The second issue of relevance was whether the unsafe operation of a city vehicle could render the city streets unsafe within the meaning of statutory regulations. With regard to this matter the Court stated:

> In our opinion, a holding that a municipality is liable on account of an unsafe condition of the streets, where such unsafety is due to no physical imperfection, would involve the modification of well-established principles of law.[71]

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68. *Id.* at 121.
69. 54 N.D. 487, 209 N.W. 1002 (1926).
70. *Id.* at 494, 209 N.W. at 1004-05.
71. *Id.* at 495, 209 N.W. at 1005.

RECENT DEVELOPMENTS

It appears that three trends are developing in the field of municipal tort liability. First are those jurisdictions whose courts are claiming that municipal immunity is court made law and as such may be changed by the courts. These jurisdictions are following the holding in *Holytz v. City of Milwaukee*,[72] in which the Supreme Court of Wisconsin stated:

> [T]he governmental immunity doctrine has judicial origins. . . .[W]e are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments.[73]

Other states adopting a similar viewpoint include Arizona,[74] Florida,[75] Kentucky,[76] Michigan,[77] Minnesota,[78] and South Dakota.[79]

A second trend is seen in those jurisdictions in which the courts refuse to abolish the doctrine of governmental immunity without legislative enactment. North Dakota has strongly adopted this viewpoint. The North Dakota Supreme Court in *Fetzer v. Minot Park District*[80] stated emphatically:

> The courts cannot legislate regardless of how much we might desire to do so. Therefore, regardless of how worthy a claim against a municipal corporation might be, we cannot assume the functions of the Legislative Assembly. Our power is limited to passing on laws enacted by the Legislature, and, if the Legislature fails to act, we cannot change the law by judicial decision. . . . As was said by the Honorable A. M. Christianson, in his concurring opinion to *Anderson v. Board of Education of City of Fargo*, 49 N.D. 181, 190 N.W. 807: "If the rule is wrong the Legislature has ample power to change it. It is the duty of the courts to enforce the law as it exists."[81]

Other states agreeing with the North Dakota decision in leaving the thorny problem to legislative action include Kansas,[82] New Hampshire,[83] Missouri,[84] Ohio,[85] Pennsylvania[86] and Tennessee.[87]

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72. 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
73. *Id.* at ——, 115 N.W.2d at 623.
74. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963).
75. Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
76. Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964).
77. Williams v. City of Detorit, 364 Mich. 231, 111 N.W.2d 1 (1961).
78. Spanel v. Mounds View Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).
79. Bucholz v. City of Sioux Falls, 77 S.D. 322, 91 N.W.2d 606 (1958).
80. 138 N.W.2d 601 (N.D. 1965).
81. *Id.* at 604.
82. Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966).
83. Gossler v. City of Manchester, 107 N.H. 310, 221 A.2d 242 (1966).
84. Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963).
85. Hyde v. City of Lakewood, 2 Ohio St.2d 155, 207 N.E.2d 547 (1965).
86. Dillon v. New York School Dist., 422 Pa. 103, 220 A.2d 896 (1966).
87. Coffman v. City of Pulaski, 220 Tenn. 642, 422 S.W.2d 429 (1967).

The stand taken by the North Dakota Supreme Court and other jurisdictions whose solution is to refer the problem to state legislatures appears ill founded. As the Supreme Court of Wisconsin stated in the *Holytz*[88] case, the doctrine of governmental immunity has judicial origins and courts should take the lead in its abolition. In the absence of a specific statute declaring municipal tort immunity, a court's refusal to deal with the problem by referring it to a legislature is only judicial "buckpassing". Not all state legislators are lawyers and many are not aware nor concerned with this problem. Consequently, referral to a legislature often is just another way of postponing any definite action. What is necessary is courageous court action which, if nothing else, may force legislatures to deal with the issue of municipal tort immunity.

The third, and perhaps most encouraging trend is that some state legislatures have taken it upon themselves to abrogate the common law immunity by statute. Washington,[89] Oregon,[90] California,[91] and New York[92] are some states which have enacted legislation affecting the doctrine of governmental immunity. While not all of this legislation deals exclusively with municipal immunity, it is at least a step forward in the battle against governmental immunity at all levels.

CONCLUSIONS AND RECOMMENDATIONS

Ever since Professor Edwin Borchard's scholarly critique of governmental tort liability,[93] countless legal writers have examined and cross-examined the governmental immunity doctrine. The criticisms are wide-ranging and highly varied. Some common examples are

> that it is unfair to impose upon the individual the burden of his damage, rather than upon the entire community where it justly belongs; that by denying a remedy for a wrong, the doctrine results in the deprivation of life, liberty, and property without due process of law; and that the doctrine runs counter to a basic concept underlying the law of torts, that is, that liability follows negligence.[94]

Whether as a result of these criticisms or merely recognition by the courts and legislatures that "[m]ost of the arguments for

88. Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
89. *See* WASH. REV. CODE ANN. § 4.92.090 (Supp. 1966).
90. *See* ORE. REV. STAT. §§ 30.320, 30.400 (Supp. 1967-1968).
91. *See* CAL. GOV'T CODE §§ 810-840.6, 945 (West Supp. 1966).
92. *See* N.Y. JUDICIARY, COURT ACTS, *N.Y.* CT. CL. ACT, § 8 (McKinney 1963).
93. *See* E. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1 (1924); E. Borchard, *Governmental Responsibility in Tort VI*, 36 YALE L. J. 1 (1926). E. Borchard, *Governmental Responsibility in Tort*: VII, 28 COLUM. L. REV. 577 (1928).
94. Comment, 41 N.C. L. REV. 290, 291 (1963).

governmental immunity . . . took root at a time when the activities of a municipal corporation were exceedingly limited, . . ."[95] trends indicate that many jurisdictions are relaxing, if not eliminating, the doctrine of municipal governmental tort immunity.

Opponents of municipal liability have made one strong argument, claiming that municipal liability would create critical financial difficulties for small communities.[96] This, of course, would be of great interest to a state such as North Dakota where most of the cities are "small". However, statistics show that the abolition of governmental immunity would not increase the small municipal tort burden more than fifteen or twenty percent.[97]

The North Dakota Legislature has acted in the area of financial liability by providing that cities may carry insurance. Section 40-43-07 of the North Dakota Century Code[98] provides that political subdivisions may provide for liability insurance to protect themselves against claims for loss, damage or injury. Section 39-01-08[99] further provides that a city may carry insurance on their motor vehicles or aircraft. Both of these statutes state, however, that the city waives its immunity only to the extent of the type and policy limits of their insurance coverage.

In *Fetzer v. Minot Park District*[100] the North Dakota Supreme Court stated quite emphatically that changes in the area of municipal liability must come from the State Legislature. There are at least two positive alternatives for the North Dakota Legislature. First, as a long range goal, they could follow the example of New Jersey[101] and establish a study commission to make a report on municipal tort liability with the possibility of someday eliminating municipal tort immunity. Second, even if reluctant to completely eliminate municipal tort immunity, they could pass legislation specifically delineating which municipal functions are to be considered governmental and which are proprietary. This would at least help clarify in the minds of both the court and private citizens in which areas the city may be held liable for its wrongful acts.

Some of the more progressive state legislatures have already acted. Following the example of the Federal Tort Claims Act,[102] which authorizes tort claims against the federal government for injuries caused by the wrongful acts of federal employees acting

95. *Municipal Tort Liability, supra* note 6, at 400.
96. H. Kennedy & R. Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S.CAL. L. REV. 161, 181 (1963).
97. G. Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW & CONTEMP. PROB. 363, 367 (1942).
98. N.D. CENT. CODE § 40-43-07 (1968).
99. N.D. CENT. CODE § 39-01-08 (Supp. 1969).
100. 138 N.W.2d 601 (N.D. 1965).
101. N.J. STAT. ANN. §§ 52: 17B-1, 52: 17B-4.2 (Supp. 1968).
102. Federal Tort Claims Act of 1946, 28 U.S.C. § 1346(b) (1958).

within the scope of their employment, these states have enacted similar laws with regard to municipal tort liability. The Minnesota legislature, for example, in reaction to the catalytic case of *Spanels v. Mounds View School Dist.*,[103] has wholly recodified the law of governmental immunity[104] so that basically municipalities would be subject to liability for their torts and the torts of their agents acting within the scope of their employment.[105]

The California legislature has also provided that a public entity is liable for injury caused by the act or omission of an employee acting within the scope of his employment.[106]

It should be understood that in seeking clarification of municipal liability, it is only as to those harms which are torts that the municipality should be held liable. If indeed government is to serve to protect persons and their property, and there is to be a "remedy for every wrong," this is a necessity.

ROBERT W. HOLTE

103. 264 Minn. 279, 118 N.W.2d 795 (1962).
104. MINN. SESS. LAWS 1963, Ch. 798.
105. MINN. STAT. ANN. § 466.02 (1963); MINN. SESS. LAWS 1963, Ch. 798, § 2.
106. CAL. GOV'T CODE § 815(2) (West Supp. 1966).