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LIABILITY IN TORT OF MUNICIPAL CORPORATIONS IN MISSOURI

WALTER FREEDMAN*

A layman would think it incredible that in this modern age of comparative technological development and sociological enlightenment the historic maxim, "the King can do no wrong," should be invoked to exempt the branches of democratic governments from liability for their torts. The aphorism stands as an impregnable fortress protecting the immunity of the municipality, a subordinate agency of the state, against the blast of criticism which has been directed at the rule—a creation of judicial empiricism.

It is sophistry to say that "the King can do no wrong." It is obvious that the municipal corporation is today an active creature, permeating our existence and shaping our conduct. The municipality in our modern state orders, prohibits, and protects. Through its agents and servants it is capable of and does inflict harm. The many cases brought against municipal corporations for negligence attest to the validity of this truism.

One of this country's great legal scholars has shown the maxim to be based on a misconception. The first American case exempting a municipality from liability in tort was founded upon a misinterpretation of an earlier English case. Despite this error and the manifest injustice of the rule, judicial utterances continue in doctrinal accord.

2. Borchard, supra note 1, 34 YALE L. J., at 2, n. 2; (1926) 36 id. 1, 757, 1039.
4. Russell v. Men of Devon, 100 Eng. Rep. 359 (K. B. 1788). In this case the defendant was an unincorporated county which possessed no corporate fund. Any judgment in plaintiff's favor would have had to be satisfied by a few individuals, the injustice of which is patent. Municipalities and counties, today, are incorporated and possess funds which may be enlarged, if need be, through the exercise of the taxing power.

(275)
Mr. Justice Holmes, himself dissatisfied with the basis for the "obsolete theory," took occasion to advance an equally unsatisfactory basis. He placed the exemption upon "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." The justification of the myth of the nonsuitability of the state was exploded by the United States Supreme Court itself in an earlier case. To say then that the state is sovereign, the city its governmental agency; that no suit can be brought against the state without its consent; that, therefore, none can be brought against the municipality, is to propose a syllogism which has no foundation in fact.

The fallacious nature of the explanation for the rule of non-liability is best illustrated by instances where the liability of the municipality is clear and uncontradicted: in contract,7 in admiralty law,8 in trespass,9 for maintenance of a nuisance,10 under statutory and constitutional provision,11 and et cetera.

In partial recognition of the explanation for the rule of non-liability the courts have made an inroad into the commands of judicial ritual and allocated municipal conduct into two classifications.12 The first is conduct pursued in the performance of duties arbitrarily imposed by the legislature. In this field the municipality is regarded as a state agency to which the legislature has delegated a portion of its governmental power to be exercised in behalf of the state. These functions are labelled "governmental" or "public." In the performance of these the municipality shares the exemption of the sovereign for injuries inflicted by the negligence of its officers. This immunity is rationalized by demonstrating that here the municipality derives no profit. Liability in tort, however, is not

9. Dooley v. City of Kansas, 82 Mo. 444 (1884).
11. Mo. Const. art. 2, § 21 (1875); Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946 (1895); Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822 (1890); Webb City and Carterville Waterworks Co. v. Webb City, 78 Mo. App. 422 (1899).
 dependent upon the actor being engaged in a profit-making venture at the time the negligent act is committed.\(^\text{13}\)

Another explanation, supported by Missouri adjudications,\(^\text{14}\) is that members of municipal departments, in the performance of public duties, are not agents of the municipality, and, therefore, the doctrine of *respondeat superior* does not apply. This reasoning stands opposed to a fundamental principle of agency law which considers the character of the service performed immaterial, and regards as important the extent of control which the employer has over the employee in the matter of wages, duration of employment, manner of execution of the work, and other matters.\(^\text{15}\)

To submit, in justification of the rule, that the immunity is necessary for the proper functioning of the city, is to propound the obvious contradiction that the agency formed to protect society is under no obligation, when acting itself, to protect an individual member of society.\(^\text{16}\)

In the other class of functions performed by municipal corporations are those voluntarily assumed under general statutes and generally regarded as being conducted for pecuniary gain or for the special advantage and benefit of the locality and its inhabitants. These functions are referred to as “corporate,” “ministerial,” or “proprietary.” In the performance of these duties the municipality is responsible for the negligence of its agents just as a private person or corporation. This distinction is recognized in Missouri.\(^\text{17}\) It is, in fact, accepted in all the states except one.\(^\text{18}\)

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16. See Johnson, J., in Fowler v. Cleveland, 100 Ohio St. 158, 128 N. E. 72 (1919).
17. Murtaugh v. St. Louis, 44 Mo. 479 (1869); Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 466 (1892); Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330 (1906); same, 192 Mo. App. 192, 112 S. W. 724 (1908); Healy v. Kansas City, 277 Mo. 619, 211 S. W. 59 (1919); Lober v. Kansas City, 74 S. W. (2d) 815 (Mo. 1934); Whittfield v. Carrollton, 50 Mo. App. 98 (1892); Bullmaster v. St. Joseph, 70 Mo. App. 60 (1897); D'Arcourt v. Little River Drainage Dist., 212 Mo. App. 610, 245 S. W. 394 (1922), aff'd, 253 S. W. 966 (Mo. 1923); 6 McQuillen, *op. cit. supra* note 7, at §§ 2771, 2792.
18. 6 McQuillen, *op. cit. supra* note 7, at §§ 2771, 2792. The lone dissenting state is South Carolina: Black v. Columbia, 19 S. C. 412 (1883); Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228 (1911). The refusal to recognize the distinction is commendable, but the conclusion of the South Carolina courts that in neither case is the municipality liable, is subject to stricture.
Liability or non-liability, therefore, of a municipal corporation for its
torts depends not upon the nature of the tort or the relation existing be-
tween the city and the injured person, but upon the character of the act
performed. The dichotomy has occasioned much litigation, designed to
categorize various activities upon which the liability or non-liability is con-
tingent.

In the early Missouri case of Murtaugh v. St. Louis, Currier, J., said:

"... where the officer or servant of a municipal corporation
is in the exercise of a power conferred upon the corporation for
its private benefit, and injury ensues from the negligence or mis-
feasance of such officer or servant, the corporation is liable, as
in the case of private corporations or parties; but when the acts
or omissions complained of were done or omitted in the exercise
of a corporate franchise conferred upon the corporation for the
public good, and not for private corporate advantage, then the
corporation is not liable for the consequences of such acts or omis-
sions on the part of its officers and servants."

Since this utterance the Missouri appellate courts have found it ne-
necessary to determine which functions performed by a municipal corpo-
ration are governmental and which are ministerial. In this process of
adjudication, the courts have designated the following functions as gov-
ernmental: the maintenance of hospitals, police forces, prisons, order
in public parks, courthouses, schools, fire departments, traffic sig-
nals,\(^28\) safety gates at railroad crossings,\(^29\) dogpounds,\(^30\) and the collection of refuse and debris.\(^31\) The exercise of the power of taxation is undisputably the performance of a governmental function.\(^32\)

The following activities are held to be exercised by the municipality in its proprietary capacity: the maintenance of electric light plants,\(^33\) waterworks,\(^34\) sewers,\(^35\) bridges,\(^36\) streets,\(^37\) alleys,\(^38\) markets,\(^39\) parks,\(^40\) comfort stations\(^41\) and sanitary streets.\(^42\)

Today, the municipality performs numerous tasks. So blended are they that segregation along logical lines is impossible.\(^43\) This conclusion is perhaps most strikingly illustrated by the following examples: Water (private) is intimately connected with health (public). It is needed for

\(^{28}\) Auslander v. St Louis, 332 Mo. 145, 56 S. W. (2d) 778 (1933).
\(^{30}\) Wilks v. Caruthersville, 162 Mo. App. 492, 142 S. W. 500 (1912); Thomas v. Kennett, 178 S. W. 254 (Mo. App. 1915).
\(^{31}\) Cassidy v. St. Joseph, 247 Mo. 197, 163 S. W. 306 (1912); Behrmann v. St. Louis, 273 Mo. 578, 261 S. W. 547 (1918); Lober v. Kansas City, 74 S. W. (2d) 815 (Mo. 1934).
\(^{32}\) Butler v. Moberly, 131 Mo. App. 172, 110 S. W. 682 (1908); Brightwell v. Kansas City, 155 Mo. App. 519, 134 S. W. 87 (1911).
\(^{33}\) Riley v. Independence, 258 Mo. 671, 167 S. W. 1022 (1914); Thompson v. Lamar, 322 Mo. 514, 17 S. W. (2d) 960 (1929); Bullmaster v. St. Joseph, 70 Mo. App. 60 (1897) (even though the electricity generated was used to light public streets and buildings).
\(^{34}\) Dammann v. St. Louis, 152 Mo. 186, 53 S. W. 932 (1899); De Mayo v. Kansas City, 210 S. W. 380 (Mo. 1919); Public Service Comm. v. Kirkwood, 319 Mo. 562, 4 S. W. (2d) 773 (1928).
\(^{36}\) Jordan v. Hannibal, 87 Mo. 673 (1885); Boyd v. Kansas City, 291 Mo. 622, 257 S. W. 1001 (1922).
\(^{37}\) Wegmann v. Jefferson City, 61 Mo. 55 (1875); Russell v. Columbia, 74 Mo. 480 (1881); Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330 (1906); same, 132 Mo. App. 182, 112 S. W. 724 (1908); Davoren v. Kansas City, 308 Mo. 513, 273 S. W. 401 (1925); Metz v. Kansas City, 229 Mo. App. 402, 81 S. W. (2d) 462 (1935).
\(^{38}\) Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34 (1904); Asbury v. Kansas City, 161 Mo. App. 486, 144 S. W. 127 (1913).
\(^{40}\) Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913); Healy v. Kansas City, 277 Mo. 619, 211 S. W. 59 (1919); Volz v. St. Louis, 326 Mo. 362, 32 S. W. (2d) 72 (1930); Muser v. Kansas City, 249 S. W. 681 (Mo. App. 1925); Edmonston v. Kansas City, 227 Mo. App. 817, 57 S. W. (2d) 690 (1933); Thayer v. St. Joseph, 227 Mo. App. 623, 54 S. W. (2d) 442 (1932).
\(^{41}\) Kuenzel v. St. Louis, 278 Mo. 277, 212 S. W. 876 (1919).
\(^{42}\) Adams v. Frankford, 251 S. W. 125 (Mo. App. 1923), apparently overruled sub silentio in Lober v. Kansas City, 74 S. W. (2d) 815 (Mo. 1934).
\(^{43}\) "The reasons given for liability and for non-liability of municipal corporations we admit are not logical or consistent. Some of the reasons given for non-liability will apply just as forcibly to cases where liability is asserted and vice versa." Ellison, J., in Young v. Metropolitan Street Ry., 126 Mo. App. 1, 9, 103 S. W. 135 (1907). See Seasongood, supra note 1, at 917.
fire protection (public), street cleaning (private and public), and in the cleaning of schools (public). It serves drinking fountains in public places (public) and to sprinkle the grass in the parks (private). It is required in air-conditioning courthouses and hospitals (public). Electricity (private) is used to control traffic lights (public) and to light city buildings (public). Adequate street lighting tends to decrease accidents, thereby lessening the need for police (public). Sewers (private) and comfort stations (private) are part of a system of public sanitation (public). The fire and police departments (public) furnish needed protection to markets (private).

In utter disregard for this penumbral relationship, the courts cling to the incongruity of the dual function of municipal corporations. It will be the purpose now to discuss the case decisions as announced by the Missouri courts.

I. GOVERNMENTAL FUNCTIONS

Missouri joins the majority of American states in regarding the fire department as a governmental agency. Therefore, one injured by the negligent driving of a fire truck en route to a fire was not allowed to recover. In an earlier case, the supreme court decided that no action could be maintained against the city for property destroyed because the firemen did not sufficiently exert themselves. It followed that the city would not be liable in damages for refusing to use its fire engines to pump water around an obstruction in a sewer, for which it was not responsible, in order to prevent damage to abutting property owners.

Since the early case of Worley v. Columbia, the courts have zealously guarded against liability being imposed upon the city for injuries arising from the negligent conduct of the police department. It has been held that a municipality is not liable for the unjustifiable threats made by its officers; nor for injuries resulting from the negligent operation of a patrol

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44. See annotation (1920) 9 A. L. R. 143.
45. McKenna v. St. Louis, 6 Mo. App. 320 (1878).
48. 88 Mo. 106 (1885). In this case the defendant city attempted to impose a license tax on auctioneers. The plaintiff was arrested for failure to pay the tax. The tax was subsequently declared invalid and the plaintiff sued for false imprisonment. Recovery was denied.
49. Butler v. Moberly, 131 Mo. App. 172, 110 S. W. 682 (1908). This case also points out that a city is not liable in damages for the refusal of a
wagon, a necessary instrumentality in the exercise of the power of police protection. A workhouse is similarly regarded. With the introduction of electric traffic signals, serving to replace police officers in the direction of traffic, the courts have been faced with a new problem. In the recent important cause of Auslander v. St. Louis, the court en banc was called upon to determine whether the municipality was liable to a plaintiff who sustained injuries in a collision at an intersection in St. Louis, because of a defective traffic signal. A policeman had discovered earlier that the signal was not working properly. He had reported it five hours before the accident, but no action was taken to correct the defect. The court denied recovery, carefully pointing out that the signal was not an obstruction, and that the collision was not due to its presence. The negligence consisted in the failure of the police department, to which the care and supervision of these signals was entrusted, to remedy the defect. For such negligence the city was not liable. A later case denied recovery to one injured when his motorcycle actually collided with the "STOP" sign which was securely fastened to the street. The plaintiff charged that this constituted an obstruction. The court adjudged the sign to be a reasonable means of regulating traffic—a governmental function.

An interesting situation was presented to division two of the supreme court for determination in Healy v. Kansas City. The Kansas City Council had provided for a Fourth of July celebration in one of the city parks. The park board, in charge of the affair, made arrangements with a military organization to conduct a sham battle. The personnel of the organization proved to be inadequate. The board directed the plaintiff, along with others unfamiliar with the operation of a gun, to help. The inexperience of the men and the crowding of the persons gathered to watch the demonstration hampered the careful operation of the gun. The plaintiff was injured when the gun was fired prematurely. The court, recognizing the dual cause giving rise to the injury, denied plaintiff re-

51. Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 465 (1892), where the court held that a prisoner who was injured by a mule he was ordered to harness could not recover because in maintaining a workhouse and committing offenders thereto, the city was exercising a governmental function.
52. 332 Mo. 145, 56 S. W. (2d) 778 (1933).
54. 277 Mo. 619, 211 S. W. 59 (1919).
covery. The city, it held, is not liable for the maintenance of good order in the park. The prevention of the dangerous conditions caused by gathering crowds or by the lawless or imprudent conduct of individuals is a governmental function. 55

In Cunningham v. St. Louis, 66 recovery was denied one who sustained injuries in falling into an unguarded pit adjacent to an approach to the St. Louis courthouse. The court relied on a Missouri constitutional provision 57 which placed the relation of the city to its courthouse on a similar basis as that of a county to its courthouse.

In Missouri, the maintenance of a dog-pound is regarded as a governmental function. Pounds are erected for the humane purpose of keeping diseased dogs from spreading the disease and to keep them from suffering. Yet an inhumane treatment by an attendant of the pound, resulting in the death or injury of the dog, goes uncompensated. 58

Without dissent, the Missouri courts have held the operation of schools a governmental function. As a consequence thereof, they have denied recovery for injuries caused by the wrongful act of the directors of a school district, 59 or the negligence of members of the board of education. 60

In holding, as did Walker, J., in the last-cited case, that the board of education in maintaining the schools is performing a governmental duty, he was supported by a constitutional provision, 61 which requires the establishment and maintenance of "free public schools for the gratuitous instruction of all persons... between the ages of six and twenty years." Another basis advanced regarded the school funds as being held in trust for the exclusive purpose of the advancement of education. Any attempt to apply them otherwise would be a diversion of trust funds. In a more

55. Id. at 628.
56. 96 Mo. 53, 8 S. W. 787 (1888).
57. Art. 9, § 23, requiring St. Louis to collect the state revenue and "perform all other functions in relation to the State, in the same manner, as if it were a county."
59. State ex rel. Carrollton School District v. Gordon, 231 Mo. 547, 574, 133 S. W. 44 (1910): "But a school district is but the arm and instrumentality of the State for one single and noble purpose, viz., to educate the children of the district..."; McClure Bros. v. School District of Tipton, 79 Mo. App. 80 (1899).
60. Cochran v. Wilson, 287 Mo. 210, 229 S. W. 1050 (1921) (a pedestrian injured by falling down the unlighted steps in a school); Dick v. Board of Education of St. Louis, 238 S. W. 1073 (Mo. 1922) (a pupil injured due to the negligence of an employee of the school board).
61. Mo. Const. art. 11, § 1.
recent case, an employee of the school board attempted to recover for injuries sustained in the operation of a food-chopping machine in a school lunch room. The plaintiff relied on the now-discredited case of Hannon v. St. Louis County. She endeavored to support her case by pointing out that the board was not compelled to operate a lunch room although authorized to do so. Since, therefore, it chose to exercise its discretion in favor of operating one, it was no longer entitled to immunity. In denying recovery the court said: "The true ground of distinction to be observed is not so much that the duty is mandatory rather than self-imposed pursuant to authority of a general law, but, is, that the duty assumed is public in character ...." The court recognized that there was no logical reason why a quasi-corporation should be liable for damages arising from a voluntary undertaking pursuant to a general authority, when a similar act of negligence would occasion no liability if the furnishing of the convenience were mandatory. The fact that in one case the legislature determines the necessity and expediency and in the other the determination is left to a local governmental agency is an insufficient basis upon which to predicate a different rule of liability.

Having reversed an earlier case, Missouri now numbers among the majority of states in holding that the cleaning or sprinkling of streets and the removal of rubbish and garbage thereby is a governmental function designed to promote the public health and comfort. The city, therefore, is not liable for the torts of its employees in this field. The recent case of Lober v. Kansas City presented a factual situation which required the court to choose between conflicting legal rules. The plaintiff sued the city to recover for damages to his printing shop and merchandise. The loss, amounting to $25,000, was caused by water flowing from a street hydrant because an employee of the street cleaning department, in attempting to shut off the water, exerted too much pressure and broke the

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63. 62 Mo. 313 (1876).
64. Krueger v. Board of Education of St. Louis, 310 Mo. 239, 248, 274 S. W. 811 (1925).
65. Young v. Metropolitan St. Ry., 126 Mo. App. 1, 103 S. W. 135 (1907).
66. See annotation (1921) 14 A. L. R. 1473.
67. Cassidy v. St. Joseph, 247 Mo. 197, 152 S. W. 306 (1912) (plaintiff's husband was killed by a runaway horse used by the city in collecting refuse); Behrmann v. St. Louis, 273 Mo. 578, 201 S. W. 547 (1918) (plaintiff injured when team of horses attached to garbage collecting wagon ran into a ladder on which plaintiff was standing).
68. 74 S. W. (2d) 815 (Mo. 1934).
stem. The hydrant, part of the city-owned waterworks, was used either for the extinguishing of fires by the fire department or for the cleaning of streets by the street department. Recovery was denied. Sturgis, C., announced the traditional rule that a city was liable for injuries arising from the negligence of its operation of the waterworks, but added:

"In applying the above rule, however, we are met with the rule that in controlling or preventing loss by fire, and in protecting the health of its inhabitants by keeping its streets clean and sanitary, the city is exercising its governmental powers and is not liable for negligence in doing so. . . ."\(^69\)

The court found that the fire hydrant in question was used only in the performance of governmental functions and that the employee guilty of the negligent act worked for the street cleaning department. It, therefore, adjudged the damage as arising "from the exercise by the city of one of its governmental functions by the negligent act of a governmental employee in the performance of a governmental duty."\(^70\)

The case is important also for its expressed disapproval of the case of De Mayo v. Kansas City.\(^71\) The facts in the latter case were substantially the same as those in the Lober case. The Kansas City Court of Appeals, whose decision was affirmed by the Missouri Supreme Court, relying on the case of Stifel v. St. Louis,\(^72\) regarded the hydrant as an obstruction to the street. The court considered it as much the duty of the city, in fulfillment of its duty to maintain the street in a reasonably safe condition, to stop the flow of water as to remove a wrongful obstruction in a street. The court of appeals drew a distinction between damages resulting from negligence in cleaning the street from deleterious substances as a health measure by use of manual labor, teams and carts, previously adjudged governmental, and the mere flushing of the streets with quantities of water drawn from a hydrant served by city-owned waterworks. That this unrealistic distinction has been judicially disapproved is, unlike the result, commendable.

\(^69\) Id. at 819. This case overrules sub silentio the case of Adams v. Frankford, 251 S. W. 125 (Mo. App. 1923), a case in which the city was held liable for the destruction of plaintiff's property due to the negligence of its employee in piling up and burning brushwood which he had swept off the city street. In reaching the decision the court of appeals relied upon cases dealing with street obstructions, rather than street cleaning.

\(^70\) Id. at 823.

\(^71\) 210 S. W. 380 (Mo. 1919).

\(^72\) 181 S. W. 577 (Mo. 1915).
In the maintenance of a city hospital, the municipality is performing a governmental function. The city of St. Louis, therefore, was held not liable to a charitable hospital patient for injuries resulting from the negligence of its servants at that institution. Kansas City was held excused from liability for the death of plaintiff's husband, killed by an insane patient in whose cell he was placed, in the case of Zummo v. Kansas City. The court is clearly correct in denouncing the preservation of the public health as the performance of a public act. The judicial tolerance of conduct present in the instant case is less praiseworthy.

The enactment of city ordinances is obviously a legislative act. No liability is incurred, therefore, by a municipality for its failure to pass, or enforce, ordinances. Nor is the city liable for failure to abate a nuisance existing on private property. The city in adopting a plan for public improvements is acting in its governmental capacity, but in the later paragraphs it will be shown that once erected, the maintenance of the improvement is a ministerial act upon which liability may be based.

In Brightwell v. Kansas City, the plaintiff sought to recover for the neglect of the city treasurer to issue a certificate to the purchaser of property at a sale under an assessment levied for the maintenance of parks and boulevards. In denying recovery to the plaintiff, the court rested its decision on the ground that in planning parks and boulevards, in condemning the necessary land, and in levying taxes to pay for such land, the municipality acts in the performance of governmental functions.

73. Murtaugh v. St. Louis, 44 Mo. 479 (1869).
74. 235 Mo. 222, 225 S. W. 934 (1920).
75. Moore v. Cape Girardeau, 103 Mo. 470, 15 S. W. 755 (1890).
76. Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102 (1897) (city failed to prevent building of a wooden structure as required by ordinance); Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104 (1897) (dangerous excavation); Sallee v. St. Louis, 162 Mo. 615, 54 S. W. 463 (1899) (failure to remove carcasses within six hours as required by ordinance); Ryan v. Kansas City, 232 Mo. 471, 134 S. W. 566 (1911) (failure to enforce ordinance requiring barricade and lights at excavations); Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16 (1912) (failure to enforce ordinance regarding use and storage of explosives).
79. See text at note 98 et seq.
80. 153 Mo. App. 519, 134 S. W. 87 (1911).
II. PROPRIETARY FUNCTIONS

It has already been mentioned 81 that some of the activities performed by municipalities have been judicially classified as proprietary. In the performance of these functions the municipal corporation is generally adjudged liable for negligent conduct in connection therewith on the same basis as a private person or corporation.

Generally, the supplying of electricity, a function sometimes performed by private companies and now increasingly performed by municipal corporations, has been considered a non-governmental function. By judicial decision Missouri was placed in this category when Graves, J., in the case of Riley v. Independence, 82 said: "Cities undertaking to run the lighting business must assume the same responsibilities as private persons and private corporations running like plants." Some years before this decision, the legislature, seeking to encourage the erection of municipal waterworks, passed an act exempting cities of the second, third, and fourth classes from liability "on account of negligence in the operation of the waterworks plant." 83 This statute was invoked to preclude recovery from a municipality for damages resulting from the failure of the city to furnish steam for the operation of a mine, according to its agreement. 84 In 1919, an act was passed which sought to extend the same immunity to the erection and purchase of electric light plants, gas plants, and other public utilities. 85 The following year the statute granting exemption to the city for torts committed in the operation of its waterworks, was declared unconstitutional because the title to the act did not divulge its entire content. 86 Apparently, overlooking this declaration of unconstitutionality, the supreme court granted recovery to one burned by an uninsulated high voltage wire blown against him. A very questionable interpretation of the statute was adopted. 87 In the most recent case, no mention is made of

81. See notes 33 to 42, supra.
82. 258 Mo. 671, 681, 167 S. W. 1022 (1914), holding the city liable for injuries sustained by its employee in an electric light plant due to a defectively constructed and maintained switch, which it was the duty of the injured person to use.
86. Vice v. Kirksville, 280 Mo. 348, 217 S. W. 77 (1920). The statute does not appear in the 1929 revision of the Missouri statutes.
87. Thompson v. Lamar, 322 Mo. 514, 17 S. W. (2d) 960 (1929). The defendant city sought exemption under the statute (see note 83, supra), which, by the amendment of 1919 (see note 85, supra), now applied also to electric light plants. The court rejected the defendant's contention that the exemption extended to torts committed in the operation of a light plant, by pursuing the fol-
the statute. The usual recovery for injuries inflicted as a result of negligence in the operation of an electric plant was permitted.

Few persons would deny that public parks are designed to provide places for recreation, amusement, and relaxation. Yet, since 1891, municipalities in Missouri are adjudged to maintain public parks in a quasi-private capacity. In the first case arising from an attempt to hold a city responsible for the drowning of a boy in a pond in a public park, the court was able to hold the city liable for maintaining a nuisance. Surprisingly enough, in an earlier case, in which recovery was denied to the parents of an eleven year old boy who, despite previous reprimands, climbed over a four and one-half foot fence surrounding the reservoir and was drowned, the question of the duty of the city to persons using the parks was not

lowing reasoning: "Section 9119, in exempting a municipality from actionable liability for negligence respecting waterworks plants, uses the word 'operation' whereas the new Section 9111, enacted in 1919, uses the words 'erection or purchase' in providing that the provisions of the several sections of the article, 'which concern the purchase of waterworks,' shall apply, so far as the same are applicable, to electric light plants and other public utilities. Had it been the intent of the General Assembly, in enacting new Section 9111, to exempt municipalities from actionable liability for negligence in the operation of electric light and power plants, as in the case of the operation of waterworks plants (as provided in Sec. 9119), it is clear to our minds that the law-making body of the State would have used the word 'operation' instead of, or in addition to, the words 'erection or purchase', in enacting Section 9111."

88. Roberts v. Lamar, 99 S. W. (2d) 498 (Mo. App. 1936). In this case plaintiff was employed by the Federal Emergency Relief Committee, which agreed to send its men to work for the defendant city. Plaintiff was ordered to trim tree branches along a power line used in supplying electricity for street lighting. The work was supervised by a foreman employed by the city. The attempt of the defendant city to establish that by lending the services of the light superintendent for the purposes of supervising the work relief, it was engaged in the administration of a public charity, was rejected by the court which pointed out that the city had nothing to do with the administration of the relief funds. Liability was imposed on the ground that the trimming of trees to protect the light wires was a ministerial function.

89. See Woodson, J., in Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913), where he points out that the park provides for the poor persons what the sea shore provides for the wealthy. "It is largely for this protection of life and limb, and the separation of the youth of the country from vice and dangers, that these parks are created and maintained. . . ."

90. State ex rel. Wood v. Schweickardt, 109 Mo. 496, 19 S. W. 47 (1891) (case did not involve the tort liability of a city but was concerned with the right of a city to lease the right of selling liquor in a public park).

91. Capp v. St. Louis, 251 Mo. 345, 158 S. W. 616 (1913). This case is often cited as a leading case sustaining the rule that in the maintaining of a park a city acts in a proprietary capacity. A careful reading of the opinion discloses that the court regarded the pond in which the boy was drowned, which pond was created by the washing away of the Des Peres River bed by the drainage from the Euclid Avenue Storm Sewer, as a nuisance. At 353, Woodson, J., refers to the "horrible nuisance" and at p. 352 to the "inexcusable nuisance". At 362: "The same law that requires a municipal corporation to keep its streets free from nuisances, and reasonably safe for those who lawfully use them, also imposes upon it the duty to keep its public parks and other public places in a reasonably safe condition for all who lawfully frequent and use them." (Italics the writer's.)

mentioned. Since, however, the court centered its consideration upon the question of negligence, the duty must inferentially have been assumed. Subsequent cases, however, have unmistakingly established the existence of such duty. Recovery is now granted for injuries sustained as a result of defective amusement devices, ungarded holes, pools, and comfort stations. Where the injured person knew of the existence of the dangerous condition and proceeded in disregard of such knowledge, recovery is denied, in spite of the fact that it is incumbent on the city to maintain the parks in a reasonably safe condition.

Unlike quasi-corporations, municipal corporations are liable in damages for injuries sustained as a result of the defective condition of sidewalks, sewers, alleys, and streets. To such actions the usual prin-

96. Keunzel v. St. Louis, 278 Mo. 277, 212 S. W. 876 (1919) (plaintiff injured while entering a rest room provided for women in the pavilion in O'Fallon Park, due to the City's failure to provide the passageway).
98. Counties are not liable for injuries caused by the defective conditions of the highways: Reardon v. St. Louis County, 36 Mo. 555 (1865); Swineford v. Franklin County, 73 Mo. 279 (1880); Clark v. Adair County, 79 Mo. 536 (1883); Reed v. Howell County, 125 Mo. 58, 28 S. W. 177 (1894); Moxley v. Pike County, 276 Mo. 449, 208 S. W. 246 (1918). The only case holding contra, Hannon v. St. Louis County, 62 Mo. 313 (1876), has been expressly disapproved by both divisions of the Missouri Supreme Court: Moxley v. Pike County, supra; Cochran v. Wilson, 287 Mo. 210, 229 S. W. 1050 (1921). In Kansas City v. Holmes, 274 Mo. 159, 202 S. W. 392 (1918), the court attempted to justify the different treatment afforded cities and counties in dealing with the liability for the negligence of its officers and agents by suggesting that cities are organized with a view to profit by the group which takes the initiative in getting the charter, and whose ambition in this connection is increased by the prospective profit which comes from a system of streets, alleys and other urban improvements. The state provides a plan by which the ambition of inhabitants of a small contiguous area may be utilized for the benefits of the urban corporations, and the corporation is given authority to control the improvements. The establishment of a county is automatic and will exist although no person may have urged its creation.
102. Halpin v. Kansas City, 76 Mo. 335 (1882); Tritz v. Kansas City, 84 Mo. 632 (1884); Maus v. Springfield, 101 Mo. 612, 14 S. W. 630 (1890);
principles of tort law apply.\textsuperscript{103} While the city is not an insurer of the safety of its streets,\textsuperscript{104} its obligation to maintain them in a reasonably safe condition for travel is continuing\textsuperscript{105} and non-delegable.\textsuperscript{106} The duty is not affected nor the liability lessened because the defect was created, or the obstruction placed thereon, by a third person.\textsuperscript{107} It is material only that the city knew, or by the exercise of ordinary care would have known, of its condition and had a reasonable time to correct the defect or remove the obstruction.\textsuperscript{108} The obligation commences with the city’s acknowledg-


106. Blake v. St. Louis, 40 Mo. 569 (1867); Bassett v. St. Joseph, 53 Mo. 290 (1873); Welsh v. St. Louis, 73 Mo. 71 (1880) (overruling Barry v. St. Louis, 17 Mo. 121 (1852)); Russell v. Columbia, 74 Mo. 480 (1881); Haniford v. Kansas City, 103 Mo. 172, 15 S. W. 753 (1890); Hunt v. St. Louis, 278 Mo. 218, 211 S. W. 673 (1919); Ahlfield v. City of Mexico, 108 S. W. 122 (Mo. App. 1908); Schlinski v. St. Joseph, 170 Mo. App. 380, 156 S. W. 823 (1913); Burton v. Kansas City, 181 Mo. App. 427, 168 S. W. 889 (1914).


108. Bonine v. Richmond, 75 Mo. 437 (1882); Jordan v. Hannibal, 87 Mo. 673 (1885); Young v. Webb City, 150 Mo. 333, 51 S. W. 709 (1899); Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709 (1907); Hitchings v. Maryville, 134 Mo. App. 712, 115 S. W. 473 (1909); Cooper v. Caruthersville, 264 S. W. 46 (Mo. App. 1924). In the following cases the city was held not liable because it did not appear that the city had a reasonable time in which to remove the obstruction: Vonkey v. St. Louis, 219 Mo. 37, 117 S. W. 733 (1909); Richardson v. Marceline, 73 Mo. App. 360 (1898); Allen v. Kansas City, 64 S. W. (2d) 765 (Mo. App. 1933).

The “ought to have known” requirement is more readily imposed upon a municipality because it has a duty to inspect the condition of the city streets. Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96 (1905). Where the unsafe condition is caused by one acting under the authority of the city, or by one having a permit authorizing the construction, the city is liable for injuries regardless of notice. Stephens v. Macon, 83 Mo. 345 (1884); Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 240 (1886); Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273 (1906); Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36 (1907); Merritt v. Kinloch Telephone Co., 215 Mo. 299, 115 S. W. 19 (1908); Mehan v. St. Louis, 217 Mo. 35, 116 S. W. 514 (1909); Buttron v. Bridell, 228 Mo. 822, 129 S. W. 12 (1910); Smith v. St. Joseph, 42 Mo. App. 392 (1890); Golden v. Clinton, 54 Mo. App. 100 (1893). Cf. Haniford v. Kansas City, 103 Mo. 172, 15 S. W. 753 (1890) (pedestrian fell into unguarded and unlighted excavation made for a cable railway). The case makes no distinction between cases in
ment of the street to be such, either by a formal or tacit acceptance manifested in the silent acquiescence of the city in the use by the public of the path as a street. \(^{109}\) In Missouri the obligation exists in the absence of statute and is said to be implied from the city's duty to construct and control streets. \(^{110}\) Yet, the only misfeasance which will support an action against the city is want of care in the constructing or maintaining of the street, \(^{111}\) and not negligence in adopting an improper plan for construction, \(^{112}\) unless the plan is patently dangerous and unsafe. \(^{113}\)

The purpose for which the injured person was using the street at the time of the accident is immaterial, \(^{114}\) so long as the injury occurred on the property which the municipality was to maintain. \(^{115}\)

which an independent contractor was employed by the city, and those in which employment was by a licensor); Hunt v. St. Louis, 278 Mo. 213, 211 S. W. 673 (1919), where the court carelessly refers to city's liability "upon notice". The discrepancy may be dismissed by regarding the pronunciation as lacking in precision of phraseology.


114. Donoho v. Vulcan Iron-Works, 7 Mo. App. 447 (1879), aff'd, 75 Mo. 401 (1882) (boy playing in the street); Straub v. St. Louis, 175 Mo. 413, 75 S. W. 100 (1903) (boy playing on the sidewalk). Cf. Williams v. St. Joseph, 196 Mo. App. 299, 148 S. W. 459 (1912), where one who was injured by falling into an excavation in the street while riding a bicycle, in violation of a statute, was denied recovery.

115. Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900 (1899) (no recovery because it was not conclusively shown whether the child was on public or private property at the time of the drowning). Cf. Goldsmith v. Kennett, 78 S. W. (2d) 146 (1934) (city not liable to plaintiff who tripped over an unguarded water meter because an ordinance places the duty to keep all water pipes and fixtures in repair on the consumer, and, therefore, the city owed the plaintiff no duty, but the duty was owed by the property owner himself).

A very interesting situation was presented to the court in the recent case of Lowery v. Kansas City, 337 Mo. 47, 85 S. W. (2d) 104 (1935). The plaintiff sued the city for injuries suffered when an automobile, in which she was riding on a bridge within the corporate limits of the defendant city, was overturned upon striking a steel girder which extended about two and one-half feet above the surface of the bridge, and some thirteen and one-half feet from the curb. The warning light had been broken four months before the day when the plaintiff was injured, and had never been replaced. The plaintiff's case was based entirely upon the city's common-law duty with regard to keeping "the public streets within its corporate limits in a safe condition and fit for public travel." The bridge in question was built by a private company and operated as a toll bridge. In 1927, after Kansas City had approved a bond.
The obligation of the municipality to keep its streets free from interfering obstructions is so zealously enforced that it was given preference over the principle of non-liability for the torts of the police in *Carrington v. St. Louis*. Where, however, a municipality keeps such a part of the street in reasonable repair as may be necessary for the use of the travelling public, it is generally not liable for injury sustained by one who, in the exercise of ordinary care, may be injured on some other part of the street over which he was passing, which was out of repair, notwithstanding the city may have ordered the street to be open.

In applying the rules to varying situations, the court has imposed liability on a municipality for the following: injuries sustained by travelers in a carriage, which fell into an unguarded hole dug in the street for the purpose of connecting the water main with a house; for the drowning of a child in a pool formed on the property of an abutting owner as a consequence of the city's failure to provide adequate drainage in a ravine across which the city was constructing a highway embankment; and for damages caused by the backing-up of water due to a clogged-up drain. Liability may be imposed upon a municipality for its failure to remove ice and snow from the city streets. No recovery, however, may be had for

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issue for the purpose, the city purchased the bridge and tendered it free to the State Highway Department, in consideration of its "becoming and constituting a part of the state highway system and maintained as such by said Commission" by virtue of Mo. Rev. Stat. (1929) § 8139. The Highway Commission accepted the title in the name of the state, the city assuming the obligation to install and maintain adequate lights for the lighting of said bridge at their own cost in accordance with the plans and regulations of the Highway Commission. In a lengthy opinion (per Hyde, C.), recovery was denied on the grounds that the place where the plaintiff was injured was not one of the defendant's streets but was a part of the state highway system. Therefore, defendant owed no duty with the respect to the safety of the place where she was injured. Nor could the plaintiff recover on the theory that the city violated a contract with the Highway Commission by failing to maintain a light on the girder because there was no proof of any regulation of the State Highway Commission requiring a light to be on the girder.

116. 89 Mo. 208, 1 S. W. 240 (1886) (plaintiff fell over a door, leading to the basement of a police station, negligently left open into the street). Cf. Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 390 (1906), where the city was held responsible for an assault committed by an employee engaged in repairing a city street.

117. Bassett v. St. Joseph, 53 Mo. 290 (1873); Craig v. Sedalia, 63 Mo. 417 (1876); Ely v. St. Louis, 131 Mo. 728, 31 S. W. 168 (1904).

118. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273 (1906).


120. Kinlough v. Maplewood, 201 S. W. 625 (Mo. App. 1918).

injuries arising out of a collision with a safety gate placed at a railroad crossing.\textsuperscript{122}

Liability of a municipality for injuries sustained as a result of the negligence of an independent contractor engaged by the city has had a somewhat kaleidoscopic history. In the early case of \textit{Barry v. St. Louis},\textsuperscript{123} it was held that the city was not liable to one injured in falling into an open sewer. The court considered it proper to hold the contractor alone liable since it was he who was in complete control of the management and construction. The holding was soon overruled in \textit{Welsh v. St. Louis},\textsuperscript{124} where the court criticized the \textit{Barry} case for its failure to consider whether the city was negligent in failing to discharge its duty of maintaining the streets in a reasonably safe condition for travel. Subsequent adjudications leave no doubt of the responsibility of the city for injuries suffered as a result of the negligence of independent contractors employed in repairing or constructing the roads.\textsuperscript{125} A stipulation in the contract obligating the contractor to take precautions in respect to the performance of the work undertaken by him will not exempt the city from its liability.\textsuperscript{126} Yet, where a child picked up an unexploded dynamite cap, negligently left in the street several weeks prior by an independent contractor who had found it necessary to do some blasting in fulfilling his contractual undertaking with the city, the court refused to attach responsibility on the city, as a matter of law. It considered that the injury did not result from the performance by the contractor of his contract with the city, but from a negligent act collateral to the work itself.\textsuperscript{127} It thereby becomes a jury question whether in failing to discover and remove the dynamite caps, the city had failed to maintain the streets in a reasonably safe condition.

The same obligation, \textit{i. e.}, of maintaining the streets in a reasonably

\begin{footnotesize}
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\item But generally liability is not imposed where the condition is general throughout the city, and there has not been a sufficient time within which to remove the ice and snow. \textit{Wolf v. Kansas City}, 296 Mo. 95, 246 S. W. 236 (1922); \textit{Rice v. Kansas City}, 16 S. W. (2d) 659 (Mo. App. 1929).

\item 122. \textit{Seibert v. Missouri Pac. Ry.}, 188 Mo. 657, 87 S. W. 995 (1905).

\item 123. 17 Mo. 121 (1852).

\item 124. 73 Mo. 71 (1880) (city liable to one who fell into a sewer left unguarded by an independent contractor).


\item 126. \textit{Russell v. Columbia}, 74 Mo. 480 (1881).

\end{itemize}
\end{footnotesize}
safe condition, is invoked to support recovery for injuries received by persons using the street, but caused, not by a defect in the street itself, but rather by a billboard, or sign overhanging the street.

A somewhat different treatment is accorded cases in which the negligence of an independent contractor has resulted in injuring abutting property. In Holman v. Clark, the city was held not liable to plaintiff whose property was damaged by an explosion of dynamite stored on a street adjacent to the property. The court announced that while the city owed a duty to persons using the streets to keep them free of nuisances, there was no corresponding duty in the city to provide the same protection to adjacent owners. As to the latter, a condition precedent to the liability of the municipality is the obtaining of knowledge that the dangerous condition existed. Knowledge of a police officer that a workman carried a few sticks of dynamite into a shed was not regarded as sufficient to justify imputing knowledge to the city that dangerous quantities of dynamite had been stored therein, especially when the dynamite was not needed in the work. The decision was based on an earlier case, which held that "the city was under no duty or obligation to protect adjoining property against the negligence of a contractor, when the plan of the work is reasonable and not liable to work injury if properly carried out." When, however, the city failed to notify the abutting owner of the projected work, recovery was allowed.

Recovery by injured property owners for damages resulting from the change of a grade, or from negligent construction, is permitted by

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129. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847 (1906). Cf. Miller v. Kansas City, 157 Mo. App. 533, 137 S. W. 998 (1911) (recovery denied because sign was not loose long enough to impute knowledge of its condition to the city).
130. 272 Mo. 266, 198 S. W. 868 (1917).
131. Sappington v. Centralia, 162 Mo. App. 418, 144 S. W. 1112 (1912) (property damaged by a backing-up of rain water, due to the fact that a trench-digging machine had broken down and stopped up the culvert).
132. Gerst v. St. Louis, 185 Mo. 151, 84 S. W. 34 (1904). But where plaintiff had actual notice, see McGrath v. St. Louis, 215 Mo. 191, 114 S. W. 611 (1908).
134. White v. Springfield, 189 Mo. App. 228, 173 S. W. 1090 (1915) (water collected as a result of unevenly paved surface).
virtue of a Missouri constitutional provision ordering the payment for a "taking or damaging" of property. 135

III. NON-LIABILITY IRRESPECTIVE OF NATURE OF ACT

In some instances the courts invoke the rule of non-liability irrespective of the nature of the act out of which the cause of action arose. Where the act relied upon, or in the course of which the injury occurred, is wholly beyond the corporate powers, or ultra vires, no liability arises against the municipality. Recovery, therefore, is denied to one injured on a defective sidewalk which the city council had no power to order constructed because it was situated beyond the corporate boundary. 136 An attempt by a city to erect and maintain a tourist camp is "wholly ultra vires", and, therefore, the city is not liable for damages resulting from the offensive odors emitted from a cesspool employed in connection with the camp. 137

Generally, municipal corporations, just as private corporations, are not responsible for injuries caused by their agents acting in excess of the authority conferred upon them. 138 Hence, where a municipality hired a construction company to pave an alley already laid out, and the company went beyond the limits of the alley and excavated under the plaintiff's abutting property, the city was not liable. "Whatever the contractor may have done outside of the limits of the alley . . . the city was not responsible therefor. . . ." 139

As a result of the cases so far, it can be said that in order for a person, injured as a result of negligence for which the municipality is responsible, to recover damages for his injuries, he must show not only that the duty violated was connected with a proprietary activity of the municipal corporation, but he must also prove: (1) the negligent person was a servant of the municipality; (2) the act in connection with which the tort was committed was within the corporate powers of the municipality; (3) the

136. Stealey v. Kansas City, 179 Mo. 400, 78 S. W. 599 (1904).
138. Hilsdorf v. St. Louis, 45 Mo. 94 (1869) (mayor had no authority to bind the city by contract to pay for the removal of carcasses); Rowland v. Gallatin, 75 Mo. 134 (1881) (officer removed private land to build a street); Bigelow v. Springfield, 178 Mo. App. 463, 162 S. W. 750 (1914) (official acted in absence of city ordinance authorizing action).
offending official was acting within the scope of his authority; and (4) he was not guilty of contributory negligence.\(^{140}\)

**IV. LIABILITY IRRESPECTIVE OF NATURE OF THE ACT**

A municipality which, in the performance of even a governmental function, creates a nuisance is liable to persons injured therefrom, regardless of any act of negligence on its part.\(^{141}\) While the courts have judicially determined that fire houses,\(^{142}\) sandpits,\(^{143}\) and safety gates,\(^{144}\) were not nuisances, the following have been declared nuisances: a septic tank from which offensive stench emitted,\(^{145}\) railroad side track erected above the street grade causing surface water to back-up,\(^ {146}\) disposal of dead animals resulting in pollution of private waters,\(^{147}\) embankments,\(^{148}\) improper disposal of sewage,\(^ {149}\) and the piling up of large quantities of dirt.\(^{150}\)

The municipality is liable also for the trespass committed by its agents and servants acting under its command, in relation to a matter within the scope of its corporate powers.\(^{151}\) This rule was invoked to imposed responsibility upon a municipality for the destruction of a house. The city council, in the purported exercise of its statutory power to "prevent and remove nuisance" had ordered the destruction. The court held that the statute did not give the council power to declare what was a nuisance, and even if the building in question was being put to so hazardous a use as to be a nuisance, that would only have justified a suppression of the use and not the destruction of the building.\(^{152}\)

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140. MCQUILLEN, op. cit. supra note 7, at § 2780.
143. Whitfield v. Carrollton, 50 Mo. App. 98 (1892).
144. Seibert v. Mo. Pac. Ry., 188 Mo. 657, 87 S. W. 996 (1905).
151. Dooley v. Kansas City, 82 Mo. 444 (1884) (city authorized to purchase land outside its limits seized plaintiff's land and used it to keep persons infected with contagious disease); Soulard v. St. Louis, 36 Mo. 546 (1865) (city appropriated private property for street purposes, without following the procedure prescribed by its charter).
152. Allison v. Richmond, 51 Mo. App. 133 (1892).
V. Statutory Requirement of Notice

A statutory procedural formality, prerequisite to the maintaining of an action for personal injuries arising from sidewalks, streets, bridges and boulevards, is the giving of written notice to the mayor of the intention of the person injured to sue.153 The statute requires that the notice be served within a specified period after the occurrence of the accident, stating the time, place and "character and circumstances" of the injury suffered. Recognizing that the primary purposes of the statute are to (1) enable investigation by the city,154 (2) afford an opportunity for settlement and thereby avoid perplexing litigation,155 and (3) protect the city from stale claims,156 the courts have construed the statute liberally157 so that it would not defeat its purpose and serve as a "pitfall in the way of honest claimants."158 It has been held that the requirement of furnishing the notice within the specified period after the accident was waived where the injured person was, because of his injury, unable to give the notice.159 One serving notice on the assistant city counselor who accepted it in the name of the mayor, is considered as having substantially complied with the statutory requirement.160 A failure to accurately specify the time of the accident is not objectionable.161 Recently, the supreme court held that a mere general statement of the "character and circumstances" of the injury would be sufficient to satisfy the statutory requirement.162

VI. Conclusion

The postulate of state immunity in tort survives by virtue of antiquity alone. It has no place in a society where economical, industrial, tech-

153. MO. REV. STAT. (1929) § 7493.
156. Plater v. Kansas City, 334 Mo. 842, 68 S. W. (2d) 800 (1934).
161. Boyd v. Kansas City, 291 Mo. 622, 237 S. W. 1001 (1922) (notice read that accident occurred "on or about" a mentioned day and the accident actually happened on that date); Kling v. Kansas City, 227 Mo. App. 1248, 61 S. W. (2d) 411 (1933) (variance between notice alleging injury on city street "about 12:15 P. M." on a named date, and proof that the accident happened at 12:15 A. M. on the next day, not a fatal variance).
162. David v. St. Louis, 98 S. W. (2d) 353 (Mo. 1936); Comment (1937) 22 WASH. U. L. Q. 447.
nological and sociological forces have added to the complexity of the problems with which municipalities must deal. The adherence to the paradoxical dichotomous nature of a municipality is a vivid example of the continuing phenomenon of an interplay between legal principles and reality.

If there is a guide which the courts employ in determining whether an activity performed by the municipality is governmental or proprietary it must be the one of—she loves me, she loves me not! Certainly there is no acceptable criterion by which to determine the enigmatic nature of municipal activity. Nor is its absence difficult to explain. There is no clear cut differentiation between corporate and governmental functions. The city street is an integral part of the state highway; the city sewer is a necessary instrumentality in a system of public sanitation; police protection and traffic regulation are as necessary within a public park as without, et cetera. It would be wise to destroy this judicially-manufactured distinction. The responsibility of the community should be co-extensive with its activity. The legal duty of a municipality to its citizens should be on the same basis as that of private persons. Under this conception, the controlling criterion would be the existence of a legal duty running to the individual.

The judicial submission to the commands of ritual has left the injured citizen in a sad plight. An action against a negligent official may provide adequate relief in proceedings to recover specific property, or where the action of the official may be controlled by mandamus, injunction or other coercive relief. It is mockery to speak of its availability in an action for damages where its effectiveness is limited to the pecuniary responsibility of the officer.

To uphold liability against a municipality will not in any way impede the effectiveness of municipal activity. Through the power of taxation the city can spread the cost of municipal negligence among all its inhabitants—where it belongs—rather than upon the blameless but injured

163a. "There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 151.
164. Borchard, supra note 1, 34 YALE L. J., at 135.
one. It is unfair to draw an analogy to the immunity in tort of a charitable trust. A diversion of trust funds may seriously affect the operation of an eleemosynary institution, but the taxing power is a safeguard of the continued existence of a municipality.

Effective as is the judicial device\(^{165}\) of labelling an activity either governmental or proprietary, its potency is limited by the fact that \textit{stare decisis} makes difficult the transfer of a function from one classification to the other. While the historical anachronism, which gives rise to a distinction which is synonymous with liability and non-liability, is unsound, unjust, and obsolete, only one unfamiliar with the vicissitudes of the judicial process will believe that the rule will be expunged by a departure from the rigidity of the application of the rule of \textit{stare decisis}. It is regrettable that the doctrine has led the courts along the path of blind adherence strewn with \textit{ex post facto} rationalization. If there is to be an immediate solution, it must be through legislation,\(^{166}\) designed to admit municipal responsibility in tort.\(^{167}\)

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165. Butler, J., in Trenton \textit{v}. New Jersey, 262 U. S. 182, 191 (1923): "The basis of the distinction [between governmental and proprietary functions] is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts."

166. Seagonodd, \textit{supra} note 1, at 942.

167. "All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused." \textit{Cardozo, op. cit. supra}, note 163a, at 144.