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THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS IN PENNSYLVANIA

E. B. SCHULZ*

A question of major importance in a society marked by the steady growth of governmental activities is the degree of legal responsibility for injuries to persons and property resulting from the performance of public services. The limited liability of governmental units in the United States has often been the subject of unfavorable comment, especially in recent years, and there is a growing sentiment in favor of a change in policy.¹ This could readily be accomplished by action of the legislatures and the courts. Since municipal corporations do not enjoy the general immunity from suit accorded the national government and the states, a survey of the law of municipal liability for torts, besides revealing the maximum involuntary liability of any single unit of government, affords a means of ascertaining the trend of legislative and judicial opinion with regard to its extension.

The situation in Pennsylvania will be presented according to the following plan: (1) a consideration of the basic principles adhered to by the courts and the manner of their application in specific instances; (2) a discussion of excep-

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¹E. M. Borchard, "Government Liability in Tort", 34 Yale L. Jl. 1, 129, 229 (1924-1925); "Governmental Responsibility in Tort", 36 Yale L. Jl. 1, 757, 1039 (1926-1927); "Theories of Governmental Responsibility in Tort", 28 Col. L. Rev. 577, 734 (1928); "Municipal Responsibility for the Torts of Policemen", 42 Yale L. Jl. 241 (1932); L. W. Feezer, "Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases", 78 U. Pa. L. Rev. 805 (1930), 79 U. Pa. L. Rev. 742 (1931); C. W. Tooke, "Extension of Municipal Liability in Tort", 19 Va. L. Rev. 97 (1932); Editorial Notes, "Inroads upon Immunity in Tort", 46 Harv. L. Rev. 305 (1932). Attention is directed to the references in Borchard's "Municipal Responsibility for the Torts of Policemen", 42 Yale L. Jl. 244, 245, note 17.

tions to the general rules; (3) a summary of pertinent constitutional and statutory provisions; and (4) an appraisal of the legislative and judicial attitudes toward curtailment of the immunity which Pennsylvania municipalities now enjoy.

BASIC PRINCIPLES

Two basic principles are applied by the Pennsylvania courts in liability cases involving municipal corporations. According to the Supreme Court, the controlling question in determining the common law liability or non-liability of a municipal corporation for torts is whether the nature of the service is corporate and private or governmental and public.² If acting in a corporate or business capacity, a municipality may be held liable, but if exercising powers of a public or governmental character, immunity from liability is ordinarily the rule. A second guiding principle relieves a municipality from liability for negligence when its duties fall within the terms "legislative", "judicial", or "discretionary" as distinguished from "absolute", "imperative", or "ministerial". In spite of ambiguous expressions of judicial opinion concerning its significance and proper application, this rule, as ordinarily used in Pennsylvania, is clearly supplementary to the public-private criterion of liability.

THE PUBLIC-PRIVATE OR GOVERNMENTAL-CORPORATE RULE

Since so much depends upon the capacity in which a municipality acts, the basis of distinction between public or governmental and private or corporate functions is obviously a matter of primary importance. In Pennsylvania, municipalities have been held to be acting in a governmental capacity if exercising the police power; if dealing with a matter of general concern or discharging duties for the public or general benefit, such as protection of health and property; if performing a service delegated to the municipality to be exercised on behalf of the sovereign state; and if performing gratuitously a service of such a character as to come within the broad legal meaning of the term "charitable".³ Although these are by no means mutually exclusive criteria, they are presented as such because of the language used by the Supreme Court in various opinions.⁴

²*Scibilia v. Philadelphia*, 279 Pa. 549, 553, 124 Atl. 273, 274 (1924).

³"A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." *Fire Insurance Patrol v. Boyd*, 120 Pa. 624 (1888), quoting *Jackson v. Phillips*, 14 Allen 556 (Mass.)

⁴*Devers v. Scranton*, 308 Pa. 13, 161 Atl. 540 (1932); *Bell v. Pittsburgh*, 297 Pa. 185, 146 Atl. 567 (1929); *Balashaitis et ux. v. Lackawanna County*, 296 Pa. 83, 145 Atl. 691 (1929); *American Aniline Products, Inc. v. Lock-Haven*, 288 Pa. 420, 135 Atl. 726 (1926); *Scibilia v. Philadelphia*, 279 Pa. 549, 124 Atl. 273 (1924); *Moore v. Luzerne County*, 262 Pa. 216, 105 Atl. 94 (1918); *Betham v. Philadelphia*, 196 Pa. 302, 46 Atl. 448 (1900); *Bodge v. Philadelphia*, 167 Pa. 492, 31

To determine whether or not a municipality is acting in its corporate or private capacity, the following tests have been applied: Is the activity carried on for the peculiar benefit of the corporation in its local and special interests, i.e., for the private advantage and benefit of its inhabitants?; Is the activity one of a business nature such as is generally carried on by individuals or private corporations?; Is a business or commercial revenue derived and intended to be derived from the performance of the service causing injury?⁴ An affirmative answer to all three of these questions is not essential, nor is the fact that certain services give rise to income sufficient in itself to place them in the "corporate" category.

The Supreme Court has stated that in distinguishing between the governmental and business powers of a public body regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. "If granted for public purposes exclusively they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage or emolument, though the public may derive a common benefit therefrom, the corporation, *quod hoc*, is to be regarded as a private company."⁵

As illustrated by the following cases, the derivation of income may prove to be the determining force if an exercise of the police power is not involved. *Bodge v. Philadelphia*⁶ was a case in which a man was run over by a team driven by one of the employees of the electrical bureau of the city. The court, holding that the city was acting in its corporate capacity, stressed the fact that while the bureau neither manufactured nor sold electricity, it derived an annual revenue of about \$150,000 from certain grants of privileges to private citizens and corporations. The bureau was described as "a revenue producing department of the municipal government" which could in no proper sense be regarded as "a branch of the police power of the municipality." It was also held that in the performance of municipal duties for the benefit of the city the employees of the bureau were in fact the servants of the city in like manner as the employees of its gas and water departments. In *Scibilia v. Philadelphia*⁷ the plaintiff was injured by a city-owned truck hauling ashes to a city dump and operated by an employee of the Bureau of Street Cleaning of the Department of Public Works. The immunity of the city from liability was recognized on the ground that even though some small incidental revenue may be gained therefrom, the collection of ashes, being an exercise of the police power for the promotion of public health, is a governmental function. Commenting upon the weight to be attached to derivation of income from the performance of a service, the Supreme Court said: "Where the authority exercised

Atl. 728 (1895); *Philadelphia v. Gilmartin*, 71 Pa. 141 (1872); *Carr v. The Northern Liberties*, 35 Pa. 324 (1860).

⁵*Moore v. Luzerne County*, 262 Pa. 222, 105 Atl. 96 (1918).

⁶167 Pa. 492, 31 Atl. 728 (1895).

⁷279 Pa. 549, 124 Atl. 273 (1924).

or thing done, is on the borderline between the private and the governmental capacities in which municipalities may act, and has features suggestive of both, charges made for and commercial income derived from the rendition of the services involved have been given decisive influence as elements which determine the case to be of a kind where damages for injuries may be recovered, and the absence of these elements has been allowed force the other way."⁸ A situation existed in *Kappel v. Pittsburgh*⁹ in which this rule would probably have been applied if the Allegheny County Court had drawn different conclusions concerning the authority of the city to perform the service involved. Suit for damages had been brought because an automobile was stolen while parked in a place maintained by the city on a public wharf and in charge of its employees. Although the plaintiff had paid a parking fee, the court ruled that inasmuch as no act of the state legislature authorized the operation of an automobile parking place, the city was exercising its police power and consequently acting in a governmental capacity.

The recent case of *Bell v. Pittsburgh*¹⁰ affords an excellent illustration of the perplexities arising from the practice of distinguishing between governmental and corporate functions. It also demonstrates the legal consequences of a mixture of these two types of activity. Helen Bell, who entered a public building jointly owned and occupied by Pittsburgh and Allegheny County, was injured as a result of the negligent operation of a county elevator by a county employee while on her way to the public welfare department of the city. The building housed the various county offices, the courts of common pleas, the bar association, the law library, and such city offices as those of the mayor, treasurer, the police, public safety, health and public welfare departments, the bureau of water, and all revenue producing bureaus. Part of the building was rented to private enterprises, including a cigar stand, public telephones, and a tunnel under the building. Upholding an award of damages to the plaintiff, the Supreme Court asserted that when a county and city jointly own and occupy a building for governmental and business purposes, the fact that some of the activities centered in the building are exclusively of a purely governmental nature will not affect liability for negligence when they are joined with business activities. Where elevators are operated in such a jointly owned building, they must always be considered in the use in which the joint arrangement places them, namely, joint business and government use. A trip on such an elevator by one in regard to a governmental function, and a trip by one in respect to business, in the same vehicle, cannot be separated when viewing the duties and responsibilities of the carriers which transport the parties. Where the acts in furtherance of the activities of the separate agencies are at times mingled and at times alternated, there is no separation when testing their

⁸279 Pa. 557, 124 Atl. 276 (1924).

⁹77 Pitts. Leg. Jl. 218 (1929).

¹⁰297 Pa. 185, 146 Atl. 567 (1929).

legal effect as related to responsibility for the negligent acts of servants. Reason and justice dictate that the rules governing business activities predominate. The two bodies jointly engage in business enterprises in leasing part of the structure, and it seems that the combination of their interests to effect a given purpose through the joint building was in itself a business enterprise, in that it lessened the cost of government operation. Where a person goes into one of such elevators, operated by a county employee, to go to a city department, and is injured by the negligent operation of the elevator, both city and county are liable.¹¹

As evidenced by the foregoing and other cases, the criteria for determining whether a city is acting in a public or private capacity are not so precise as to prevent difficulties in application. The Supreme Court, discussing the problem in the *Scibilia* case, pointed out that in these days of increasing governmental activity, the demarcation between what are purely public functions within the police power and what are not is becoming increasingly difficult to observe, and remarked that the courts must classify each act as best they can in view of existing legislation relevant to the situation, applicable general principles, and the nearest pertinent authorities. "Attempts at the statement of general rules," said the Court, "to control or guide the judiciary in determining these questions have in the past proved rather futile."¹²

APPLICATION OF THE GOVERNMENTAL-CORPORATE RULE

By virtue of this governmental-corporate test of liability, it is well established in Pennsylvania that no action to recover damages lies against a municipality for the negligence of its police, fire, or health departments, unless such a right is clearly given by act of the state legislature, because the service of these departments, being delegated to the municipality to be performed on behalf of the state, is governmental in character.¹³ The most recent decisions are based directly upon the public nature of these services, but in some of the earlier cases other grounds for exemption from liability were also advanced. In *Elliott v. Philadelphia*,¹⁴ decided in 1874, policemen had arrested a servant for driving his master's

¹¹297 Pa. 190, 191, 146 Atl. 568 (1929).

¹²279 Pa. 559, 124 Atl. 277 (1924).

¹³*Police*: Graff v. McKeesport, 316 Pa. 263, 175 Atl. 426 (1934); Steele v. McKeesport, 298 Pa. 116, 148 Atl. 53 (1929); Jameson v. Philadelphia, 282 Pa. 207, 127 Atl. 629 (1925); Norristown v. Fitzpatrick, 94 Pa. 121 (1880); Elliott v. Philadelphia, 75 Pa. 347 (1874); Miller v. Hastings Borough, 25 Super. Ct. 569 (1904); Cover v. Johnston, 2 Blair Cty. L. R. 22 (1901); Fox v. The Northern Liberties, 3 W. & S. 103 (1841). *Fire Protection*: Devers v. Scranton, 308 Pa. 13, 161 Atl. 540 (1932); Kies v. Erie, 135 Pa. 144, 19 Atl. 942 (1890); Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888); Knight v. Philadelphia, 15 W. N. C. 307 (1884); Rosenberry v. Philadelphia, 7 W. N. C. 558 (1879); Freeman v. Philadelphia, 7 W. N. C. 45 (1879); Lilly v. Scranton, 2 Lack. L. N. 175 (1893). *Public Health*: Bandos v. Philadelphia, 304 Pa. 191, 155 Atl. 279 (1931); Scibilia v. Philadelphia, 279 Pa. 549, 124 Atl. 273 (1924); Howard v. Philadelphia, 250 Pa. 184, 95 Atl. 388 (1915); Hand v. Philadelphia, 8 Pa. Cty. Ct. Rep. 213 (1890).

¹⁴75 Pa. 347 (1874).

horse recklessly and furiously on a city street faster than was permitted by ordinance. Due to the negligence of the police the horse was killed and the carriage damaged. The Supreme Court upheld the decision of the District Court of Philadelphia to the effect that the city was not liable and in its brief comment referred with approval to the reasoning of Judge Thayer of the lower court. Besides asserting that the policemen, although appointed by the city, were "quasi-civil officers" of the state government, Judge Thayer emphasized the discretionary character of their work and observed that it would be unreasonable to hold a municipal corporation responsible for the unauthorized or unlawful acts of its officers and agents. In discussing the ability of municipalities to control policemen, he said, "A municipal body is bound by law to execute a particular work. It is reasonable to suppose that they have such opportunities for the constant supervision of the work, and such constant control of their agents, that they should be responsible for the manner in which the work is done. But will any one say, that it is equally reasonable to hold the municipality responsible for the acts of these officers in the discharge of their varied duties, in controlling persons and things, as it is to hold it responsible for the manner of executing a public improvement? * * * It is quite practicable to give particular instructions for the performance of a public work and to see that they are complied with. Is it possible to give particular instructions to police officers in regard to what they shall do in every case, and under all possible circumstances which may arise in the discharge of their various and complicated duties? In the execution of a public work, nothing need be left to the discretion of the agent. Can the same be said in regard to the functions which are delegated by a municipal government to police officers?"¹⁵ This line of reasoning was not resorted to by the Supreme Court in *Steele v. McKeesport*,¹⁶ decided in 1929. Policemen had roped off a street to protect a crowd of people from anticipated danger, but after the crowd had dispersed a person drove into the rope and was injured. The court stated that there was no right of recovery against municipalities for the negligence of their police departments in the performance of services of a governmental character.

The immunity of cities from liability for the tortious action of firemen was reaffirmed in the recent case of *Devers v. Scranton*.¹⁷ Devers sued in trespass to recover damages for the death of his adult son who was run down and killed by a motor-driven fire ladder truck which was responding to an alarm. The court held that acts done in the performance of the functions of government, such as protection of health or property, do not create a liability in tort.

*Howard v. Philadelphia*¹⁸ was a case involving the negligence of a physician employed by the Philadelphia board of health. A serious illness, necessitating the

¹⁵Ibid, p. 350.

¹⁶298 Pa. 116, 148 Atl. 53 (1929).

¹⁷308 Pa. 13, 161 Atl. 340 (1932). Cf. *infra*, pp. 162, 163.

¹⁸250 Pa. 184, 95 Atl. 388 (1915).

amputation of one of the plaintiff's limbs, resulted from a vaccination to which Howard submitted under protest in order to be relieved from quarantine regulations. In denying the liability of the municipality, the court rejected the contention that in doing what it did the city was exercising a corporate function for the private advantage and benefit of its inhabitants. The case of *Korenic v. Pittsburgh*¹⁹ concerned the question of municipal liability for the negligence of servants engaged in the operation of a city hospital. As a result of negligence, an inmate of the insane department of the hospital was injured by another patient in an insane attack, but the lower court denied the right to recover damages on the ground that a hospital is a purely public charity in the operation of which a municipality is acting in a governmental capacity.

Other functions classed as governmental in Pennsylvania, in connection with which the rule of non-liability has been applied, are the collection and disposal of municipal refuse, including street cleaning and the maintenance and operation of dumps;²⁰ the lighting of streets;²¹ the maintenance and operation of a morgue and morgue ambulance;²² the inspection of buildings;²³ the provision of polling places;²⁴ the administration of poor relief;²⁵ the erection and maintenance of courthouses and jails;²⁶ the creation and administration of a system of schools;²⁷ the bonding of contractors engaged in the construction of highways to guarantee payment of labor, materials, and machinery;²⁸ and the selection of employees to be discharged under an ordinance requiring a reduction in personnel.²⁹ The inclusion of some of the activities in this list is warranted only on the authority of decisions rendered by lower courts without the benefit of a Supreme Court ruling in regard to the specific matters in question. Moreover, some of the cases have involved school districts, poor districts, townships, and counties rather than cities or boroughs. Although the liability of these quasi-corporations, which act primarily as agents

¹⁹70 Pitts. Leg. Jl. 1001 (1922).

²⁰*Bandos v. Philadelphia*, 304 Pa. 191, 155 Atl. 279 (1931); *Scibilia v. Philadelphia*, 279 Pa. 549, 124 Atl. 273 (1924); *Healy et al. v. Philadelphia*, 117 Super. Ct. 417, 178 Atl. 337 (1935); *Mooney v. Philadelphia*, 115 Super. Ct. 433, 175 Atl. 886 (1934); *Siwak v. Rankin*, 72 Super. Ct. 218 (1919); *Minkewicz v. Plymouth*, 27 Luz. 241 (1932); *Zellman v. Philadelphia*, 17 D. & C. 493 (1932).

²¹*Horner v. Philadelphia*, 194 Pa. 542, 45 Atl. 330 (1900); *Canavan v. Oil City*, 183 Pa. 611 (1898).

²²*Wray v. County*, 69 Pitts. Leg. Jl. 172, 50 C. C. 174, 30 Dist. 344 (1920).

²³*Walch v. Clifton Heights*, 21 Del. 286, 15 D. & C. 661 (1931).

²⁴*Hubbard v. Crawford County*, 221 Pa. 438, 70 Atl. 805 (1908).

²⁵*Wildoner v. Central Poor District*, 267 Pa. 375, 110 Atl. 175 (1920).

²⁶*Henry Shenk Co. v. County of Erie*, 319 Pa. 100, 178 Atl. 662 (1935); *Cousins v. Butler*, 73 Super. Ct. 86 (1919).

²⁷*Ford v. School District*, 121 Pa. 543, 15 Atl. 812 (1888); *Brinton v. School District*, 81 Super. Ct. 450 (1923); *Rosenblit v. Philadelphia*, 28 Super. Ct. 586 (1905).

²⁸*Szilagyi v. Bethlehem*, 312 Pa. 260, 167 Atl. 782 (1933).

²⁹*Leary v. Philadelphia*, 314 Pa. 458, 172 Atl. 459 (1934).

of the state, is in fact more limited than that of cities and boroughs, there is no reason to believe that the cases would have been decided differently had cities or boroughs been the defendants.³⁰

The liability of municipal corporations for torts is well established with regard to municipally owned and operated gas, light, and water supply systems. These activities have been described as corporate or private as distinguished from governmental or public functions.³¹ Liability has also been recognized in connection with the provision and maintenance of parks, playgrounds, swimming pools, and other recreational facilities,³² public wharves,³³ public buildings,³⁴ and an electrical bureau deriving revenue from grants of privileges to private corporations and individuals.³⁵

In holding a municipality liable for negligence in managing its public parks, the Pennsylvania courts are in disagreement with the courts of many states. It is the obligation of Pennsylvania municipalities to maintain park structures, amusement appliances, public walks or ways in parks, and playgrounds in such a reasonably safe condition as not to imperil the public which is invited to make use of

³⁰That the same rules of liability apply in general to both municipal corporations and quasi-corporations is evidenced by the opinions in a number of cases. Thus in *Balashaitis v. Lackawanna County*, 296 Pa. 83, 145 Atl. 691 (1929), the Supreme Court said that a county is a quasi-corporation and is impliedly liable for wrongful acts done in its private or corporate character and from which it derives some special or immediate advantage or emolument, but not as to such acts done in its public capacity as a governmental agency in the discharge of duties imposed for the public or general benefit. Cf., *Bell v. Pittsburgh*, 297 Pa. 185, 146 Atl. 567 (1929); *Brinton v. School District*, 81 Super. Ct. 450 (1923). However, the statements in earlier cases were that liability attaches to quasi-corporations only in connection with the performance of a positive or absolute duty enjoined or imposed by statute. See *Kelley v. Cumberland County*, 229 Pa. 289 (1910); *Bucher v. Northumberland County*, 209 Pa. 618 (1904).

³¹"When a municipal corporation engages in an activity of a business, rather than one of a governmental nature, such as the supply of light or water, which is generally engaged in by individuals or private corporations, it acts as such corporation, and not in its sovereign capacity", *American Aniline Products, Inc. v. Lock Haven*, 288 Pa. 420, 135 Atl. 726 (1926). See *Shirk v. Lancaster City*, 313 Pa. 158, 169 Atl. 557 (1934); *Armstrong & Latta v. Philadelphia*, 249 Pa. 39, 94 Atl. 455 (1915); *Smith v. Philadelphia*, 81 Pa. 38 (1876); *Philadelphia v. Gilmartin*, 71 Pa. 140 (1872); *Philadelphia v. Collins*, 68 Pa. 106 (1871). A city, in supplying gas to its inhabitants, acts as a private corporation and is subject to the same duties, liabilities, and disabilities, *Western Saving Fund Society v. Philadelphia*, 31 Pa. 175 (1858); *Kibele v. Philadelphia*, 105 Pa. 41 (1884).

³²*Fehrs v. McKeesport*, 318 Pa. 279, 178 Atl. 380 (1935); *Paraska v. Scranton*, 313 Pa. 227, 169 Atl. 434 (1934); *Novak v. Ford City Borough*, 292 Pa. 537, 141 Atl. 496 (1928); *Rockett v. Philadelphia*, 256 Pa. 347, 100 Atl. 286 (1917); *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905 (1906); *Glase v. Philadelphia*, 169 Pa. 488, 32 Atl. 600 (1895); *Barthold v. Philadelphia*, 154 Pa. 109 (1893).

³³*Klein v. Philadelphia*, 223 Pa. 507, 72 Atl. 845 (1909); *Allegheny v. Campbell*, 107 Pa. 530 (1884); *Pittsburgh v. Grier*, 22 Pa. 54 (1853).

³⁴*Bell v. Pittsburgh*, 297 Pa. 185, 146 Atl. 567 (1929); *Wise v. Philadelphia*, 239 Pa. 392 (1913); *Fox v. Philadelphia*, 208 Pa. 127, 57 Atl. 356 (1904); *Kies v. Erie*, 169 Pa. 598, 32 Atl. 621 (1895).

³⁵*Bodge v. Philadelphia*, 167 Pa. 492, 31 Atl. 728 (1895).

them for rest and pleasure.³⁶ Thus a city was held liable in damages for an injury caused by the negligence of city employees in leaving dynamite caps in a park opened to public use;³⁷ for injuries caused by the fall of a grandstand which had become unsafe by reason of decay;³⁸ for the drowning of a boy due to the negligence of a swimming pool guard in opening a drainage valve without giving notice;³⁹ and for injury suffered as a result of a dangerous obstruction in a park path.⁴⁰ However, a municipality is not liable for injuries to a pedestrian who falls in a public park by reason of a defective pathway which has not been constructed for public use but has been worn by persons walking over it.⁴¹ The first appellate court decision in Pennsylvania involving accidents in public playgrounds was rendered by the Supreme Court in *Paraska v. Scranton*⁴² in 1934. A child fell from a swing during one of the regular recreation periods and struck a sharp-edged stone protruding from the ground directly in the path of the swing when in motion. The Court held that no sound distinction exists between public parks and public playgrounds and that if a city undertakes to manage and supervise such property, it must take care to keep it in a reasonably safe condition for those invited to come upon it.

In regard to municipal liability in connection with public wharves, the attitude of the courts is that a city, being in possession of a public wharf, exercising exclusive supervision and control over it, and receiving tolls for its use, is bound to keep it in proper condition for use.⁴³

It is difficult to generalize regarding the extent and basis of responsibility for injuries received in or about public buildings. Two groups of cases are distinguishable. One consists of those cases in which injury results, not from the dangerous and defective condition of the building, but from the negligent performance of activities associated with or involved in the management and operation thereof. The other comprises cases in which the condition of the building, attributable to dangerous and negligent construction or maintenance, is the cause of injury.

The determining factor in the former group appears to be the capacity, governmental or private, in which the municipal corporation was deemed to be acting, as evidenced by the use to which the building was put, the character of the activity to which the injury was due, or the status of the officers or employees whose acts were

³⁶This rule is probably derived from the maxim that municipal corporations are liable for the improper management and use of their real property to the same extent and in the same manner as private corporations and natural persons. Cf. *infra*, pp. 158-161.

³⁷*Fehrs v. McKeesport*, 318 Pa. 279, 178 Atl. 380 (1935).

³⁸*Daum v. Pittsburgh*, 65 Pitts. Leg. Jl. 547 (1915).

³⁹*Barto v. McKeesport*, 77 Pitts. Leg. Jl. 143 (1929).

⁴⁰*Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905 (1906).

⁴¹*Sowers v. Philadelphia*, 63 Super. Ct. 227 (1916).

⁴²313 Pa. 227, 169 Atl. 434.

⁴³*Pittsburgh v. Grier*, 22 Pa. 54 (1853).

involved. Thus in *Bell v. Pittsburgh*,⁴⁴ the details of which have been set forth above, liability for an injury resulting from the negligent operation of an elevator was based expressly upon the view that the city and county, joint owners and occupants of the building, were engaged in an enterprise which, by reason of the use made of the building and the circumstances of the undertaking, was of a corporate or business character. In an earlier case, *Fox v. Philadelphia*,⁴⁵ although the Court did not comment upon the capacity in which the city was acting as owner and manager of the city hall wherein the accident occurred, the city was held liable on the ground that the rule applicable to common carriers of passengers, according to which the mere happening of an injurious accident to a passenger raises *prima facie* a presumption of negligence on the part of the carrier, is also applicable to a municipality which operates elevators in a public building. Presumably, a municipality acts in a corporate capacity in operating an elevator. In both of these cases the sole cause of injury was the negligent operation of an auxiliary part of a public building. Substantially similar circumstances gave rise to the case of *Kies v. Erie*⁴⁶ in which the defendant city was sued for damages because of injuries received by a passerby when the doors of a fire station swung open. The first time this case was tried the plaintiff contended that the cause of injury was the carelessness of the firemen operating the doors, but, as thus presented, the court denied the plaintiff's claim for damages on the ground that a municipality is not liable for the negligent acts of its firemen.

The cases involving attribution of injury to the condition of a building appear to be governed by the rule, discussed subsequently,⁴⁷ that municipal corporations are liable for the improper management and use of their real property to the same extent and in the same manner as private corporations and natural persons. In the second trial of *Kies v. Erie*,⁴⁸ the plaintiff claimed that injury was due to the dangerous and negligent construction of the doors, which opened rapidly through the operation of large steel springs, while the defendant contended that the springs were only intended to aid the firemen and that after the doors commenced to move it was the duty of the firemen to prevent too rapid and violent a motion. This time the court held that the city was not liable if the accident could have been avoided by the use of reasonable care on the part of the firemen, but that it was liable if the necessary, natural, and probable operation of the doors was dangerous. In *Rosenblitt v. Philadelphia*,⁴⁹ a pupil was injured by the fall of plaster from the ceiling of a school room, and while neither the city nor the school district was held liable for damages, it is significant that the non-liability

⁴⁴297 Pa. 185, 146 Atl. 567 (1929). Cf. *supra*, pp. 140, 141.

⁴⁵208 Pa. 127, 57 Atl. 356 (1904).

⁴⁶135 Pa. 144, 19 Atl. 942 (1890).

⁴⁷Cf. *infra*, pp. 158-161.

⁴⁸169 Pa. 598, 32 Atl. 62 (1895).

⁴⁹28 Super. Ct. 586 (1905).

of the city was based on the fact that although the city held title to the building, the management and control thereof was vested in the school district authorities. The inference may be drawn that whatever the purpose served by the building, the city would have been held liable if it had controlled as well as owned the building. Two other pertinent cases are *Burton v. Philadelphia*⁵⁰ and *Glase v. Philadelphia*.⁵¹

The plaintiff in the former case was injured by falling through an unguarded areaway in a fire station, but was denied damages on the ground that since the public has no right to inspect fire stations, a city owes no higher duty to persons inspecting them than to trespassers. Here, again, the use of the building for governmental rather than corporate purposes was not commented on by the court. In the latter case, the Superior Court reversed the judgment of the lower court in nonsuiting the plaintiff who had been injured when he stepped on the revolving lid of a manhole located on a pumping station roof which the public was permitted to use as a place of rest and recreation. The reason for the reversal was that the jury should have been permitted to decide whether or not the design and operation of the manhole cover was so dangerous as to constitute negligence and whether or not the plaintiff was guilty of contributory negligence. Although the immediate basis of the decision was the same as in the park and recreation cases previously considered, namely, the recognized responsibilities of municipal corporations in providing the public with places of rest and recreation, these responsibilities are closely associated with, if not derived from, the obligations arising from the ownership and control of real property in general. The principal use of the pumping station as part of the city's water supply system seems to have had no bearing upon the case, and the decision would probably have been the same even if the building had been used primarily as a police or fire station.

Judging by the foregoing cases, it seems that liability for injuries due to the condition of a building arises from ownership and control thereof, irrespective of use, whereas liability for injuries inflicted as a consequence of the negligent management and operation of a public building, apart from its condition, is determined according to the governmental or corporate character of the activities involved. However, the case of *Cousins v. Butler*⁵² constitutes at least one reason for questioning the validity of the first part of this generalization. In this case a convict awaiting removal to the Allegheny county workhouse suffered injuries when an iron railing of a jail stairway gave way while he was leaning against it, and the court denied the liability of the defendant county on the ground that the erection of courthouses and jails and their maintenance in suitable and convenient order and repair are purely governmental functions. Although the injury was definitely caused by the condition of the building, the court, in referring to the responsibilities of

⁵⁰23 Dist. 1058 (1914).

⁵¹169 Pa. 488, 32 Atl. 600 (1895); *cf.*, *Unterreiner v. Turtle Creek Borough*, 305 Pa. 341, 157 Atl. 682 (1931).

⁵²73 Super. Ct. 86 (1919). See particularly pp. 90,91.

ownership, distinguished between the acts of municipalities and other governmental agencies done or performed in their ministerial or corporate character in the management of property for their own benefit or in the exercise of powers assumed voluntarily for their own advantage, on the one hand, and on the other, those broader functions of government proper delegated by the state to be performed by certain public instrumentalities.⁵² Perhaps the point of distinction between this case and the others lies in the fact that the defendant was a quasi-corporation.

Although municipalities may be held liable for injuries inflicted in the performance of corporate functions, the award of damages in particular instances depends not only upon the evidence pertaining to negligence and contributory negligence, but also upon application of the discretionary-ministerial rule, which will be discussed subsequently,⁵³ the rule of *respondeat superior*, and the doctrine of non-liability for *ultra vires* acts. A brief summary of a few cases will serve to illustrate the application of these principles by the courts.

In an action against a city for injuries to a building caused by the breaking of a water main, recovery of damages was denied because a latent defect in the pipe was the cause of the break and there was no evidence to show that the defect could have been discovered by proper inspection. Nor was negligence proved because the accident might have been prevented by adopting some special method or device, when such is not commonly done by reasonably prudent persons under similar circumstances.⁵⁴ Again, when a water main broke and damaged the plaintiff's property, it was held that there could be no recovery in the absence of evidence showing that the main was not properly constructed or that leaks which occurred on several previous occasions indicated a defect in the pipe.⁵⁵ The case of *Klein v. Pittsburgh*⁵⁶ was an action for damages for injuries resulting from a fall into a washout or ditch beside a graded path in a city park. The plaintiff, who was standing on the edge of the path watching a race, testified that she did not see the hole and was not looking about her to notice anything. This amounted to contributory negligence and judgment was entered for the city.

Three cases involving the rule of *respondeat superior*, which show the tests applied to determine whether or not officers are agents or servants of a municipal corporation, are *Ashby v. Erie*,⁵⁷ *Alcorn v. Philadelphia*,⁵⁸ and *Ankenbrand v. Philadelphia*.⁵⁹ The first was a suit to recover damages sustained by the flooding of a basement in consequence of the bursting of a water main. The water com-

⁵³*Infra*, pp. 150-153.

⁵⁴*Ritz-Carlton Co. v. Philadelphia*, 282 Pa. 307 (1925).

⁵⁵*Allied Realty Co. v. Philadelphia*, 95 Super. Ct. 62 (1928).

⁵⁶97 Super. Ct. 56 (1929), 76 Pitts. Leg. Jl. 452.

⁵⁷85 Pa. 286 (1877).

⁵⁸44 Pa. 348 (1863).

⁵⁹52 Super. Ct. 581 (1913). *Cf.*, *Fox v. Philadelphia*, 208 Pa. 127, 57 Atl. 356 (1904).

missioners were appointed by the judges of the Court of Common Pleas and derived their authority and duties from a source other than the city. Counsel for the plaintiff claimed that the duties of the water commissioners related to the exercise of the corporate powers of the city and were for the peculiar benefit of the corporation in its local and special interest, but the court held that the city, under the law in question, was not liable for the negligence of the water commissioners who were not appointed by it and neither owed obedience nor were accountable to the city authorities. In the *Alcorn* case it was decided that a city is not responsible to a lot-owner for damages resulting from the negligent location of lot lines by a district surveyor over whom it has no control. This officer was elected directly by the people under authority of a statute rather than an ordinance and was not subject to removal by the corporate authorities. The third of these cases, which involved the responsibility of Philadelphia for an injury caused by failure to keep a park footway in proper repair, necessitated determination of the character of the relation between the Fairmount Park commissioners and the city. Some of the commissioners became such by virtue of their being city officers and the others were appointed by judges elected by the voters of Philadelphia. The court remarked that the conclusive test in arriving at the legislative intent as to where a duty has been imposed is not the mode of appointment of the commissioners, although that may be a pertinent circumstance, but the nature of their functions with reference to the public ways of the city within the park limits. In support of its conclusion that the legislature intended to preserve the paramount dominion of the city and that the commissioners constituted an agency of the city through which it performed a municipal function and discharged a municipal duty, the court pointed out that under the applicable statutes the title to and ownership of the park and all that belongs to it, whether acquired by purchase, donation, or the exercise of eminent domain, were vested in the city; that except for donations, the cost of its laying out, improvement, adornment, and maintenance was borne by the city; that the commissioners had no fund under their direct control and all their expenditures were subject to such appropriations as the council might make; that the commissioners were not a body corporate, municipal, quasi-municipal, or private; that the power and duty of the city to maintain, which *ex vi termini* include the power and duty to keep in a reasonably safe condition, did not rest on uncertain inferences, but on express and unequivocal legislative declaration; and that, as the city derives its powers from the legislature, it is for that body to determine how the officers and agents of the city shall be selected.

As for *ultra vires* acts, it is well established that municipal corporations are not liable for damages if the act complained of necessarily lies wholly outside the general or special powers of the corporation as conferred by its charter or by

statute. Nor are they accountable for the *ultra vires* and subsequently unratified actions of their agents and servants.⁶⁰

THE DISCRETIONARY-MINISTERIAL RULE

Besides the primary public-private test, Pennsylvania courts apply the discretionary-ministerial rule in determining the liability of municipal corporations. Under this rule a municipality is not liable in damages for failure to exercise or for the manner in which it exercises powers of a discretionary character. In the well known case of *McDade v. Chester*,⁶¹ action was brought against the city to recover damages for a personal injury received by the plaintiff from the explosion of a privately owned and operated manufactory of fireworks. The factory had caught fire and the plaintiff was helping to extinguish the flames. McDade contended that the city had neglected its absolute duty to suppress the manufacture of fireworks which was *per se* a nuisance, but the court ruled that although the municipal authorities had full power to act in the premises, the power was discretionary and consequently the city was not liable. The cases of *Smith v. Selinsgrove Borough*⁶² and *Ewen v. Philadelphia*⁶³ were decided in the same way for the same reason. In the former case a child was bitten by a dog having rabies and suit was brought for negligence in failing to pass an ordinance prohibiting dogs from running at large. Although the Chief Burgess and Council knew that dogs in such a condition had been running at large in the borough a few months before the child was attacked, the court rendered judgment for the defendant borough. In the latter case the wife of the plaintiff was drowned when a steamboat in Fairmount Park carried down the river and over the Fairmount dam which had been erected within the park limits by a private corporation acting under statutory authority. There was no statute requiring the city to provide safeguards to prevent boats from drifting over the dam, and the claim that the city was liable for damages because of its failure to maintain such safeguards was denied by the court.

The chief problems involved in the application of this discretionary-ministerial rule are its relation to the public-private criterion of liability and the distinction between discretionary and ministerial duties. An examination of the opinions in various cases reveals shifts in the attitude of the Supreme Court regarding these matters.

A case which would probably be decided on different grounds today is that of *Grant v. Erie*.⁶⁴ By act of the state legislature the city was empowered to con-

⁶⁰*Betham v. Philadelphia*, 196 Pa. 302, 46 Atl. 448 (1900); *Elliott v. Philadelphia*, 75 Pa. 347 (1874); *Fox v. The Northern Liberties*, 3 W. & S. 103 (1841); *Wahl v. Borough*, 64 Super. Ct. 155 (1916); *Moore v. Coal Twp.*, 56 Super. Ct. 55 (1914); *Hand v. Philadelphia*, 8 Pa. Cty. Ct. Rep. 213 (1890).

⁶¹117 Pa. 414, 12 Atl. 421 (1888).

⁶²199 Pa. 615, 49 Atl. 213 (1901).

⁶³194 Pa. 548, 45 Atl. 339 (1900).

⁶⁴69 Pa. 420 (1871).

struct a sufficient number of reservoirs to supply water in case of fire. The council constructed the reservoirs but allowed one to become so dilapidated that it would not hold water. Buildings located near this reservoir were destroyed by fire because no water was available, but instead of dismissing the action for damages on the ground that the provision of water for fire protection was a governmental function, the court based its denial on the discretionary nature of the authority granted the city by the legislature. The following excerpt from the opinion in *Carr v. The Northern Liberties*⁶⁵ was quoted with approval: "Where any person has a right to demand the exercise of a public function, and there is an officer, or set of officers, authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed." To illustrate the meaning of this statement the court declared that if it were made the duty of a municipality to station a police officer at a particular corner in order to protect pedestrians from being run over by passing vehicles, it might be doubted whether it would be an answer to an action to say that a horse and wagon, and not the absence of the officer, was the cause of injury; but if the municipality were vested with the authority to employ and keep on foot a sufficient police force, "no one can surely pretend that a foot-passenger run over by a wagon could sue the corporation for damages, even though he should be able to show that they had formerly kept an officer at that place for that purpose and had withdrawn him, or that he had been guilty of negligence in the performance of his duties."⁶⁶ From the example used, it may be inferred that the court might have supported a claim for damages for failure to perform or for negligence in the performance of a ministerial duty imposed by statute, irrespective of the capacity, governmental or corporate, in which the municipality was acting.

In *Howard v. Philadelphia*, the facts of which have been set forth above,⁶⁷ the attitude of the court was consistent with the position taken in *Grant v. Erie*. Not only was a distinction drawn between duties imposed by law which are imperative and those so imposed which involve the exercise of discretion, but the general liability of municipalities in connection with governmental duties of an imperative character appears to have been recognized in principle. In the language of the court, "* * * by general rule municipalities are exempt from liability for the negligent acts of their officers and agents, except in case where the negligence occurs in the performance of some duty which has been imposed by law upon the municipality. The rule as thus stated * * * leaves somewhat to be supplied because of its conciseness. If we add to it that in order to constitute an

⁶⁵35 Pa. 324 (1860).

⁶⁶69 Pa. 424.

⁶⁷*Supra* pp. 142, 143.

exception to the rule the duties so imposed must be imperative and not discretionary, so as to make clear the distinction between duty and authority, or power; and further, that the duty must relate to the municipality's public or governmental functions, as distinguished from its private or corporate functions and duties, the rule as thus stated is one which has always been recognized in our own state, and obtains in most, if not in all, other states."⁶⁸

Nine years later, however, in the *Scibilia* case, although approving the use of the discretionary-ministerial rule in those exceptional instances, to be discussed shortly, in which municipal liability may be recognized in spite of the performance of governmental functions, the court limited its general application to liability cases involving the corporate or business activities of municipalities. "It should be kept in mind", said the court, "that the words 'absolute', 'imperative' and 'ministerial', as used in the rule, denote a definite duty, performance of which can be demanded of officials empowered to act, and the neglect or omission to perform such a duty is treated in the law as a basis of liability *where the obligation attaches to the city in its corporate, or private, capacity* * * *."⁶⁹ Finally, in certain established instances, failure to comply with a duty of like imperative nature may also create a liability *when a municipality acts in its public capacity*,⁶⁹ for example, in connection with the building or construction of highways or public works, or their repair * * * ; but, to date, these examples, and instances of nuisances on, or improper use of, governmentally owned real estate, seem to mark the limit of municipal responsibility in respect to the exercise of public or governmental duties, so far as our decisions are concerned * * * , though some of the language of this court in times past might indicate that the liability extends further."⁷⁰ In support of its position regarding the proper application of the discretionary-ministerial rule, the court argued that if a breach of an imposed duty were accepted as the sole or controlling criterion for judging questions of liability in cases of negligence, such a breach could as well give rise to the right to sue for damages growing out of the negligence of the police or firemen as of employees in charge of or working on the construction or repair of highways, since so far as legislative mandates in Pennsylvania are concerned, "the duty to organize and maintain police and fire service is just as mandatory on cities, at least on those of the first class, as the duty to construct and maintain highways."⁷¹ The court concluded that a city, although required to render a particular service to the public, will not be liable for injuries inflicted in the performance of that duty if the service is of a governmental character, and expressed the opinion that marked exceptions to this rule in no way affect the general principle. In spite of an apparent agree-

⁶⁸250 Pa. 186 (1915).

⁶⁹The italics are the author's.

⁷⁰279 Pa. 554, 555, 124 Atl. 275 (1924).

⁷¹279 Pa. 556, 124 Atl. 275 (1924).

ment in the matter of general definition, comparison of the illustrations used in *Grant v. Erie* and *Scibilia v. Philadelphia* indicates a difference of opinion concerning the nature of an imperative duty.

As evidenced by the recent case of *Szilagyi v. Bethlehem*,⁷² the attitude of the Supreme Court concerning the proper relation between the public-private and discretionary-ministerial rules has not changed since the *Scibilia* opinion was rendered. Suit was brought against Bethlehem for failure to procure bonds from a contractor in order to indemnify persons furnishing materials, machinery, and labor in the construction of a highway. Although concluding that pertinent acts of the state legislature undoubtedly spoke in terms of a command to the respective municipalities and imposed the duty of securing the additional bond, the court held that the duty was governmental and that neglect to perform it did not impose liability upon the city. The proper remedy was to compel performance by mandamus. Apparently, then, the present position of the Supreme Court is that the discretionary-ministerial rule does not modify the general doctrine of non-liability in the performance of governmental functions. It is noteworthy, also, as pointed out in the *Scibilia* case, that previous decisions of the court in no way conflict with this view, in spite of statements sometimes included in its opinion.

EXCEPTIONS TO THE GENERAL RULES

There are a number of important exceptions to the general rule that municipal corporations are exempt from liability for torts committed while acting in a governmental capacity. In the first place, a municipality may be held liable for negligence in the construction, repair, and maintenance of streets, sidewalks, sewers, drains, and other public works. The courts of Pennsylvania place these functions in the governmental category but give the discretionary-ministerial rule controlling force in determining liability.⁷³ According to the Supreme Court, departure, in respect to this group of activities, from the general principle of non-liability in the performance of governmental functions is based "more on long established precedent than on fixed rules or pure logic."⁷⁴ The rule that a municipality is not liable for the non-exercise of or the manner in which it exercises its discretionary powers accounts for immunity from liability in connection with determination of the need for a public improvement and the selection and adoption of a plan therefore; but for negligence in the execution of a plan and in the maintenance and repair of an improvement, liability is recognized.⁷⁵ The general rule of non-

⁷²312 Pa. 260; 167 Atl. 782 (1933).

⁷³*Szilagyi et al. v. Bethlehem*, 312 Pa. 268 (1933); *Scibilia v. Philadelphia*, 279 Pa. 555 (1924); *Moore v. Luzerne County*, 262 Pa. 216, 105 Atl. 94 (1918); *Allentown v. Kramer*, 73 Pa. 406, 409 (1873).

⁷⁴279 Pa. 555, 556 (1924). Cf. *infra*, pp. 164, 165.

⁷⁵*Aron v. Philadelphia*, 310 Pa. 84, 164 Atl. 777 (1933); *Canavan v. Oil City*, 183 Pa. 611 (1898); *Easton v. Neff*, 102 Pa. 474 (1883); *Fair v. Philadelphia*, 88 Pa. 309 (1879).

liability for injuries caused by public works constructed upon a faulty plan is subject to the exception that if the facts of a case warrant it, a jury may decide whether or not the plan, although it need not be the best that engineering skill might have devised, is so defective as to make its adoption an act of negligence.⁷⁶

For both temporary and permanent consequential injuries arising from the exercise of lawful powers in the construction and repair of public improvements, the appropriate remedy is a proceeding before viewers. As stated in *Stork v. Philadelphia*,⁷⁷ the absolute liability for consequential injury imposed on municipalities by the constitution and statutes is for such injury only as is the direct and necessary consequence of the act of eminent domain, irrespective of care or negligence in doing it; and for such injury proceedings before viewers is the proper remedy, while for negligence in performing the work, trespass is the only relief.⁷⁸

With respect to the effect of municipal action upon watercourses and surface water, it has been held in Pennsylvania that an action in trespass lies against a municipal corporation if it neglects to provide or improperly constructs sufficient ways under a road or bridge to allow a stream or watercourse to pass and so causes special damage to the complaining party;⁷⁹ if it diverts the waters of a stream and deprives lower riparian owners of the use thereof;⁸⁰ if it negligently diverts the natural flow of surface water so that it accumulates and flows upon abutting property where it would not otherwise flow;⁸¹ or if it collects surface water by an artificial channel, thereby increasing its amount, and discharges it in a body upon the land of a private person to his injury.⁸² However, if acting without negligence, a municipality is not liable to a property owner in an action of trespass for an

⁷⁶*Levine v. Pittsburgh*, 252 Pa. 181, 97 Atl. 392 (1916); *Eichenhofer v. Philadelphia*, 248 Pa. 365, 93 Atl. 1065 (1915); *McIntyre v. Pittsburgh*, 238 Pa. 524, 86 Atl. 300 (1913); *Red v. Tarentum*, 213 Pa. 357, 62 Atl. 928 (1905); *Johnson v. Philadelphia*, 139 Pa. 646, 21 Atl. 316; *Childs v. Crawford City*, 176 Pa. 139, 34 Atl. 1020 (1896); *Lehigh County v. Hoffert*, 116 Pa. 119, 9 Atl. 177 (1887); *Oil City and Petroleum Bridge Co. v. Jackson*, 114 Pa. 321, 6 Atl. 128 (1886); *Diklich v. Johnstown*, 118 Super. Ct. 283, 180 Atl. 41 (1935); *Schroeder v. Mechanicsburg Borough*, 74 Super. Ct. 532 (1920).

⁷⁷195 Pa. 101, 45 Atl. 678 (1900).

⁷⁸See also *Robinson v. Norwood Borough*, 215 Pa. 375, 64 Atl. 539 (1906); *Power v. Ridgway Borough*, 149 Pa. 317, 24 Atl. 307 (1892); *Allentown v. Kramer*, 73 Pa. 406 (1873); *Green v. Reading*, 9 Watts 382 (1840); *Malone v. Philadelphia*, 2 Penny. 370 (1882); *Schroeder v. Mechanicsburg Borough*, 74 Super. Ct. 532, (1920); *Beach v. Scranton*, 25 Super. Ct. 430 (1904); *Chatham St.*, 16 Super. Ct. 103 (1900).

⁷⁹*Kunkle v. Ford City*, 305 Pa. 416, 158 Atl. 159 (1931); *Krug v. St. Mary's*, 152 Pa. 30, 25 Atl. 161 (1892); *Rife v. Middletown*, 32 Super. Ct. 68 (1906).

⁸⁰*Irving's Ex'rs v. Media*, 194 Pa. 648, 45 Atl. 482 (1900); S. C. 10 Super. Ct. 132 (1899).

⁸¹*Mitchell v. New Castle*, 275 Pa. 426, 119 Atl. 485 (1923); *Robinson v. Norwood Borough*, 215 Pa. 375, 64 Atl. 539 (1906); *Weir v. Plymouth Borough*, 148 Pa. 566, 24 Atl. 94 (1892); *Torrey v. Scranton*, 133 Pa. 173, 19 Atl. 351 (1890); *Meninchino v. New Castle*, 96 Super. Ct. 405 (1929); *Beach v. Scranton*, 25 Super. Ct. 530 (1904).

⁸²*Frederick v. Lansdale Borough*, 156 Pa. 613, 27 Atl. 563 (1893); *Bohan v. Avoca Borough*, 154 Pa. 404, 26 Atl. 604 (1893); *Elliott v. Oil City*, 129 Pa. 570, 18 Atl. 553 (1889).

increased flow of surface water over or onto his property arising from changes in the character of the surface produced by the opening of streets, the filling in of lots, the building of houses, etc., in the ordinary and regular course of development from rural to urban territory.⁸³ Although a municipality may collect waters which would naturally flow on lower land and direct their flow by their own force and volume on the lower tenement, liability has been recognized if the change in the course of flow works injury to the owner of the lower tenement.⁸⁴ In an action for trespass against a city for injuries to land from flooding alleged to be due to the negligent manner in which the city raised the grade of property and an alley in the erection of a fire engine house, a verdict for the plaintiff was sustained where there was evidence that water was diverted and its natural flow unnecessarily turned upon the plaintiff's property;⁸⁵ but where a borough, without negligence, constructed a paved gutter along a street for draining surface water, the gutter ending at the borough limits, it was not liable in trespass for injuries to property because its plan included no provision for disposing of the water upon reaching the end of the gutter, there having been no increased flow of water caused by its action.⁸⁶

In the matter of sewerage and drainage it has been established by numerous decisions that municipalities are not liable for failure to provide sewers, gutters, culverts, and drains, nor for the inadequacy of those provided, but may be held responsible for injuries which result from carelessness in constructing or repairing such works or from failure to keep them in good condition and free from obstructions.⁸⁷ Thus, if a method of construction, adequate when undertaken, is of such a character that the builder should reasonably anticipate that it will subsequently become inadequate due to the decay of material used, a municipality is affected with knowledge of the fact and must prevent injury to others by proper inspection and repair.⁸⁸ When sewage is discharged into a stream or an open surface ditch, a municipality is bound to keep the channel open and remove accumu-

⁸³Kunkle v. Ford City, 305 Pa. 416, 158 Atl. 159 (1931); Strauss v. Allentown, 215 Pa. 96, 63 Atl. 1073 (1906); Robinson v. Norwood Borough, 215 Pa. 375, 64 Atl. 539 (1906); Schroeder v. Mechanicsburg Borough, 74 Super. Ct. 532 (1920).

⁸⁴Taylor v. Canton Twp., 30 Super. Ct. 305 (1906).

⁸⁵Bruggeman v. York, 63 Super. Ct. 542 (1916).

⁸⁶Barrett v. Borough, 38 Super. Ct. 76 (1909).

⁸⁷Aron v. Philadelphia, 310 Pa. 84, 164 Atl. 777 (1933); McNemry v. Bellevue Borough, 301 Pa. 568, 152 Atl. 563 (1930); Bear v. Allentown, 148 Pa. 80, 23 Atl. 1062 (1892); Michener v. Philadelphia, 118 Pa. 535, 12 Atl. 174 (1888); Vanderslice v. Philadelphia, 103 Pa. 102 (1883); Collins v. Philadelphia, 93 Pa. 272 (1880); Fair v. Philadelphia, 88 Pa. 309 (1879); Allentown v. Kramer, 75 Pa. 406 (1873); Carr v. The Northern Liberties, 35 Pa. 324 (1860); Yeager v. Pittsburgh, 103 Super. Ct. 34, 157 Atl. 353 (1931); Malpass v. Philadelphia, 52 Super. Ct. 250 (1913); Herr v. Altoona, 31 Super. Ct. 375 (1906); Siegfried v. Bethlehem, 27 Super. Ct. 456 (1905); Cooper v. Scranton, 21 Super. Ct. 17 (1902); Loss v. Borough, 70 Pitts. Leg. Jl. 622 (1922).

⁸⁸Workingman's Savings Bank and Trust Co. v. Pittsburgh, 284 Pa. 248, 131 Atl. 283 (1925).

lations of refuse and filth; and if a sewer is so maintained as to emit offensive odors which create an insanitary and dangerous condition interfering with the safe and comfortable enjoyment of property to the impairment of its value, damages may be collected.⁸⁹ In several cases involving similar circumstances, responsibility for death, sickness, or physical discomfort was denied on the ground that the evidence failed to show that conditions created by acts of the city, e. g., a stagnant pool and a flooded cellar, were the proximate causes of the wrongs upon which the plaintiffs' claims were based.⁹⁰ In *Glasgow v. Altoona*,⁹¹ it was held that where claims for damages resulting from the pollution of a stream are not merely for permanent injury to land, but include injury to health, injury to trade, and deprivation of the use of water, the plaintiff may recover the entire amount of actual damages up to the trial of the cause irrespective of the value of the land.

Apart from liability for negligence in construction, a municipality is held to no higher measure of duty so far as streets, highways, street crossings, sidewalks, and bridges are concerned than that of exercising ordinary care to keep them in a reasonably safe condition, having in view the ordinary requirements of the public.⁹² Since the care bestowed must be measured by the extent of public use, alleys need not be given the same degree of care as streets.⁹³ No legal duty is imposed to pave a street with a particular material or in a particular method; nor is uniformity of construction on all the streets or ways an obligation. Neither do new or unexpected uses requiring great changes impose upon a municipality the duty of at once reconstructing a street or alley to suit the new use.⁹⁴ Further-

⁸⁹*Freedman et al. v. West Hazelton Borough*, 297 Pa. 58, 146 Atl. 564 (1929); *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858 (1897); *Blizzard v. Danville*, 175 Pa. 479, 34 Atl. 846 (1896); *Good v. Altoona*, 162 Pa. 493, 29 Atl. 741 (1894); *Yeager v. Pittsburgh*, 103 Super. Ct. 34, 157 Atl. 353 (1931).

⁹⁰*Bruggeman v. York City*, 254 Pa. 430, 98 Atl. 970 (1916); *Wharton v. Bradford City*, 209 Pa. 319, 58 Atl. 621 (1904).

⁹¹27 Super. Ct. 55 (1905).

⁹²*Streets*: *Davis v. Wilkes-Barre*, 286 Pa. 488, 134 Atl. 105 (1926); *Reichard v. Bangor*, 286 Pa. 25, 132 Atl. 803 (1926); *Lawrence v. Scranton*, 284 Pa. 215, 130 Atl. 428 (1925); *Reddington v. Philadelphia*, 253 Pa. 390, 98 Atl. 601 (1916); *Levine v. Pittsburgh*, 252 Pa. 181, 97 Atl. 392 (1916); *Short v. Carbondale*, 249 Pa. 564 (1915); *McDonald v. Philadelphia*, 248 Pa. 145, 93 Atl. 959 (1915); *Bucher v. Sunbury Borough*, 216 Pa. 89, 64 Atl. 906 (1906); and other cases cited in the text. *Street crossings*: *Chilton v. Carbondale*, 160 Pa. 463, 28 Atl. 833 (1894); *Easton v. Neff*, 102 Pa. 474 (1883). *Sidewalks*: *Roth v. Verona Borough et al.*, 316 Pa. 279, 175 Atl. 689 (1934); *Tauber v. Wilkesburg*, 309 Pa. 331, 163 Atl. 675 (1933); *Wyman v. Philadelphia*, 175 Pa. 117, 54 Atl. 621 (1896); *Brookville v. Arthurs*, 152 Pa. 334, 25 Atl. 551 (1892); *McLoughlin v. Philadelphia*, 142 Pa. 80, 21 Atl. 754 (1891); *Felts v. Borough*, 104 Super. Ct. 59, 158 Atl. 592 (1932); *Hammer v. Philadelphia*, 104 Super. Ct. 119 (1932). *Bridges*: *Eichenhofer v. Philadelphia*, 248 Pa. 365, 93 Atl. 1065 (1915); *Herrlein v. McKeesport*, 247 Pa. 277, 93 Atl. 319 (1915); *McLoughlin v. Corry*, 77 Pa. 109 (1875); *Prinkey v. Dunbar Twp.*, 105 Super. Ct. 326, 161 Atl. 640 (1932); *Yordy v. Northumberland*, 104 Super. Ct. 237, 158 Atl. 607 (1932).

⁹³*Musick v. Latrobe Borough*, 184 Pa. 375, 39 Atl. 226 (1898).

⁹⁴*Megargee v. Philadelphia*, 153 Pa. 340, 25 Atl. 1130 (1893).

more, a municipal corporation charged with the duty of keeping the highways in repair is not liable to the owner or occupier of property fronting thereon for the loss to his business resulting from the neglect of such duty, since one who is injured by a public nuisance, either in his person or property, cannot have his remedy by an action unless he can show a damage which is peculiar to himself and different in kind and degree from and beyond that which is sustained by the general public.⁹⁵

To demonstrate the circumstances under which liability in regard to streets and highways is recognized, a few representative cases will be summarized. A verdict for the plaintiff was sustained in a case in which a city used a wall belonging to an abutting owner as a support for a street, pavement, and gutter, and by faulty construction and negligent care of the street and gutter, the wall was destroyed and the owner's cellar damaged.⁹⁶ In *Munley v. Sugar Notch Borough*,⁹⁷ the borough was held liable for personal injuries because it permitted mortar boxes to remain for three or four weeks in a much traveled street, and in *Walker v. Philadelphia*,⁹⁸ judgment for the plaintiff was affirmed because the plaintiff, on alighting from a car, stepped into a hole in what appeared at the time of the accident to be an even street surface, the street being dimly lighted and the hole filled with dirty water. The fact that a defect or obstruction in a street is the result of the acts of persons who are neither representatives nor employees of a municipality does not relieve it from liability if it had actual or constructive notice thereof.⁹⁹ Ordinarily, a municipality is held to have constructive notice of defects in a highway only when they can be seen by one of its officers exercising reasonable supervision, and not when the defects are so slight as not to attract the attention of pedestrians.¹⁰⁰ It is the duty of a municipality to inspect carefully poles and wires erected on a street, failure to do so constituting such negligence as to allow recovery in case of personal injuries,¹⁰¹ and if a city permits a street railway company to construct its railways on the streets in such a way as to render the use of the streets by the public unsafe and dangerous, the city will be responsible for injuries resulting therefrom.¹⁰² With regard to snow and ice, the liability of a municipality for in-

⁹⁵Gold v. Philadelphia, 115 Pa. 184, 8 Atl. 386 (1887).

⁹⁶Edwards v. Williamsport, 36 Super. Ct. 42 (1908).

⁹⁷215 Pa. 228, 64 Atl. 377 (1906).

⁹⁸211 Pa. 38, 60 Atl. 318 (1905).

⁹⁹Fleming v. Wilmerding, 223 Pa. 295, 72 Atl. 624 (1909); Koch v. Williamsport, 195 Pa. 488, 46 Atl. 67 (1900); Mooney v. Luzerne, 186 Pa. 161, 40 Atl. 311 (1898); Scranton v. Catterson, 94 Pa. 202 (1880).

¹⁰⁰Malone v. Union Paving Co., 306 Pa. 111, 159 Atl. 21 (1932).

¹⁰¹Kost v. Ashland Borough, 236 Pa. 164, 84 Atl. 691 (1912); Mooney v. Luzerne, 186 Pa. 161, 40 Atl. 311 (1898).

¹⁰²McKim v. Philadelphia, 217 Pa. 243, 66 Atl. 340 (1907); if an excavation or obstruction is created in a street by a railroad company while relaying tracks, the municipality is not liable when the plaintiff is injured before the abandonment of the work, Long v. Philadelphia, 212 Pa. 125, 61 Atl. 810 (1905).

juries to travelers caused by accumulations of ice and snow on its streets depends on whether it has exercised reasonable care and diligence to keep its streets reasonably safe for travelers who are using due care, and its liability should be made to depend upon what is reasonable under all circumstances, paying attention to climatic conditions. A municipality cannot prevent the general slipperiness of its streets caused by ice and snow, but it can prevent, by drain or otherwise, such accumulations thereof, in the shape of ridges or hills, as render their passage dangerous.¹⁰³ While the height and size of the ridges may not be capable of exact definition, they must at least be such as to be generally observable as unsafe and likely to cause injury to travelers.¹⁰⁴

The construction and repair of public works is frequently carried on by private contractors or by licensees, and the question of municipal liability under such circumstances has been presented to the courts in a number of cases. If street pavements or sidewalks are being constructed or repaired, or if the contractor or licensee is making street excavations to lay sewers or water pipes, or for other purposes, the duty of municipalities to maintain streets in a reasonably safe condition for both pedestrian and vehicular travel is involved.¹⁰⁵ The prevailing rule in Pennsylvania is that a municipality is not liable for the negligence of an independent contractor or licensee unless the work is done under the direction and control of, not merely inspection by, the municipal authorities; unless the work is intrinsically dangerous; or unless the contractor is required to keep a thoroughfare open and lacks exclusive control thereover with authority to prohibit its use by the public.¹⁰⁶ If the primary negligence is that of a contractor, an abutting owner, or other third person, and a judgment is recovered against the municipality alone, it may recover against the person whose negligence was the cause of the injury.¹⁰⁷

Another line of cases in which damages may be awarded despite the performance of governmental functions is governed by the principle that municipal corporations are liable for the improper management and use of their real property to the same extent and in the same manner as private corporations and natural persons. The injuries to persons or property for which liability is recognized in-

¹⁰³*McCracken v. Curwensville Borough*, 309 Pa. 98, 163 Atl. 217 (1932).

¹⁰⁴*Bailey v. Oil City*, 305 Pa. 325, 157 Atl. 486 (1931).

¹⁰⁵*Meyers v. Philadelphia*, 217 Pa. 159, 66 Atl. 251 (1907).

¹⁰⁶*Scott v. Erie*, 297 Pa. 344, 147 Atl. 68 (1929); *Reichard v. Bangor*, 286 Pa. 25, 132 Atl. 803 (1926); *Norbeck v. Philadelphia*, 224 Pa. 30, 73 Atl. 179 (1909); *Levenite v. Lancaster*, 215 Pa. 576, 64 Atl. 782 (1906); *White v. Philadelphia*, 201 Pa. 512, 51 Atl. 332 (1902); *Stork v. Philadelphia*, 199 Pa. 462, 49 Atl. 236 (1901); *Burger v. Philadelphia*, 196 Pa. 41, 46 Atl. 262 (1900); *Susquehanna Depot Borough v. Simmons*, 112 Pa. 384, 5 Atl. 434 (1886); *Harrisburgh v. Saylor*, 87 Pa. 216 (1878); *Reed v. Allegheny City*, 79 Pa. 300 (1875); *Painter v. Pittsburgh*, 46 Pa. 213 (1863); *Haas v. Borough*, 54 Super. Ct. 75 (1913); *Rose v. Philadelphia*, 31 L. I. 165 (1874).

¹⁰⁷*Brobston v. Borough of Darby*, 290 Pa. 331, 138 Atl. 849 (1927).

clude such as are caused by either the condition of real estate or the existence of a nuisance thereon.

It was suggested above¹⁰⁸ that this rule probably accounts for the attitude of the Pennsylvania courts regarding the responsibilities of municipal corporations in connection with wharves, parks, and playgrounds; and its application in public building cases has also been considered.¹⁰⁹ Consequently, these cases need not be discussed again at this point, except for a brief reference to *Kies v. Erie*.¹¹⁰ In that case, it will be recalled, the fact that the building was being used in the performance of a governmental function, fire protection, did not deter the court from ruling that the city was liable if the necessary, natural, and probable operation of the fire station doors was dangerous. Although the doors swung open over a street sidewalk along which the injured person was passing, the city's liability was based upon the responsibilities associated with the ownership and control of real property and not upon its obligation to exercise reasonable care to keep streets in a reasonably safe condition for public use.

This duty was involved in *Lawrence v. Scranton*,¹¹¹ but the case is presented in this connection because of its bearing on the question of liability for nuisance. A fifteen year old boy, while playing on a street, struck a match on a manhole cover to light a cigarette and was injured when an explosion of gas occurred. The presence of the gas could only be accounted for through a leak in gas mains some distance away, the gas escaping along a water pipe leading to the manhole. There was evidence that an employee of the city had examined the manhole daily for about a month prior to the accident and had found quantities of gas collected therein. The court, in holding that the case was for the jury, stated that municipalities, as governmental agencies, have a discretionary power to abate certain kinds of nuisances, but that they become civilly liable if they permit a nuisance to exist on their own property to the damage of others, or if damage results from the continued existence of a known nuisance on a street. Remarking that a given condition in a street may not technically be a nuisance, the court referred to the liability of municipalities for injuries sustained because of failure to use ordinary care in keeping streets in a reasonably safe condition for travel.

Two cases in which nuisances were maintained on city property utilized for governmental purposes are *Siwak v. Borough of Rankin*¹¹² and *Briegel v. Philadelphia*.¹¹³ A verdict for the plaintiff was sustained in the *Siwak* case because the evidence tended to show that the dwellings of the plaintiff were rendered uninhabitable and dangerous to the health of the occupants by reason of noisome and

¹⁰⁸Supra, note 36.

¹⁰⁹Supra, pp. 146-148.

¹¹⁰169 Pa. 598, 32 Atl. 621 (1895).

¹¹¹284 Pa. 215, 130 Atl. 428 (1925).

¹¹²72 Super. Ct. 218 (1919). See also *Brinton v. School District*, 81 Super. Ct. 450 (1923).

¹¹³135 Pa. 451, 19 Atl. 1038 (1890).

noxious vapors and stench resulting from the operation of the borough's incinerating plant erected on land owned by the borough and located within its limits. In the *Briegel* case, the city was held liable for actual damage sustained when a defectively constructed privy well, which was maintained upon city property used for public school purposes, created a nuisance to the injury of an adjoining property owner. The city was the owner in fee of the property and derived a remuneration for its use for school purposes, permitting the board of school directors to use it in consideration of a certain sum collectible by taxation from its citizens.

Liability for the creation of a nuisance in the discharge of governmental duties has also been recognized in cases wherein the municipalities concerned did not own the property upon which the nuisance existed. Thus in *Minkewicz v. Plymouth Borough*,¹¹⁴ a case in which a municipal dump was maintained upon privately owned land with the permission of the owner, it was held that the principle of liability for nuisance does not depend upon ownership, but applies as well to a municipality as lessee, or as one gratuitously allowed to utilize property as donee of its use.

According to two decisions rendered by the Superior Court, the liability of a municipality in connection with its real property depends not only upon the possession of title thereto, but also upon the management or control thereof. In *Rosenblit v. Philadelphia*,¹¹⁵ the city, which is coterminous with the first school district of Pennsylvania and which had legal title to the school building, was held not to be liable in damages for an injury caused by falling plaster on the ground that the building was in the actual possession and control of the sectional board and that the city had no voice in the selection or removal of the officers, agents, or architects of the school district. The non-liability of the school district was based on the view that the negligence of the school authorities was in the failure to discharge their public duty to provide and maintain suitable and adequate accommodations for the public schools. This duty did not grow out of their right to control and manage the particular building or any other property but was founded upon the express provisions of the legislation which created the school district, provided the officers to represent it, and regulated the system of public education. In the performance of this duty the school district was acting in a governmental capacity. The *Briegel* case was distinguished as one of that line of cases in which it has been held that the question was not one of negligence or no negligence, but of nuisance or no nuisance. A year later, in *McCullough v. Philadelphia*,¹¹⁶ the exemption of the city from liability for personal injuries sustained by a child as

¹¹⁴27 Luz. Leg. Reg. 241 (1932). Cf., *Zellman v. Philadelphia*, 17 D. & C. 493 (1932). See also *Freedman et al. v. West Hazelton Borough*, 297 Pa. 58, 146 Atl. 564 (1929); *Owens v. Lancaster*, 182 Pa. 257, 37 Atl. 858 (1897); *Vanderslice v. Philadelphia*, 103 Pa. 102 (1883); and other cases concerning the disposal of sewage.

¹¹⁵28 Super. Ct. 586 (1905).

¹¹⁶32 Super. Ct. 109 (1906).

the result of a defect in the pavement of a school yard was likewise based on the ground that although legal title to the property was in the city, the control and management of the yard in question was in the hands of the school district authorities. In its opinion the Superior Court made a general statement to the effect that ownership with the right to control property, and not merely the holding of legal title, fixes a party with liability for damages resulting not only from a neglect to repair but also *from the maintenance of a nuisance*.¹¹⁷

Although this question of ownership and control was not raised in the *Briegel* case, it is unlikely that a different decision would have been reached, since the improper construction of the privy well appears to have been the act of the city. In any event this case was cited with approval by the Supreme Court in 1923.¹¹⁸

Another exception to the rule of non-liability in the performance of governmental functions is in connection with the use of highly dangerous agents. This is illustrated by the case of *Herron v. Pittsburgh*¹¹⁹ which was an action against the city to recover damages for personal injuries sustained by a boy from contact with a live and naked telephone wire used in the police service of the city. It appeared that the break in the wire was known to the police officials within an hour after it occurred and that it was also known to them that in close proximity were other wires carrying high and dangerous voltage. The Supreme Court held that it is the duty of all parties, including cities, using a highly dangerous agent to exercise care commensurate with the danger in order to prevent injury to persons or property exposed to its influence, and that the use or supervision of the agent under the police power does not excuse negligence in such use. A similar case is that of *Emery v. Philadelphia*.¹²⁰ Death was caused by contact with a broken wire used exclusively for fire alarm purposes and located a number of feet from the improved portion of a country road. The court held the city liable on the ground that a municipality may not, with impunity, leave a highly dangerous and insidious obstruction, such as a heavily charged and exposed electric wire, on any part of a public highway or so near it that a traveler, accidentally or intentionally deviating a few feet from the beaten track, may encounter it at the risk of his life. Both of these cases involved the duty to keep streets in a reasonably safe condition for travel, and the fact that the accidents occurred on highways was indicative of the lawful presence of the injured parties.

¹¹⁷In *Powers v. Philadelphia*, 18 Super. Ct. 621 (1902), the city was held liable for injuries to a school boy suffered by reason of negligence in the maintenance of a dangerous board walk running from a main building to an annex on property owned by the city. Referring to this decision in the *Rosenblit* case, the court pointed out that it was assumed that the ownership of the property, the right to control and management and to determine when and how it should be repaired was in the city.

¹¹⁸*Scibilia v. Philadelphia*, 279 Pa. 549, 124 Atl. 273 (1924).

¹¹⁹204 Pa. 509, 54 Atl. 311 (1903).

¹²⁰208 Pa. 492, 57 Atl. 977 (1904).

STATUTORY IMPOSITION OF LIABILITY

The field within which Pennsylvania municipalities enjoy immunity from liability for torts under the common law has been narrowed somewhat by both constitutional and statutory provisions. However, aside from the imposition of liability for consequential injuries arising from the construction and enlargement of public improvements,¹²¹ to which attention has been directed above, the constitution contains no provisions regarding the responsibilities of municipal corporations for injuries inflicted upon persons or property.

Under special acts passed in 1841, 1849, and 1863, Philadelphia, Allegheny, and Northampton counties are suable for the recovery of damages to property, both real and personal, sustained by reason of riots or the destructive acts of mobs, provided, however, that the destruction of the property is not caused by the owner's illegal or improper conduct, and provided also that the owner, having knowledge of the intention or attempt to destroy his property, gives notice thereof, if sufficient time intervenes, to the sheriff of the county or to a constable, alderman, or justice of the peace of the ward, township, or borough in which such property is situated.¹²² Under the common law municipalities are not liable for damage caused by mobs and rioters.¹²³

By legislative enactment of 1927, as amended in 1929 and 1931,¹²⁴ every county, city, borough, incorporated town, or township is made jointly and severally liable with any employee for any damages caused by the negligence of such person while operating a motor vehicle upon a highway in the course of his employment; and every city, borough, incorporated town, and township is made jointly and severally liable with any member of a volunteer fire company for any damage caused by negligence in operating a motor vehicle used by or belonging to such company, while going to, attending, or returning from a fire, or while engaged in any other proper use of such motor vehicle within the limits of the municipality. The legislature's definition of a vehicle is "every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting tractors, agricultural machinery, and devices moved by human power or used exclusively upon stationary rails or tracks"; and a "motor vehicle" is defined as "every vehicle, as herein defined, which is self-propelled, except tractors, power

¹²¹Constitution of Pennsylvania, Art. XVI, Sec. 8.

¹²²Acts of May 31, 1841, P. L. 415, Secs. 7 and 8, 16 PS 3921, 3922; March 20, 1849, P. L. 184, Sec. 1, 16 PS 3925; April 15, 1863, P. L. 499, 16 P. S. 3921, Note 5. See *Person v. Northampton County*, 19 Dist. 691 (1910).

¹²³*Norristown v. Fitzpatrick*, 94 Pa. 121 (1880); *Allegheny County v. Gibson*, 90 Pa. 397 (1879).

¹²⁴Acts of May 11, 1927, P. L. 886, Art. VI, Sec. 620; May 1, 1929, P. L. 905, Art. VI, Sec. 619, 75 PS 212; June 22, 1931, P. L. 731, Sec. 2, 75 PS 212.

shovels, road rollers, agricultural machinery, and vehicles which move upon or are guided by a track, or travel through the air."¹²⁵

A review of the cases arising under this legislation shows that its effect upon the liability of municipalities for the negligent operation of motorized vehicles can only be stated in general terms. In *Devers v. Scranton*,¹²⁶ the Supreme Court held that a city was not liable under the statute for an injury resulting from the negligence of a member of the paid fire department in operating a fire ladder truck. The reasons advanced in support of this decision were, first, that a fire truck is not a motor vehicle within the meaning of the Vehicle Code, and secondly, that if the legislature had intended to fix liability upon municipalities for the negligence of the paid employees of their fire or police departments, it would have stated so specifically in the act, as it did in the case of volunteer fire companies. The soundness of the court's interpretation is open to question on several grounds, and one of these is the point that the term "motor vehicle" is also used in the clause pertaining to volunteer fire companies. Of course, the inclusion thereunder of the fire fighting apparatus of such companies may be defended by reference to the opening paragraph of section 102 of the Code which states that for the purposes of the act words and phrases shall have the meanings respectively ascribed to them in this section "except in those instances where the context clearly indicates a different meaning." In response to this defense, however, it may be contended that this same paragraph might have been relied upon to support the conclusion that the legislature intended to impose liability for the negligence of paid firemen in operating motorized fire fighting apparatus, especially since there is much to be said for the view that the addition of the special clause pertaining to members of volunteer companies lends emphasis to the seemingly all-inclusive meaning of the words "any employee" and "in the course of his employment", as used in the clause preceding.

Whether or not the remarks in *Devers v. Scranton* about paid policemen and firemen indicated a disposition on the part of the court to consider the statutory provisions in question as not intended to curtail the immunity of municipal corporations when acting in a governmental capacity, the decision and opinion in *Graff v. McKeesport*¹²⁷ dispel whatever uncertainty may have existed in regard to this matter. McKeesport was held liable under the statute when a paid police officer, backing a police car away from the place where it had been parked, knocked down and injured the plaintiff who had stepped off the curb behind the car. In its opinion the court referred with approval to the ruling regarding fire trucks in the *Devers* case and asserted that it was the intention of the legislature to impose liability only in connection with those motor-driven vehicles which *in their primary*

¹²⁵Act of May 1, 1929, P. L. 905, Art I, Sec. 102, 75 PS 2.

¹²⁶308 Pa. 13, 161 Atl. 540 (1932).

¹²⁷316 Pa. 263, 175 Atl. 426 (1934).

function are devices in, upon, or by which any person or property is or may be transported or drawn upon a public highway.

This "primary function" test has been applied by the appellate courts in three other cases. In *Mallinger v. Pittsburgh*¹²⁸ the city was held liable for damages caused by the negligent operation of a city-owned car which was operated by a supervisor of the bureau of highways and sewers who had driven to the locality in which the accident occurred for the purpose of inspecting the work of city employees engaged in the removal of debris accumulated in a nearby public alley; while in *Mooney v. Philadelphia*¹²⁹ a motor-driven garbage truck was held to be a motor vehicle within the meaning of the statute on the ground that a garbage truck is "employed in transportation, being loaded at various places and unloaded at another place", and that in this respect the purpose for which it is used differs materially from the functions of a fire ladder truck. In the third case, *Healy v. Philadelphia*,¹³⁰ it was decided that a motor-driven sprinkler used for street cleaning purposes belongs in the category of devices exemplified by fire fighting apparatus.

As matters stand, then, at the time of writing, the highest courts have held municipalities liable under the statute for injuries inflicted by a police car, a garbage truck, and a car utilized in highway and sewer inspection work, but not for the negligent operation of a fire ladder truck and a street sprinkler. Discussing the "primary function" criterion devised by the Supreme Court, the Superior Court remarked that "if it be thought that a distinction, with regard to the liability of a municipality, between the negligent operation of a garbage truck and the like operation of a street sprinkler is too refined, the remedy is with the legislature."¹³¹

The foregoing is the only legislation which, in express terms, imposes liability for torts upon municipalities in Pennsylvania, but on several occasions the courts have maintained that liability in connection with the construction, repair, and maintenance of highways, bridges, and other public works is based upon statutory implication.¹³² However, this point of view has not been adhered to consistently.¹³³ In *Szilagyi v. Bethlehem*,¹³⁴ the Supreme Court stated that the ruling as to liability for accident through failure to maintain and repair streets and highways is purely a matter of legislative intent and purpose to impose liability on the various

¹²⁸316 Pa. 257, 175 Atl. 525 (1934).

¹²⁹115 Super. Ct. 433, 175 Atl. 886 (1934).

¹³⁰117 Super. Ct. 417, 178 Atl. 337 (1935).

¹³¹*Healy et al. v. Philadelphia*, 117 Super. Ct. 422, 178 Atl. 339 (1935).

¹³²*Brunacci v. Plains Township*, 315 Pa. 391, 173 Atl. 329 (1934); *Szilagyi v. Bethlehem*, 312 Pa. 260, 167 Atl. 782 (1933); *Clark v. Allegheny County*, 260 Pa. 199, 103 Atl. 552 (1918); *Kelley v. Cumberland County*, 229 Pa. 289, 78 Atl. 276 (1910).

¹³³*Scibilia v. Philadelphia*, 279 Pa. 524, 124 Atl. 273 (1924); *Ford v. School District*, 121 Pa. 543, 15 Atl. 812 (1888); *Cousins v. Butler*, 73 Super. Ct. 86 (1919).

¹³⁴312 Pa. 260 (1933).

subdivisions of government; that it was so decided in *Dean v. New Milford Township*,¹³⁵ and that a constitutional provision was required to create a remedy for an undoubted wrong committed in the construction of a highway.¹³⁶ An examination of the *New Milford* opinion indicates that the court probably had in mind the statement therein that a suit would well be brought against the supervisors of the township because, by the 27th and 28th sections of the Act of June 13, 1836, the duty of maintaining and repairing roads is thrown upon them, and they are agents of the corporation. The judge in this early case based his conclusion on the rule that neglect of an absolute duty imposed by statute creates liability. This same test was applied in *Winpenny v. Philadelphia*,¹³⁷ a case in which the court held that by the 28th section of the Consolidation Act passed February 2, 1854, P. L. 21, it was made the duty of the city council to keep the navigable waters within said city forever open and free from obstructions, and that consequently the city was liable for failure to do so.

Since, as pointed out above,¹³⁸ the Supreme Court has taken the position in recent cases, including the *Szilagyi* case, that this "imperative duty" rule has no proper application when governmental functions are involved, the explanation of liability for negligence in the maintenance and repair of highways and streets, which was given in *Scibilia v. Philadelphia*, is superior, from the standpoint of consistency, to that advanced in *Szilagyi v. Bethlehem*. In the *Scibilia* case, the court pointed out that recovery of damages had been allowed in the earlier cases on the ground that the negligence of the governmental agencies represented a breach of an imperative duty expressly imposed by the State, but asserted that the decisions in this particular kind of a case are in a class by themselves and depend more on long established precedent than on fixed rules or pure logic.¹³⁹

Whatever the correct explanation of these decisions, the present attitude of the highest court seems to be that, so far as governmental functions in general are concerned, statutory imposition of an imperative duty does not in itself warrant the inference that the legislature intended to impose liability. Certainly, no such conclusion was drawn in the *Szilagyi* case.¹⁴⁰ Nevertheless, it was stated in *Brunacci v. Plains Township*¹⁴¹ that in order to hold a township liable for the condition of a sidewalk, there must be legislation compelling repair and maintenance; and this statement indicates that even now legislative imposition of the duty to repair and maintain public works is likely to be accepted as conclusive evidence of legislative intention that municipalities should be held liable for neglect thereof.

¹³⁵ W. & S. 545 (1843).

¹³⁶The wrongs referred to are consequential injuries.

¹³⁷65 Pa. 135 (1870). Cf., *Snyder v. Philadelphia*, 78 Pa. 23 (1875).

¹³⁸Supra, pp. 152, 153.

¹³⁹279 Pa. 555, 556.

¹⁴⁰For the details of this case see supra, p. 153.

¹⁴¹15 Pa. 391, 173 Atl. 329 (1934).

LEGISLATIVE AND JUDICIAL ATTITUDES TOWARD AN EXTENSION
OF MUNICIPAL LIABILITY

As for the attitude of the legislature toward an extension of municipal liability in tort, the best available evidence is the action that has been taken to date. Although the liability clauses contained in the Motor Vehicle Code of 1927, as amended in 1929 and 1931, are the only instances, since 1863, of legislation expressly imposing liability for negligence, this action represents an important step toward the curtailment of municipal immunity from responsibility for negligence in the performance of governmental functions.

The position taken by the judicial branch of the government is that the problem of extending municipal liability is legislative rather than judicial in character, since questions of public policy of an economic nature are involved. The Supreme Court has said that maybe, when providing for the exercise of authority which is on the borderline between governmental and corporate functions, and perhaps in other instances, the legislature ought to make the municipalities expressly liable for damages where negligence in the exercise of, or in the omission to exercise, the powers in question causes injuries to others,¹⁴² but it has consistently maintained that changes in the established rules concerning liability must await legislative action. It has also asserted that acts of the legislature pertaining to liability will be strictly construed and that liability will not be recognized unless it is clearly the intention of the legislature that it be imposed.¹⁴³

A review of the cases decided by the appellate courts over a period of more than a hundred years indicates that no substantial change has occurred in the judiciary's position regarding the extent of municipal liability. If anything, the tendency has been to narrow it, because during the last fifteen years the Supreme Court has stated in definite terms that the discretionary-ministerial rule is limited in application to services of a corporate character, except in connection with those activities, governmental in nature, in the performance of which liability has for a long time been recognized, whereas, as shown above, the opinions in earlier cases contained statements indicative of the view that the discretionary-ministerial rule has a broader application.

Another noteworthy feature of the cases decided in recent years is the attempt to clarify the law of liability through more comprehensive and precise statements regarding the controlling principles. These may be summarized briefly as follows: (1) municipal corporations may be held liable if acting in a corporate, as distinguished from a governmental, capacity; (2) on the basis of long established precedent, liability is also recognized in the performance of certain functions of

¹⁴²*Scibilia v. Philadelphia*, 279 Pa. 560 (1924).

¹⁴³Recent cases including statements to this effect are *Szilagi v. Bethlehem*, 312 Pa. 260, 167 Atl. 782 (1933); *Devers v. Scranton*, 308 Pa. 13, 161 Atl. 540 (1932); and *Scibilia v. Philadelphia*, 279 Pa. 549, 124 Atl. 273 (1924).

a governmental character; (3) the discretionary-ministerial rule, according to which a municipal corporation is not liable for the non-exercise of, or for the manner in which it exercises, its discretionary powers, is to be applied in determining liability for injury due to any activity, whether governmental or corporate, falling within the category of activities with respect to which the principle of liability has been established; (4) the rule of non-liability in the performance of governmental functions does not relieve a municipal corporation of responsibility for creating and maintaining a nuisance, for the negligent use of highly dangerous agents, or for neglecting duties arising from the ownership and control of real property.

Considerations of fairness and justice have led to protests against the application of some of these rules, which seem to be based upon rather arbitrary and unreasonable distinctions, especially from the standpoint of persons who have suffered injuries through no fault of their own. Although the Pennsylvania courts may, perhaps, deserve criticism for adhering to them, as well as for a seemingly narrow construction of the liability clauses in the Motor Vehicle Code, there is much to be said in defense of the conservative stand taken by the judicial branch. So many matters of policy are involved that legislative action based upon careful consideration of all aspects of the problem will probably prove more satisfactory in the long run than court action.

From the standpoint of social justice, for instance, some of the questions to be decided are whether the present policy of immunity from liability in certain designated fields of governmental activity should be continued, and if so, in which fields. Should liability be recognized for all injuries resulting from the performance of public services, irrespective of negligence or contributory negligence, or for all except those due to the carelessness of the injured party, or merely for injuries attributable to the negligence of the public authorities? The financial effects of any extension of liability should also be the subject of careful investigation. Will municipalities be able to bear the burden of an extended liability, or should the state government provide the funds needed to pay damages for injuries resulting from the performance of governmental, as distinguished from corporate, functions? Should a liability fund supported by contributions from both municipalities and the state, or from municipalities only, be established upon an actuarial basis? Questions of this type ought to be raised and answered in the development of a sound policy concerning municipal liability in tort,¹⁴⁴ and the task is clearly one that ought to be undertaken, sooner or later, by the legislative branch of the government.

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¹⁴⁴For discussions of the theoretical and practical aspects of this problem, see the references given in Note 1.