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Comments

TORTS—MUNICIPAL CORPORATIONS—MUNICIPAL “GOVERNMENTAL” TORT IMMUNITY DOCTRINE IN MISSOURI

INTRODUCTION

The author of the statement, “The King can do no wrong,” would be amazed by the tortious and complex meanderings which courts have taken in predicating municipal tort immunity in the Twentieth Century upon a guide relevant to Twelfth Century needs. This aphorism, that the King can do no wrong, is not questioned as to its inception, but rather in how it came to be affixed and upheld in modern day municipal corporations law.

The sovereignty of the King was eventually transferred to Parliament, and then to the subdivisions acting for Parliament, the State; and the municipality as a participant and sharer in this sovereign character also took upon itself to adopt the sovereign cloak protecting it from suit, as it did the King. With the sovereignty concept as a foundation, *Russel v. Men Residing in the County of Devon*¹ became the principal case establishing municipal non-liability in torts.

In England at the time of *Russel*, there was no concept of local corporate autonomy and legal recoveries were not allowed against such nonexistent bodies but rather against the individual inhabitants of a particular area. Therefore, in the repair or disrepair of bridges and roads, the inhabitants themselves were held responsible by fines against their lands or by personal services. The county, as such, became charged with this obligation only when some definite obligation on an individual or his land could not be otherwise established. The plaintiffs in the *Russel* decision brought an action on the case to recover for an injury to their wagon caused by the disrepair of a bridge. Two of the inhabitants of the county, answering for defendant county, demurred generally for themselves and the rest of the inhabitants.

Lord Kenyon, the judge deciding the action, was confronted with a governmental entity practically nonexistent according to our present day definition of a municipality. It was called a county but unincorporated and without funds. In sustaining the defendant's demurrer, Lord Kenyon expressed the following reasons for so doing: (1) if this case were allowed, an infinity of actions would result; (2) an action would lie against a single individual who was bound to keep the bridge in repair; (3) it would be an injustice to those who came into the county subsequent to the injury; and (4) if the county were to be regarded as a corporation, there was no corporate fund from which payment of a judgment might be made.

1. 2 Term Rep. 667, 100 Eng. Rep. 359 (1778).

Therefore, when the courts of this country were confronted with a problem of similar circumstances but affecting towns which *were* incorporated and *with* funds, they applied the doctrine of non-liability to American towns which Lord Kenyon had applied to the unincorporated county in the *Russel* case.² This was clearly a misapplication of the precedent established in the *Russel* decision; however, this doctrine, with its many variations, inconsistencies, and exceptions in application, has been widely accepted and has become "the American doctrine" of municipal tort immunity. The fallacy of this doctrine as applied to this country's municipalities is in the fact that incorporation of the governmental subdivision has remedied the lack of a party defendant. Duties may now be imposed upon our towns and counties for the benefit of the individual. The modern day taxing power provides the means both of performing functions for the citizen and of compensating for injuries through payments of damages to the injured. Insurance carried by the modern municipality is commonplace today even though carried without legal compulsion because of its immunity; its acquisition is due to the growing moral responsibility of the municipality toward its injured citizens.³ Every logical reason for rejection of the immunity doctrine to the municipal corporation has been argued before the courts; however the bulk of American tribunals continue to cling to the precedent established in *Russel*, as misapplied in this country. Consequently, when the injured plaintiff seeks compensation he must sue an all too often execution-proof municipal employee who was negligently performing his duties on behalf of the city; this in most instances is no recovery at all.

The early cases in Missouri's municipal tort history, as well as the recent

2. The court stated in *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 187 (1810):

We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books some times called *quasi* corporations. Of this description are counties and hundreds, in England; and counties, towns & c., in this state.

In *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 250 (1812), the court remarked: The plaintiff has brought his action against the inhabitants of the town of *Leicester*, for the loss of his horse, occasioned by the neglect of that town to keep a certain bridge in repair. . . . But it is well settled that the common law gives no such action.

See also, *Hooe v. Alexandria*, 12 Fed. Cas. 461 (No. 6666) (C.C.D.C. 1802).

3. The effect of liability insurance upon the immunity of a municipality is an area which itself is beset with difficulties. The basic problem is this: even though coverage exists, an insurance company is not normally liable unless the insured is in fact liable for the claim which is made. Under this principle the fact of insurance would do nothing; it would simply be a useless public expenditure. However, the authorities in many areas have allowed the fact of insurance, where there is a covenant on the part of the insurance company not to use the immunity defense, to subject the city to liability. This area is beyond the scope of this comment, but it is mentioned for the purpose of showing that the existence of insurance coverage does not necessarily end the injustices caused by the immunity doctrine. For an excellent discussion of this matter see Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588. See also, Annot., 68 A.L.R.2d 1437 (1959).

cases of *Dallas v. City of St. Louis*⁴ and *Gillen v. City of St. Louis*,⁵ have applied (or have misapplied) the precedent long ago established in the *Russel* decision. The Missouri Supreme Court in both *Dallas* and *Gillen* adhered to the "governmental-proprietary" dichotomy of municipal functions⁶ which has been declared by many eminent scholars and judges to be without any rational basis, if not the product of palpable error.⁷

The *Dallas* case permitted plaintiff to recover for the wrongful death of her husband, which resulted while he was servicing a city garbage and refuse truck. The court classified the operation of a city garage for maintenance and repair of its motor vehicles as proprietary. As the question of negligence wasn't in issue upon appeal, the court based liability solely upon the fact that the function performed was proprietary and not governmental, in which latter case immunity would have been granted.⁸ This fictional classification of a city's acts interjects another inconsistency into an area where inconsistencies seem to abound.

Using a similar approach, the court in *Gillen* denied recovery for serious and permanent injuries resulting from a traffic sign falling and striking the plaintiff while he was lawfully using the public sidewalk. In rejecting plaintiff's claim of general negligence under the *res ipsa loquitur* doctrine the court stated:

We think the petition shows upon its face that the alleged negligent acts complained of in the construction, maintenance and control of the mentioned traffic sign were committed in the performance of a governmental function for which the City is not liable in tort.⁹

4. 338 S.W.2d 39 (Mo. 1960).

5. 345 S.W.2d 69 (Mo. 1961).

6. "The common-law distinction that, with whatever exceptions, now renders municipal corporations of almost all the American states immune from tort liability in the performance of one class of functions—'public,' 'sovereign,' 'state,' 'governmental,' 'political'—but not in the other—'private,' 'corporate,' 'proprietary,' 'Commercial'—seems to the 'plain man' to be due to the 'perverse ingenuity' of the judicial mind." Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

7. Annot., 120 A.L.R. 1376, 1378 (1936); Annot., 60 A.L.R.2d 1193, 1198 (1958); Barnett, *op. cit. supra* note 6; Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1934); Freedman, *Liability in Tort of Municipal Corporations in Missouri*, 3 MO. L. REV. 275 (1938); Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942).

8. The reason for this classification was amply expressed in *Healy v. Kansas City*, 277 Mo. 619, 626, 211 S.W. 59, 60 (1919); the court stated:

Municipal corporations are considered in two aspects. One where their functions relate to the corporate interests only, and the other where they discharge certain governmental functions. The authority for the latter is characterized as "quasi-delegated sovereignty for the preservation of the public peace and safety and the prevention of crime." In performing the duties relating solely to its corporate character the city is liable for injuries caused by negligence of its agents; in performing duties relative to the latter or governmental character for the public good, it is not liable.

9. *Gillen v. City of St. Louis*, *supra* note 5, at 73.

In tacitly affirming the city's negligence, the court deferred the plaintiff's claim to a far distant time when the legislature might take the matter under their ambit.

With the early English development and the Missouri Supreme Court's recent treatment of the subject before us, it is the purpose of this comment to delve into the inequities and the injustices to which the municipal immunity doctrine has subjected the injured plaintiff in Missouri. This criticism is aimed at the non-liability for a municipality's "governmental" torts; it does not challenge the prerogative of a governmental unit to establish or decide what services shall be provided. However, once this prerogative has been exercised, and the undertaking begun, it is asserted that the immunity doctrine has no place in the law today. The ingrained philosophy of immunity from governmental tort is a vivid illustration of how strict adherence to precedent and judicial unresponsiveness toward injustices fails to serve the crying needs of the injured plaintiff in our modern society.

With these considerations in mind, an examination will be made of the areas in which the courts have allowed municipalities to escape liability for acts which would be actionable if committed by an individual or his agent.

I. FIRE DEPARTMENTS IN MISSOURI

Missouri joins the great majority of states in upholding governmental immunity for the operation and maintenance of fire departments. The relatively few cases on this subject indicate the depth of entrenchment that the immunity doctrine possesses.

Heller v. Sedalia,¹⁰ was the first Missouri case involving a city's liability for the operation of its fire department. The court had to decide whether the alleged negligence of firemen should make the city liable for the loss of a valuable brewery. In setting forth what was to become the general rule in Missouri, the court said:

It was not the intention of the Legislature, in conferring power on the city to establish a fire department, to render it responsible as an insurer for losses by fire. The power conferred was a legislative or discretionary power, which the city authorities might in their wisdom exercise or not. The creation of the fire department was not for the peculiar benefit of the corporation, but for the public. And the officers of this department, although appointed by the city, are public officers, and not agents of the city in the sense that renders the city liable for their acts or omissions of duty.¹¹

The court did not even attempt to examine the question of negligence, but rather entered upon the discussion of immunity of fire departments.

This type of reasoning was further established as a precedent in *McKenna v. City of St. Louis*.¹² This was an action for the death of a nine year old boy who, while lawfully standing on the sidewalk, was run over by the wheel of one of the fire department's hose carriages due to the alleged careless, reckless and

10. 53 Mo. 159 (1873).

11. *Id.* at 161.

12. 6 Mo. App. 320 (St. L. Ct. App. 1878).

unskillful driving of the carriage by a city employee. The court recited the ritualized argument of governmental immunity and the non-responsibility for such negligence in the performance of matters of public concern. The plaintiff was not contesting the inherent authority of the city to establish a fire department, but rather the negligent operation of that department once established. In effect the court said that the taking of the life of a nine year old boy without compensation was a necessary consequence of the operation of the city's fire department.

In a similar vein, it has been held that the erection of a fire house in a residential district, when it could be built in a business district only a few blocks away, does not constitute an enjoined nuisance to property owners even though such construction results in a devaluation of nearby land.¹³

In *Hawkins v. City of Springfield*,¹⁴ plaintiff's property was flooded by a public sewer; plaintiff sued the city for not using effectively and at the proper time its fire engine and pump to prevent the overflow. The court held: "The city cannot be held liable in damages for either a negligent use or failure to use its fire engines and equipment."¹⁵ Interestingly enough, the city eventually had to resort to its fire equipment to rectify the problem, but the court did not feel that this strengthened plaintiff's case.

The latest case concerning fire department activities, *Richardson v. City of Hannibal*,¹⁶ again stated the oft repeated opinion that a fire department is immune from liability even though its motor, hook and ladder truck, while being driven on the wrong side of the street, collides with and demolishes a parked car. The conditions of negligence could not be more brazenly presented than here, but the court remarked:

If conditions so change that public justice demands that the municipalities shall be responsible for the negligence of the members of the fire departments, the Legislature has the power to prescribe the remedy and will probably do so.¹⁷

Unfortunately, judicial procrastination still is the byword in this aggrieved field of the law.

It is of importance to note that it has been twenty-nine years since a case has reached a Missouri appellate court concerning municipal fire departments. This absence of litigation can be partially explained by the indefatigable stand which the courts have taken.

II. POLICE DEPARTMENTS

It is also established in Missouri and elsewhere in the country that when a municipal corporation is operating a police department for the preservation of

13. *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S.W. 695 (1891).

14. 194 Mo. App. 151, 186 S.W. 576 (Spr. Ct. App. 1916). The court stated that the degree of duty was to use ordinary care and diligence to keep sewers free from obstruction likely to cause damage thereto.

15. *Id.* at 155, 186 S.W. at 577.

16. 330 Mo. 398, 50 S.W.2d 648 (1932) (en banc).

17. *Id.* at 406, 50 S.W.2d at 650.

the peace, the enforcement of the law, and the apprehension of criminals, it is performing its governmental duties and therefore is immune from tort liability. There is no argument with cases which grant immunity to police officers for failure to enforce the law or suppress crime; but when cities escape liability for wilful, negligent or illegal acts of police officers the inequities noted in the fire department cases again appear. The courts have continually held that police officers, though appointed, paid, and discharged by the municipal corporation are not agents of the municipality but of the state and therefore the general doctrine of respondeat superior is inapplicable.¹⁸

The courts of Missouri have granted immunity from tort in false arrest¹⁹ and in so doing established the following doctrine:

When, so acting [as police officers], their duties are of a public character; their acts are in the interest of civil government and of the public, and they are not, when acting in that behalf, the servants of the town or city, in its corporate capacity. The relations of principal and agent do not then exist, and the town is not liable for their said acts in that behalf. The bare allegations that said marshal and recorder committed a trespass upon the person of the plaintiff, though *colore officii*, do not, we think make, a *prima facie* case against the municipal corporation, which is not liable for any and all acts and trespasses of its officers, voluntary, malicious and unauthorized, and which, *prima facie*, is not liable for their wrongful acts.²⁰

This principle of law has been adhered to in subsequent cases, and consequently the city has not been liable for its officers' continued wrongful threats of repeated prosecutions upon a person acquitted of a crime.²¹ The city has not been liable in tort for its mayor and police officers tearing and destroying circus property, arresting the owner of such, and threatening his employees due to the city's wrongful issuance of a license to exhibit his circus on a site that was formerly a graveyard.²²

In *Ulrich v. City of St. Louis*,²³ the city was held not liable for the injury of a prisoner in a police workhouse which resulted from the negligent acts of its police officers in requiring the prisoner to harness a team of mules that were known to be vicious and dangerous. The court commented:

In this case, the city of St. Louis was simply in the exercise of its public, governmental functions delegated to it by the state, from the time

18. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 241 (1924). As Borchard points out there are two distinct but related doctrines of immunity, one dealing with states and the other with municipalities. This comment is limited to the latter, but it must be noted that the two become closely connected in the area of local police functions.

19. Worley v. Inhabitant of Columbia, 88 Mo. 106 (1885). See also, *Graves v. City of Bolivar*, 154 F. Supp. 625 (W.D. Mo. 1957); *McConnel v. City of St. Charles*, 204 S.W. 1075 (Mo. 1918).

20. *Worley v. Inhabitants of Columbia*, *supra* note 19, at 109.

21. *Butler v. City of Moberly*, 131 Mo. App. 172, 110 S.W. 682 (K.C. Ct. App. 1908).

22. *City of Kansas City v. Lemen*, 57 Fed. 905 (8th Cir. 1893).

23. 112 Mo. 138, 20 S.W. 466 (1892) (en banc).

the first arrest was made until the injury occurred, in enforcing its ordinances enacted to preserve the peace, safety, and good order of society, and it is no more liable for the negligence of its officers in this respect, than the state would be liable for the negligence of its highest officers in the performance of the same class of duties.²⁴

There are many Missouri cases which point up the inequitable consequences that can result from following the immunity doctrine. In *Connelly v. City of Sedalia*,²⁵ the court granted immunity to the city's police department for not returning a number of tires mistakenly thought to be abandoned because "the city is not liable for any conversion of the tires of which the police department may have been guilty."²⁶ If a citizen of Missouri is in jail and is maliciously and viciously assaulted by a police officer who is known to be brutal, that citizen cannot claim damages from the city "without opening up unlimited possibilities for wasteful and dishonest dissipation of public funds."²⁷ Such a judicial attitude leaves the impression that to tender a tort claim to the city after being wrongfully and viciously beaten by one of its police officers is a dishonest action on the part of the one so injured. If a claim be made to the city for the death of a prisoner as a result of the burning of the city jail, although it was proven to have no alarms, extinguishers or even a jailor on duty,²⁸ it will be dismissed. Upholding immunity in these cases throws a great doubt upon the validity of the general proposition that "for every wrong there is a remedy."

The courts have even gone so far as to extend immunity of city police departments to the maintenance of their police stations. In *Pearson v. Kansas City*, the city was held not liable to one of its own employees for injuries resulting from a fall into an elevator shaft due to the defective catching device on its elevator door.²⁹ However, in the earlier case of *Carrington v. City of St. Louis*,³⁰ the court felt that painting and leaving open the cellar door to the police station constituted an obstruction on the sidewalk and the city was therefore liable for resulting injuries. Liability was not assessed upon the basis of negligence in maintenance of a police station, but upon keeping sidewalks reasonably safe from obstructions. Strangely enough, the court found the police officer here to be an agent of the city, and his knowledge of the condition of the doors to constitute notice to the city.

The absolute position the courts have taken in police department tort cases has not been without the recognition by some of the judges that the rule of law set forth by early cases has established an unjust precedent. This divergence of

24. *Id.* at 148-49, 20 S.W. at 469.

25. 222 Mo. App. 109, 2 S.W.2d 632 (K.C. Ct. App. 1928).

26. *Id.* at 111, 2 S.W.2d at 633.

27. *Hinds v. City of Hannibal*, 212 S.W.2d 401, 402 (Mo. 1948).

28. *Brown v. City of Craig*, 350 Mo. 836, 168 S.W.2d 1080 (1943).

29. 331 Mo. 885, 55 S.W.2d 485 (1932).

30. 89 Mo. 208, 1 S.W. 240 (1886); See also, *Brown v. City of Marshall*, 71 S.W.2d 856 (K.C. Ct. App. 1934), where the death of a small boy resulted from the creation of a dangerous overhanging ledge in a sand pit by city prisoners. Liability was partially assessed on the basis of a street commissioner directing the work and thus giving notice to the city of the dangerous conditions.

opinion has not constituted a trend of insurgency, but it is interesting to note that sprinkled throughout the Missouri litigation on this subject, there is an indication of some liberalism on the part of the courts. For example, in the *Carrington* case the court declared that "while these officers are state officers for some purposes they are also city officers."³¹ This statement is contrary to the theory that police officers are purely functionaries of the state with no allegiance to the city. In *Stater v. City of Joplin*,³² which was a case involving a police vehicle, the court, after reciting the usual argument of governmental immunity, went on to comment:

It must be admitted that there is strong reason for holding that where a city has exercised the governmental power of determining the kind and character of fire and police apparatus to be used by it, it is then acting within its delegated powers for the "greater public," and that officers, in performing their duties in this connection are public officers for whose negligence the city is not required to respond; *but that when the city has exercised this governmental function of determining the general character of the apparatus, the keeping of that apparatus in proper repair becomes ministerial. However, this is not in accord with the Supreme Court and the Court of Appeals' decisions in this State, nor with the general weight of authority.*³³ (Emphasis added.)

The complexities of modern municipal government necessitate the relaxing of the present rules of non-liability. But the unwillingness of the courts to rectify the situation of municipal tort claims is not due to non-recognition of these complexities. Rather, it is the general feeling of the courts that the regulations and limitations so imposed should originate with the legislature. In the relatively recent case of *Hinds v. City of Hannibal*, the court made clear where a change must originate:

Any change in this situation must be made by the Legislature, as has been done in providing for tort claims against other states and the Federal Government, because only the Legislature could prescribe all regulations and limitations necessary to protect the public interest and provide the fiscal basis for payment of such claims.³⁴

III. TRAFFIC DIRECTION

In upholding the principle of governmental immunity in regard to the city's traffic lights, signals and street warnings, two different lines of authority appear from the Missouri cases. On the one hand, the courts have reasoned that the city is responsible for injuries resulting from any defects or obstructions upon its public

31. *Carrington v. City of St. Louis*, *supra* note 30, at 215, 1 S.W. at 241.

32. 189 Mo. App. 383, 176 S.W. 241 (Spr. Ct. App. 1915). A police officer was driving an automobile that was known to be out of order, worn and defective, and due to said mechanical condition, plus the careless and reckless manner of driving, resulted in crippling injuries to an innocent party sitting in a buggy.

33. *Id.* at 389, 176 S.W. at 242-43.

34. 212 S.W.2d 401, 402 (Mo. 1948). See also, *Brown v. City of Craig*, *supra* note 28, at 1083.

streets. This responsibility stems from the city's corporate duties to keep its streets reasonably safe and in suitable condition. On the other hand, the actual regulation of traffic on Missouri streets is a governmental function having its rudimentary basis as follows:

Formerly traffic in a city was directed and regulated solely by the police departments. But the advent of paved roads and the motor have so increased travel and the speed of vehicles that it is necessary to regulate traffic at almost all of the street intersections in a city. It is beyond the power of the police department to do so through the limited personnel of the department. In this situation efforts have been made to substitute for the policeman a signal or sign device as a means of regulation.³⁵

The justification of the traffic sign is not in dispute. But, in those instances when the sign is defective in the manner of installation, maintenance or when it constitutes an obstruction to traffic, it is contended that the rules of immunity should not apply.

The first case in which the court encountered the problem of traffic regulations or traffic control in general, was *Cavanaugh v. Gerk*.³⁶ Although the case concerned a writ of habeas corpus brought by a traffic violator, in viewing the case the court commented:

As a police regulation, the city could provide for the safety and convenience of its inhabitants, by ordinance, define the parking places, establish automatic signals and one-way streets, and other regulation³⁷

Such language plus the city's inherent police powers, firmly established automatic traffic signals within the category of the municipality's governmental functions.

The injustice of characterizing all functioning of traffic control devices as governmental was illustrated in *Blackburn v. City of St. Louis*,³⁸ when an automobile after careening off a metal safety zone button outlining a safety zone struck an innocent person standing approximately fifteen feet back from the street on the sidewalk. The court felt the maintenance of the buttons, which were proven to be discolored, unlighted, unpainted and partially sunk into the street, was a governmental function and therefore the city was immune. The plaintiff's contention that maintenance of the safety-zone buttons was a violation of the non-delegable duty of the city to keep its streets in a reasonably safe condition was rejected by the court. The inconsistency of the court's standard was shown by a later holding in *Mengel v. City of St. Louis*,³⁹ that an unguarded and unlighted concrete

35. *Prewitt v. City of St. Joseph*, 70 S.W.2d 916, 917 (Mo. 1934).

36. 313 Mo. 375, 280 S.W. 51 (1926) (en banc).

37. *Id.* at 380, 280 S.W. at 52.

38. 343 Mo. 301, 121 S.W.2d 727 (1928). See also, *Hiltener v. Kansas City*, 293 S.W.2d 422 (Mo. 1956), where the city was likewise immune from an action for personal injuries for its negligent maintenance of a vertical post and reflector sign used to define and warn of an existing safety zone.

39. 341 Mo. 994, 111 S.W.2d 5 (1937). See also, *Mertz v. Kansas City*, 229 Mo. App. 402, 81 S.W.2d 462 (K.C. Ct. App. 1935), where the city was held liable for maintenance of a street island, which had some effect on traffic regulation.

slab which was formerly used to support a traffic device, constituted an obstruction and breach of the city's corporate duty.

The negligent failure to maintain an automatic stop and go signal at a busy street intersection has been adjudged to be a governmental function of the city.⁴⁰ This was decided irrespective of the fact that the malfunctioning was reported to the city five hours prior to the plaintiff's accident, plus the fact that the city did not even put up an out-of-order sign after receiving notice.

The courts have similarly failed to impute negligence to the city in regulating or failing to regulate traffic, stating that such function was an exercise of governmental powers.⁴¹ In *Gillen v. City of St. Louis*,⁴² which is the Missouri Supreme Court's most recent declaration in this area, the court again bowed to precedent and left the injured plaintiff to seek his remedy against the negligent employee, if one could be discovered.

IV. HOSPITALS

The establishment and maintenance of a municipal hospital, while in the process of preservation and safeguarding the public health, is usually considered to be a governmental function and therefore the immunity theory follows.

The Supreme Court of Missouri first dealt with the municipal torts of hospitals in 1869. The court upheld the immunity of the city against a claim by a nonpaying patient in the city hospital for injuries received as a result of the negligence and misconduct of the officers of the hospital, and the following rule was set forth:

The general result of these adjudications seems to be this: 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 negligence or misfeasance 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 omissions on the part of its officers and servants.⁴³

Using the *Murtaugh* case as a standard, along with the traditional rule that the health officers are officers of the State, the court in *Zummo v. Kansas City* held that "the same exemption enjoyed by the State itself from liability for damages inflicted by its officers and agents in the performance of similar duties attaches to the defendant city."⁴⁴ Thus, by using this "arm of the State government" theory, there was no liability on the part of the city for negligently putting

40. *Auslander v. City of St. Louis*, 332 Mo. 145, 56 S.W.2d 778 (1938) (en banc).

41. *Caruthers v. City of St. Louis*, 341 Mo. 1073, 111 S.W.2d 32 (1937).

42. 345 S.W.2d 69 (Mo. 1961).

43. *Murtaugh v. City of St. Louis*, 44 Mo. 479, 480 (1869).

44. 285 Mo. 222, 231, 225 S.W. 934, 936 (1920).

plaintiff's husband into a room occupied by a person known to be violent, who during the night strangled and murdered plaintiff's husband.

Both the *Murtaugh* and *Zummo* cases involved nonpaying patients, which supported the city's contention of pure governmental operations from which it derives no financial benefits. However, in *Schroeder v. City of St. Louis*,⁴⁵ the court disregarded the pecuniary profit involved and remarked:

The fact that a patient is a charity case or a paying patient has no material bearing on the merits of the case. If in operating a hospital, a city is performing a governmental function, there is no liability in tort actions.⁴⁶

If a hospital in accepting payments is still to be classified as performing a governmental function, then the same reasoning should be applied to the city's water and light plants. These departments would seem to be as essential to maintenance of the governmental functions of a municipal corporation as a hospital, and yet death resulting from negligence in one of the latter departments is condemned.

Such injustice perpetuated by the immunity of the city applies not only to the innocent citizen but to the city's own employees. In *Watrous v. City of St. Louis*, as a result of unsafe conditions negligently permitted by the city, an employee in a city hospital fell into the hospital incinerator and was injured.⁴⁷ In granting governmental immunity, the court stated:

The principal reason for the rule of municipal immunity is that the general rules of respondeat superior cannot be applied to public officers without opening up unlimited possibilities for wasteful and dishonest dissipation of public funds. . . . That reason applies to claims by municipal employees with as much force and logic as it applies to claims by members of the general public.⁴⁸

It has been suggested that a fear of tort liability by the officers of a hospital might place them in a state of overcautiousness; the answer to this is that such officers are themselves now subject to suit, a change would only add another potential defendant. That the municipal corporation employs, compensates and discharges agents who commit negligent acts in itself obligates the municipal corporation to make an adjustment to the injured party rather than to pass the burden to their employees, acting under competent authority but in a negligent manner.

V. STREET CLEANING, GARBAGE AND REFUSE COLLECTION

The general rule is that the removal of dirt, garbage and refuse from the city streets and residences is classified as being a governmental function which promotes the public health and comfort and the municipality is therefore not liable for the negligent acts committed while engaged in these functions.⁴⁹ However,

45. 360 Mo. 293, 228 S.W. 677 (1950).

46. *Id.* at 296, 228 S.W.2d at 679.

47. 281 S.W.2d 594 (St. L. Ct. App. 1955).

48. *Id.* at 596.

49. RHYNE, *MUNICIPAL LAW* 774 (1957).

some of the states have held to the contrary on the ground that this is a corporate function and the benefit to the public health a mere incident. The Missouri courts regarded the functions of street cleaning, garbage and refuse collection as proprietary until 1912, when the supreme court adopted the governmental classification. In certain instances obstructions created as a result of the street cleaning operations have been declared to be within the city's proprietary capacity, on the ground that it is the duty of the city to keep its streets and sidewalks in a safe condition for travel.

The most noteworthy stand taken against governmental immunity in general, and street cleaning in particular, was handed down in 1907 by Judge Ellison in *Young v. Metropolitan St. Ry.*⁵⁰ After conceding the fact that municipalities in Missouri have been granted immunity in other functions and that the great weight of authority throughout the country classifies street cleaning as a governmental function, the judge remarked that "in our opinion the better rule is that a city is liable for the negligence of its servants in cleaning its streets."⁵¹ In this case the city was involved in a collision between a street railway car and a street cleaning vehicle which was at the time removing dirt and rubbish from the street. The court decided the case on the basis that the removal was concurrent with the duty to keep the streets safe for travel, and in adopting this argument the court threw out the "public health" concept as it applied to street cleaning functions. The court noted that:

The fact that cleaning streets is conducive to public health is a mere incident and does not affect the question. Sewers are always, and properly repaired streets are frequently, conducive to the health of congested populations, yet that does not prevent the application of ordinary rules of liability for negligence as applied to either.⁵²

The court continued, in its opinion, contesting the very basis of the governmental immunity doctrine:

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*. . . .

But, even in determining the general question, the fact that the act may be helpful to the general health, or may, in some remote degree, be referable to governmental regulation, ought not to control. . . . "In almost all affairs of purely local concern some indirect relation may be traced to a matter of health, safety, or other subject of governmental cognizance. . . ."⁵³

The position taken in this case is to be highly commended as it not only satisfied the needs of the injured claimant, but it satisfies the needs of the general public as well. It is unfortunate that this recognition of the artificiality and un-

50. 126 Mo. App. 1, 103 S.W. 135 (K.C. Ct. App. 1907).

51. *Id.* at 8, 103 S.W. at 137.

52. *Id.* at 9, 103 S.W. at 137.

53. *Id.* at 9-10, 103 S.W. at 137.

justness of governmental immunity could not have remained as a guide for future judicial interpretations. But in 1912, in *Cassidy v. City of St. Joseph*,⁵⁴ the court took the fire out of the *Young* opinion:

We think this distinction [*Young v. Metropolitan St. Ry.*] is too narrow and technical to constitute a reliable rule of action, even if the assumption which it involves, that when one of the objects of the work is to keep the street in safe condition for travel the same municipality liability results from the negligence of the officers and servants of the city who do it as would result from leaving it undone, is correct. This, however, we do not feel called upon to decide. The case, in so far as it may conflict with this opinion, is disapproved.⁵⁵

In the *Cassidy* case, an employee of the city was killed due to the negligence of a fellow employee who had left a horse and wagon unhitched in violation of a city ordinance. The court, in upholding the non-liability of the city, set forth a rule of law which has since become the classic standard for similar cases:

The patrol wagon and its driver, the city ambulance with its driver, the street sweepers with the vehicles, and employees that gather the dirt, are all agencies of the government with respect to these matters as well as the mayor and council who provide the rules that set them in motion. . . . Each actor in the drama of government is responsible only for his own conduct.⁵⁶

Although *Cassidy* established in clear language the rule to be followed, the courts later compounded the confusion by deciding in cases of a similar nature that the city was acting in its ministerial or proprietary capacity. In *Stifel v. City of St. Louis*,⁵⁷ the court held that the city was liable when it failed properly to install and maintain a city fire plug, even though the plug was used for its governmental function of sprinkling and flushing the streets in addition to its other uses. Relying heavily upon *Stifel*, the court in *DeMayo v. Kansas City*,⁵⁸ held the city liable for the damage to property resulting from the failure of city employees to turn off the water properly and securely after they had finished flushing the streets.

However, in *Lober v. Kansas City*,⁵⁹ the court reverted to the principles established in the *Cassidy* case and expressly disapproved *DeMayo*. Finding the negligent act of the city street cleaner in breaking a water hydrant and consequently causing the flooding of a business establishment to be of governmental basis, the court stated that:

It seems to us, however, that the flushing of the streets with water by the street cleaning department of the city government appertains and is primarily referable to the city's power and duty to care for and preserve

54. 247 Mo. 197, 152 S.W. 306 (1912).

55. *Id.* at 209, 152 S.W. at 310.

56. *Id.* at 207, 152 S.W. at 310. See also, *Behrmann v. City of St. Louis*, 273 Mo. 578, 201 S.W. 547 (1918).

57. 181 S.W. 577 (Mo. 1915).

58. 210 S.W. 380 (Mo. 1919).

59. 74 S.W.2d 815 (Mo. 1934).

the health and safety of the inhabitants of the city, which is governmental, rather than to its duty to keep the streets in a safe and suitable condition for use and travel.⁶⁰

The reasoning of *Cassidy* and *Lober* was reaffirmed in *Hayes v. City of Kansas City*,⁶¹ wherein the court stated that:

[T]he rule in this state is firmly established that the keeping of streets clean and free from filth and noxious refuse is a governmental function and a city is free from liability in connection therewith.⁶²

It is apparent from the cases discussed that the artificial and unsound distinctions of the Missouri courts in separating street cleaning functions as governmental in some cases and ministerial in others, have created irreconcilable rules which tend to aggravate the principle of equality of treatment for all persons so injured. In the era of the motor vehicle and its natural utilization by the municipalities in its street cleaning departments, allowing the use of such vehicles upon city streets without city liability for its employees' negligence, even under the guise of municipal betterance, can, and often does, lead to injustice.

VI. NUISANCES

The unsupportable foundation of the municipal immunity theory is amply illustrated by the confusion resulting from the courts' trying to apply the fiction of functional classification in regard to nuisances. The Missouri cases on the subject are in conflict on whether or not to grant immunity to the municipal corporation for permitting, creating or maintaining a nuisance which results in injury to persons or property. The more recent cases show a tendency to rule against the traditional doctrine of non-liability and instead to apply the same degree of liability to the municipality as would be applied to a private corporation under similar circumstances.⁶³

If the municipality did not create the conditions of the nuisance, then it is generally held that there can be no recovery for the city's failure to exercise its so called discretionary powers to abate the nuisance. To illustrate, in *Armstrong v. City of Brunswick*, the city, even though it had notice of the activity, permitted the building of hog pens for one hundred hogs next to plaintiff's hotel. This did not in the court's opinion violate a city ordinance providing that the city was required "to abate, prevent and remove nuisances."⁶⁴ The court felt that the power

60. *Id.* at 821.

61. 362 Mo. 368, 241 S.W.2d 888 (1951), concerning an action for personal injuries resulting from the negligence of a driver of a street cleaning truck that was picking up a load of dirt, ashes, cans, and garbage.

62. *Id.* at 371, 241 S.W.2d at 890.

63. *Torpey v. City of Independence*, 24 Mo. App. 288 (K.C. Ct. App. 1887). See also, *Brown v. Scruggs*, 141 Mo. App. 632, 634, 125 S.W. 537, 538 (K.C. Ct. App. 1910): "[A] municipal corporation has no more right to erect and maintain a nuisance on its own land than a private individual would have to maintain such a nuisance on his land."

64. 79 Mo. 319, 320 (1883).

under the ordinance was conferred for the public good and not for private corporate advantage. In *Kiley v. Kansas City*,⁶⁵ the city was granted immunity for the death of a child, which resulted from the collapse of a burned out building standing upon private property, but adjacent with the street. Although the building constituted a nuisance, the court did not feel that the city was bound to see that all of their laws were enforced, though it had the power to do so and notice of the situation.

On the basis of these early cases, the Missouri courts have absolved the city for failing to abate the keeping of an excessive amount of explosives on hand by a city contractor which resulted in damages to an adjacent landowner,⁶⁶ and for permitting a street carnival with a shooting gallery which resulted in the loss of an eye to a boy walking by.⁶⁷ After this tragedy the city closed the gallery down; however, the court frankly admitted that even if the officers of the city failed to abate a nuisance, the city still could not be held liable for failing to exercise its public functions.

In direct contrast to the cases previously mentioned the courts on certain occasions have denied immunity to the municipality in failing to abate nuisances, which points out the conflict in municipal tort precedent. In *Roth v. City of St. Joseph*, the court found the city liable for failure to abate a nuisance created on a public street by a railroad company in constructing an improperly drained embankment. The court remarked that in such a case "it was the duty of the city to abate the nuisance within a reasonable time after the reception of knowledge of its existence and in failing so to do it became liable for the injurious consequences. . . ."⁶⁸ In *Swentzel v. Holmes*, while ruling upon a suit between two private parties concerning the collapse of a shared party wall and their liability to a third party, the court by way of dictum stated that "the municipality under such circumstances would also be liable to third persons on account of its *passive* negligence in failing to abate the nuisance"⁶⁹

On the other hand, when the city creates or maintains a nuisance of its own, whether temporary or permanent, it is generally held liable to the same extent as a private corporation. This liability is imposed regardless of whether the nuisance is created or maintained in the performance of a governmental or proprietary capacity.

Most of the Missouri cases on the subject are in accord with this general rule. In *Frick v. Kansas City*,⁷⁰ the court found the city liable for the nuisance created by the digging of a sewer which, due to the negligence involved, increased the

65. 87 Mo. 103 (1885).

66. *Holman v. Clark*, 272 Mo. 266, 198 S.W. 868 (1917).

67. *Trower v. City of Louisiana*, 198 Mo. App. 352, 200 S.W. 763 (St. L. Ct. App. 1918).

68. *Roth v. City of St. Joseph*, 164 Mo. App. 26, 30, 147 S.W. 490, 491 (K.C. Ct. App. 1912).

69. *Swentzel v. Holmes*, 175 S.W. 871, 875 (Mo. 1915).

70. 117 Mo. App. 488, 93 S.W. 351 (K.C. Ct. App. 1906); other cases dealing with the city creating a surface water nuisance: *Roth v. City of St. Joseph*, *supra* note 68; *Brown v. Scruggs*, *supra* note 63; *Torpey v. City of Independence*, *supra* note 63.

amount of surface water on the adjoining land. In *State ex. rel. Lamm v. City of Sedalia*,⁷¹ the court held the city liable for leaving dead animals scattered around for three days prior to burying them. The court commented:

Under the circumstances of this case there is no more reason why a city cannot be enjoined for creating a public nuisance than any corporation or person. . . . And when under the circumstances herein set out it creates a public nuisance it can be dealt with the same as any individual, for "there is no law declaring municipal corporations infallible or that their demands are incontestable."⁷²

Following this realistic and liberal attitude, the courts have held the municipal corporation liable in the following situations: the creation of a back-water pond even though the pond was on private property;⁷³ for property damages resulting from the extension of a sewer without authority of an ordinance;⁷⁴ the creation of a nuisance resulting from the city's garbage disposal;⁷⁵ the maintaining of a septic tank which emitted unbearable odors⁷⁶ and the discharging of a city sewer into a riparian land owner's stream.⁷⁷

These cases would seem to preclude any opinion to the contrary, but a few earlier cases have gone down a different track. In *Martinowsky v. City of Hannibal*,⁷⁸ the court felt that the city had no control over nuisances, even though the city and others were dumping obnoxious material into a stream flowing past plaintiff's property. In *Whitfield v. Town of Carrollton*,⁷⁹ the court held that the erection by the city's agents of a large water standpipe next to a residence was not a nuisance. The court noted that "people living in cities and large towns must submit to some inconveniences, to some annoyance, to some discomforts and to some injury." The court has also denied liability for damages created by an unauthorized city tourist court and sewer discharge, on the ground the city is not liable for nuisances arising from its *ultra vires acts*.⁸⁰

VII. OTHER GOVERNMENTAL FUNCTIONS

Of all the functions performed by municipalities, the power of taxation⁸¹ and the failure to enact an ordinance are undisputably classified as governmental and

71. 241 S.W. 656 (K.C. Ct. App. 1922).

72. *Id.* at 658.

73. *Davon v. Kansas City*, 308 Mo. 513, 273 S.W. 401 (1925).

74. *Windle v. City of Springfield*, 320 Mo. 459, 8 S.W.2d 61 (1928).

75. *State ex rel. Hog Haven Farms v. Pearch*, 328 Mo. 560, 41 S.W.2d 403 (1931).

76. *Newman v. City of Marceline*, 222 Mo. App. 980, 6 S.W.2d 659 (K.C. Ct. App. 1928).

77. *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (1942). See also, *Riggs v. City of Springfield*, 96 S.W.2d 392 (Spr. Ct. App. 1936), *rev'd on other grounds*, 126 S.W.2d 1144.

78. 35 Mo. App. 70 (St. L. Ct. App. 1889).

79. 50 Mo. App. 98, 105 (K.C. Ct. App. 1892).

80. *Kennedy v. City of Nevada*, 222 Mo. App. 459, 281 S.W. 56 (K.C. Ct. App. 1926).

81. *Simons Hardware Co. v. City of St. Louis*, 192 S.W. 394 (Mo. 1916).

consequently the immunity theory follows. *Moore v. City of Cape Girardeau*,⁸² laid down the general proposition that in the area of legislating the municipality closely resembles the state legislature, and therefore the city is not liable for failure to exercise its discretionary power to enact ordinances.

The enforcement of ordinances is also granted the halo of immunity from all tort actions. The rationale of this rule is that enforcement is executive in nature and therefore it carries the same immunity as that of the legislative function. The Missouri courts have upheld the immunity when the city fails to enforce its ordinances requiring the filling of holes and depressions,⁸³ the fencing of excavations,⁸⁴ the non-erection of wooden buildings in certain zoned areas,⁸⁵ the removal of dead animals from the streets within six hours,⁸⁶ the erection of barriers and placing of lights around street excavations,⁸⁷ the issuance of a license to qualify for blasting,⁸⁸ and the providing of temporary walkways for persons passing around a sidewalk obstruction.⁸⁹ The immunity theory in these cases is approved where the city, in using reasonable care and judgment, is unaware of the violation committed. But where the city is aware of the defect or violation⁹⁰ it should be liable for its failure to enforce such ordinances in the same manner as it is held in its failure to abate a nuisance.

The courts have classified as governmental the act of refusing a building permit even where the refusal was based upon an invalid ordinance.⁹¹ By the same reasoning a city is not liable in damages for its wrongful refusal to issue a peddler's license,⁹² the neglect of the city treasurer to issue a certificate to a purchaser of property,⁹³ or the failure to reinstate a former employee who had fulfilled his service obligation and had returned to claim his former job as provided for by statute.⁹⁴

The negligent and careless acts of officers, agents, and servants of schools and school districts have been held, without exception by the courts in Missouri, to be free of pecuniary motive and therefore the city is devoid of responsibility for torts in this area.⁹⁵

82. 103 Mo. 470, 15 S.W. 755 (1897).

83. *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 36 S.W. 659 (1896).

84. *Butz v. Cavanaugh*, 137 Mo. 503, 38 S.W. 1104 (1897).

85. *Harmon v. City of St. Louis*, 137 Mo. 494, 38 S.W. 1102 (1897).

86. *Sallee v. City of St. Louis*, 152 Mo. 615, 54 S.W. 463 (1899).

87. *Ryan v. Kansas City*, 232 Mo. 471, 134 S.W. 566 (1911). See also, *Bean v. City of Moberly*, 350 Mo. 975, 169 S.W.2d 393 (1943).

88. *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (1912).

89. *Strother v. Kansas City*, 316 Mo. 1067, 296 S.W. 795 (1927) (en banc).

90. *Ibid.*; *Sallee v. City of St. Louis*, *supra* note 86; *Harmon v. City of St. Louis*, *supra* note 85; *Moran v. Pullman Palace Car Co.*, *supra* note 83.

91. *Kramer v. City of Jefferson*, 124 S.W.2d 525 (K.C. Ct. App. 1939).

92. *Butler v. City of Moberly*, 131 Mo. App. 172, 110 S.W. 682 (K.C. Ct. App. 1908).

93. *Brightwell v. Kansas City*, 153 Mo. App. 519, 134 S.W. 87 (K.C. Ct. App. 1911).

94. *Feuchter v. City of St. Louis*, 210 S.W.2d 21 (1948).

95. *Johnson v. Independent School Dist.*, 199 S.W.2d 421 (Spr. Ct. App. 1947); *Krueger v. Board of Educ. of St. Louis*, 310 Mo. 239, 274 S.W. 811 (1925); *McClure Bros. v. School Dist. of Tipton*, 79 Mo. App. 80 (K.C. Ct. App. 1889).

Also within the privileged position of governmental immunity is the operation of animal pounds in a negligent and malicious manner,⁹⁶ the failure to barricade an open pit in a court house building,⁹⁷ the negligent maintenance of a safety gate at a public railroad crossing,⁹⁸ the maintaining of "good order" at a public park,⁹⁹ and the neglect of duty in adopting plans for public improvements.¹⁰⁰

CONCLUSION

Although much has been said for the abrogation of municipal tort immunity since *Russel*,¹⁰¹ the vast majority of the courts, Missouri's included, continue to follow strictly precedents which would seem to have long ago lost their usefulness. The few outcries against immunity have been smothered by the oft-repeated statements "that it is up to the Legislature to make the change" or that "the doctrine of stare decisis compels us to do otherwise."

To accept these arguments would be to admit that the doctrine of stare decisis is an inflexible standard to which strict adherence must be given. At one time, municipal immunity may have had reason for existence, but those times have passed and the judges of the present day should be able to mold their decisions to meet the present day needs and demands. As eloquently stated by Justice Wheeler, of the Connecticut Supreme Court:

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth is found its health and life. It is not and it should not be stationary. Changes of this character should not be left to the Legislature.¹⁰²

Therefore, the courts of Missouri in giving birth to the doctrine of municipal immunity should not defer their responsibility for the eradication of this legacy of injustice.¹⁰³ No one questioned the power of the courts to close their doors to

96. *Thomas v. City of Kennet*, 178 S.W. 254 (St. L. Ct. App. 1915); *Wilks v. City of Caruthersville*, 462 Mo. App. 492, 142 S.W. 800 (St. L. Ct. App. 1912).

97. *Cunningham v. City of St. Louis*, 96 Mo. 53, 8 S.W. 787 (1888).

98. *Seibert v. Missouri Pac. Ry.*, 188 Mo. 657, 87 S.W. 995 (1905).

99. *Healy v. Kansas City*, 277 Mo. 619, 211 S.W. 59 (1919).

100. *Ely v. City of St. Louis*, 181 Mo. 723, 81 S.W. 168 (1904); *Koesman v. City of St. Louis*, 153 Mo. 293, 54 S.W. 513 (1899); *Keating v. Kansas City*, 84 Mo. 415 (1884); *Bassit v. City of St. Joseph*, 53 Mo. 290 (1873); *Woods v. Kansas City*, 58 Mo. App. 272 (K.C. Ct. App. 1894).

101. *Russel v. Men Residing in the County of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 359 (1778).

102. *Dwy v. Connecticut Co.*, 89 Conn. 74, 99, 92 Atl. 883, 891 (1914).

103. See dissenting opinion of Birch, J., in *City of St. Louis v. Gurno*, 12 Mo. 414, 426 (1849), wherein he stated that "as to the impolicy, therefore, of subjecting corporations to suits of this character, if it were even an open judicial question, no sufficient reason occurred why a citizen who may sue his neighbor, should be restrained from similarly suing 6 or 7,000 (incorporated) for an injury"