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## *Municipal Liability for Failure to Provide Police and Fire Protection*

Charles F. Reusch\*

A MUNICIPAL CORPORATION generally has no duty to provide fire and police protection,<sup>1</sup> and is not liable in tort or contract to private persons for losses suffered therefrom,<sup>2</sup> unless a statute specifically allows recovery.<sup>3</sup> The underlying reasoning for this comes from (1) the concept of governmental tort immunity when municipalities are engaged in governmental functions<sup>4</sup> (fire-fighting and giving police protection are almost universally held to be governmental functions<sup>5</sup>) and (2) the common law notion that, absent any duty imposed by statute, the municipal corporation cannot be liable for mere inactivity on the part of public servants which results in damage, there being no duty to act in the first place.<sup>6</sup>

These circumstances have led to much misery of victims of municipal negligence and incompetence, in the writer's opinion.

### **Fire Protection**

Municipal corporations do not have to provide fire protection. State legislatures invariably *allow* municipalities to maintain fire departments *but do not specifically require them to do so.*<sup>7</sup> In absence of restraints imposed by law, city authorities may abolish

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<sup>1</sup> *Bradley v. City of Oskaloosa*, 193 Iowa 1072, 188 N. W. 896 (1922); *Thon v. City of Los Angeles*, 203 Cal. App. 2d 186, 21 Cal. Rptr. 398 (1962); *Henry v. City of Los Angeles*, 114 Cal. App. 2d 603, 250 P. 2d 643 (1952).

<sup>2</sup> *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375 (1861); *City of Purcell v. Hubbard*, 401 P. 2d 488 (Okla. 1965); *Coste v. City of Superior*, 343 F. 2d 100 (7th Cir. 1965).

<sup>3</sup> *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N. W. 2d 254 (1953); *Hollifield v. Keller*, 238 S. C. 584, 121 S. E. 2d 213 (1961); *Fanning v. City of Laramie*, 402 P. 2d 460 (Wyo. 1965).

<sup>4</sup> *Von Der Haar v. City of St. Louis*, 226 S. W. 2d 376 (Mo. App. 1950).

<sup>5</sup> *Spiegler v. City of New Rochelle*, 19 App. Div. 2d 751, 243 N. Y. S. 2d 74 (1963); *Henry v. City of Los Angeles*, *supra* n. 1.

<sup>6</sup> See *Emerson, Municipal Tort Liability in the Common Law Provinces*, 1 U. B. C. L. Rev. 147 (1960); *Milstrey v. City of Hackensack*, 6 N. J. 400, 79 A. 2d 37 (1951).

<sup>7</sup> Ohio Rev. Code, § 715.05. "All municipal corporations may organize and maintain police and fire departments, erect the necessary buildings, and purchase and hold all implements and apparatus required therefor."

fire departments.<sup>8</sup> The ways in which municipal corporations have failed to provide protection are numerous and some of the situations would have been hilarious had not loss of individual life and private property occurred. If a fire department is available but the truck arrives at the scene of the fire with no hose,<sup>9</sup> or not sufficient hose to reach from the truck to the burning building,<sup>10</sup> or the firemen are not properly trained in fire fighting,<sup>11</sup> the city is not responsible.

The fact that no water is available to fight a fire because of a defective hydrant will not allow recovery since maintenance of fire hydrants is usually a governmental function and the hydrants and mains are public property.<sup>12</sup> Even if the defective hydrant is hooked up to the general city water supply and the city makes a profit from selling the water to the public (thereby engaging in a proprietary or non-governmental function) the city is not liable for loss from fire.<sup>13</sup> Failure to provide sufficient water will not make the city liable<sup>14</sup> even if it contracts with a private corporation to provide all the city's water.<sup>15</sup> The same holds true when a statute merely imposes a duty upon a public water company to furnish a water supply in the language of the common law, and gives a right of action for failure to do so.<sup>16</sup> No liability is incurred if the water pressure in the pipes is too low to deal with a fire.<sup>17</sup> If the only source of water available is a tank truck and the truck arrives at the scene of the fire with an empty tank

<sup>8</sup> *Butcher v. City of Camden*, 29 N. J. Eq. 478 (1878).

<sup>9</sup> *Thon v. City of Los Angeles*, *supra* n. 1.

<sup>10</sup> *Small v. Board of Council of City of Frankfort*, 203 Ky. 188, 261 S. W. 1111, 33 A. L. R. 692 (1924).

<sup>11</sup> *Steinhardt v. Town of N. Bay Village*, 132 So. 2d 764 (Fla. App. 1961).

<sup>12</sup> *Miller Grocery Co. v. City of Des Moines*, 195 Iowa 1310, 192 N. W. 306, 28 A. L. R. 815 (1923); *Trustees of J. DePauw Memorial Church v. New Albany Waterworks*, 193 Ind. 368, 140 N. E. 540, 27 A. L. R. 1274 (1923); *Stang v. City of Mill Valley*, 38 Cal. 2d 486, 240 P. 2d 980 (1952). This case is not specifically overruled by *Lattin v. Coachella Valley County Water Dist.*, 15 Cal. Rptr. 300 (D. App. 1961), *aff'd*, 57 Cal. 2d 499, 370 P. 2d 332, 20 Cal. Rptr. 628 (1962).

<sup>13</sup> *City of Columbus v. McIlwain*, 205 Miss. 473, 38 So. 2d 921 (1949); *Stang v. City of Mill Valley*, *supra* n. 12.

<sup>14</sup> *Mack v. Charlotte City Waterworks*, 181 N. C. 383, 107 S. E. 244 (1921).

<sup>15</sup> *Highway Trailer Co. v. Janesville Elec. Co.*, 178 Wis. 340, 190 N. W. 110, 27 A. L. R. 1268 (1922).

<sup>16</sup> *Krom v. Antigo Gas Co.*, 154 Wis. 528, 140 N. W. 41 (1913), modified and *aff'd*, 154 Wis. 528, 143 N. W. 163 (1913); *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160, 159 N. E. 896 (1928).

<sup>17</sup> *Steitz v. City of Beacon*, 295 N. Y. 51, 64 N. E. 2d 704, 163 A. L. R. 342 (1945).

because the water was used for other purposes, the city is not responsible.<sup>18</sup>

A municipal corporation certainly fails to provide fire protection if it fails to enforce ordinances intended to alleviate hazardous conditions. As a general rule, no liability may be imposed upon a city for its failure to enact or enforce ordinances.<sup>19</sup> If a city attempts to enforce an ordinance but does so negligently, it is not responsible for property damage even when the state legislature has made it the specific duty of the city to enforce this type of ordinance by making it a state statute.<sup>20</sup>

In general, a municipality may waive its governmental immunity from tort liability.<sup>21</sup> Where a municipality expends public funds for the purchase of liability insurance, the expenditure constitutes waiver of its constitutional immunity and that of its insurer to the extent of the policy coverage,<sup>22</sup> although this concept is undergoing much discussion at the present time.<sup>23</sup> None of the cases cited in footnotes 21, 22 and 23 involve municipal failure to provide fire protection, but they are mentioned because of possible future importance.

At the present time the only theory under which a city has been held liable for failure to provide fire protection is negligence. These instances are isolated and recent. When firemen refused to try and save a woman stranded on the uppermost floor of an apartment building until after she was overcome by smoke and hot gases and was dead, and at the same time refused to permit neighbors who were already making a successful rescue to con-

<sup>18</sup> *Steinhardt v. Town of N. Bay Village*, *supra* n. 11.

<sup>19</sup> *Wechsler v. City of Philadelphia*, 178 Pa. Super. 496, 115 A. 2d 898 (1955); *Lanni v. City of Bayonne*, 7 N. J. Super. 169, 72 A. 2d 397 (App. Div. 1950); *Murray v. Wilson Line, Inc.*, 270 App. Div. 372, 59 N. Y. S. 2d 750 (1946), *aff'd*, 296 N. Y. 845, 72 N. E. 2d 29 (1947); *Reid v. City of Niagara Falls*, 29 Misc. 2d 855, 216 N. Y. S. 2d 850 (Sup. Ct. 1961).

<sup>20</sup> *Rivera v. City of Amsterdam*, 5 App. Div. 2d 637, 174 N. Y. S. 2d 530 (1958); *Motyka v. City of Amsterdam*, 15 N. Y. 2d 134, 204 N. E. 2d 635, 256 N. Y. S. 2d 595 (1965); *Henry v. City of New York*, 15 N. Y. 2d 726, 205 N. E. 2d 204, 256 N. Y. S. 2d 939 (1965); *Stang v. City of Mill Valley*, *supra* n. 12.

<sup>21</sup> *Schoening v. U. S. Aviation Underwriters, Inc.*, 265 Minn. 119, 120 N. W. 2d 859 (1963).

<sup>22</sup> *Bailey v. City of Knoxville*, 113 F. Supp. 3 (E. D. Tenn. 1953), *aff'd*, 222 F. 2d 520 (6th Cir. 1955); *Marshall v. City of Green Bay*, 18 Wis. 2d 496, 118 N. W. 2d 715 (1963).

<sup>23</sup> *Wohlleben v. City of Park Falls*, 23 Wis. 2d 362, 127 N. W. 2d 35 (1964); *Rogers v. City of Oconomowoc*, 24 Wis. 2d 308, 128 N. W. 2d 640 (1964).

tinue their work, the city was held negligent and liable.<sup>24</sup> With the trend away from upholding municipal tort immunity while it is performing governmental functions, more cases reaching a verdict favorable to the plaintiff are likely.<sup>25</sup>

The long term standing of the tradition of municipal tort immunity from failure to provide fire protection when it is available is even more amazing in light of the general rule in Canada, a sister common law country. The municipal corporation there is liable for the negligence of firemen in the performance of their duties even where it has no obligation in law to establish and maintain fire protection services.<sup>26</sup> However, the city is not liable for failure to provide fire protection if it does not maintain a fire department.<sup>27</sup> This posture adheres closely to the common law rule that a volunteer is liable for tort if he aids a neighbor in distress negligently, but is under no obligation to volunteer assistance in the first place.<sup>28</sup>

### Police Protection

The law pertaining to the liability of municipalities for failure to provide protection is strangely unsettled. Maintenance and operation of a police department is a governmental function,<sup>29</sup> as is maintenance of a jail<sup>30</sup> and the care of prisoners.<sup>31</sup> Municipalities usually are not answerable for negligence of police officers in performance of their governmental functions,<sup>32</sup> but many recent cases hold that they are. When plaintiff left the scene of an auto accident and later ran from a pursuing policeman who killed him, the New York Court of Appeals held that since it is not a felony to leave the scene of an auto accident,

<sup>24</sup> *City of Fairbanks v. Schaible*, 375 P. 2d 201 (Alaska 1962). This case was overruled by *Scheele v. City of Anchorage*, 385 P. 2d 582 (Alaska 1963), but only as to a procedural point.

<sup>25</sup> See two comprehensive articles: Maier, *Sovereign Immunity: Will Ohio Follow Michigan's Lead?*, 31 U. Cinc. L. Rev. 307 (1962), and Rosenberg, *The Decline of Municipal Tort Immunity*, 5 *Current Municipal Problems* (1), 47 (1963).

<sup>26</sup> *Hesketh v. City of Toronto*, 25 Ont. App. R. 449 (1898).

<sup>27</sup> *Brown v. City of Hamilton*, 4 Ont. L. R. 249 (Ch. 1902).

<sup>28</sup> *Stevens-Willson v. City of Chatham* [1933] 2 D. L. R. 407 (Ontario C. A.).

<sup>29</sup> *Henry v. City of Los Angeles*, *supra* n. 1.

<sup>30</sup> *Klam v. Boehm*, 72 Idaho 259, 240 P. 2d 484 (1952).

<sup>31</sup> *Hosea v. City of Seattle*, 64 Wash. 2d 678, 393 P. 2d 967 (1964).

<sup>32</sup> *Rhodes v. City of Palo Alto*, 100 Cal. App. 2d 336, 223 P. 2d 639 (1950); *Poole v. City of Louisville*, 107 Ga. App. 305, 130 S. E. 2d 157 (1963).

no gun should have been used to apprehend the wrongdoer and the city was liable for his death.<sup>33</sup> The New Jersey Court held for the plaintiff when a policeman shot a teenager in the back after a small scuffle outside a bar.<sup>34</sup> When a father took a gun away from his teenage son and turned it over to the police after the son had threatened his mother's life, and the police returned the gun to the son who subsequently killed his mother and committed suicide, the city was liable.<sup>35</sup> Since a New York City ordinance made it a misdemeanor not to give aid to a policeman, the City was held liable when the plaintiff was killed while helping a policeman to pursue a felon.<sup>36</sup>

A city has been held to be performing a governmental function in enacting criminal ordinances, and lack of enforcement of these ordinances creates no liability on its part.<sup>37</sup>

A municipality can withhold police protection to those in jail. It is not responsible for injuries to a prisoner detained in a jail unfit for human habitation<sup>38</sup> even if he has been arrested for violation of state law and held in a municipal jail without authority,<sup>39</sup> although if a county jail was available, then the city is liable.<sup>40</sup> If a prisoner burns to death in an unguarded jail, the city usually is not liable;<sup>41</sup> but recently this rule has been changed in some jurisdictions.<sup>42</sup> A city is not liable if an inmate receives a beating and fatal injuries from fellow prisoners;<sup>43</sup> but recently a city was held liable when a prisoner caught syphilis from a cellmate.<sup>44</sup>

<sup>33</sup> *Fields v. New York City*, 4 N. Y. 2d 334, 151 N. E. 2d 188, 175 N. Y. S. 2d 27 (1958).

<sup>34</sup> *McAndrew v. Mularchuk*, 33 N. J. 172, 162 A. 2d 820 (1960).

<sup>35</sup> *Benway v. City of Watertown*, 1 App. Div. 2d 465, 151 N. Y. S. 2d 485 (1956).

<sup>36</sup> *Riker v. City of New York*, 204 Misc. 878, 126 N. Y. S. 2d 229 (Sup. Ct. 1953), *aff'd*, 286 App. Div. 808, 143 N. Y. S. 2d 620 (1955).

<sup>37</sup> *Bidinger v. City of Circleville*, 86 Ohio L. Abs. 449, 177 N. E. 2d 408 (Ct. App. 1961).

<sup>38</sup> *Franklin v. Town of Richlands*, 161 Va. 156, 170 S. E. 718 (1933).

<sup>39</sup> *Hobbs v. City of Washington*, 168 N. C. 293, 84 S. E. 391 (1915).

<sup>40</sup> *Edwards v. Town of Pocahontas*, 47 F. 268 (C. C. W. D. Va. 1891).

<sup>41</sup> *Pelfry's Adm'x v. City of Jackson*, 291 Ky. 161, 163 S. W. 2d 300 (1942); *McCorkell v. City of Northfield*, 266 Minn. 267, 123 N. W. 2d 367 (1963).

<sup>42</sup> *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

<sup>43</sup> *Savage v. City of Tulsa*, 174 Okla. 416, 50 P. 2d 712 (1935); *Howard v. City of Chattanooga*, 170 Tenn. 663, 98 S. W. 2d 510 (1936).

<sup>44</sup> *Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150 (1937).

When a person working in the building in which the municipal jail was located caught smallpox from a prisoner in jail on the floor above, the city was held not responsible.<sup>45</sup>

The duty to prevent mob violence and the power to preserve order are governmental,<sup>46</sup> but a charter provision making it the duty of the city to preserve the peace and to prevent disturbances does not impose liability.<sup>47</sup> Its liability to do so is often created by statute, however.<sup>48</sup> The purpose of such a statute is that it takes the burden of damages and loss from the individual and places it on the whole community, thereby making it the personal interest of every taxpayer to report to police officials public disorders of which he may have knowledge.<sup>49</sup> The terms of the particular statute, as properly construed, are determinative of the question of liability or non-liability under the facts of each case.<sup>50</sup>

### Means by which an attorney can assist a plaintiff

There are six means an attorney may employ when attacking municipal immunity from liability:

(1) Is an ostensibly governmental function really a proprietary function? Before an amendment to the Montana statutes in 1937, a city was empowered, but not compelled to maintain a fire department. The city operated its fire department as a proprietary function, except when engaged in extinguishing or going to or from the scene of a fire, or testing equipment for such occasions, when it was exercising governmental functions.<sup>51</sup> But why should a fire department be considered as proprietary some of the time and governmental the rest of the time? If a municipal corporation is making a profit from selling water, why should it be immune from liability when there isn't enough available for

<sup>45</sup> *Evans v. City of Kankakee*, 231 Ill. 223, 83 N. E. 223 (1907).

<sup>46</sup> *City of Chicago v. Chicago League Ball Club*, 196 Ill. 54, 63 N. E. 695 (1902).

<sup>47</sup> *Western College of Homeopathic Medicine v. City of Cleveland*, *supra* n. 2.

<sup>48</sup> *Lee v. Kansas City*, 175 Kan. 729, 267 P. 2d 931 (1954).

<sup>49</sup> *Maus v. City of Salina*, 154 Kan. 38, 114 P. 2d 808 (1941); *Goldman v. Forcier*, 68 R. I. 291, 27 A. 2d 340 (1942).

<sup>50</sup> *Anderson v. City of Chicago*, 313 Ill. App. 616, 40 N. E. 2d 601 (1942).

<sup>51</sup> *State ex rel. Kern v. Arnold*, 100 Mont. 346, 49 P. 2d 976 (1935).

fighting a fire?<sup>52</sup> Public policy requires fire protection,<sup>53</sup> therefore when expenditures are made for equipment and training of men, why should they be allowed to hide behind the cloak of governmental immunity when they do an incompetent job? The Florida Supreme Court has answered this question:

The immunity theory has been further supported by the idea that it is better for an individual to suffer a grievous wrong than to impose liability on the people vicariously through their government. If there is anything more sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported.

Judicial consistency loses its virtue when it is degraded by the vice of injustice.<sup>54</sup>

Alaska<sup>55</sup> and Michigan<sup>56</sup> have led the way in almost total abolition of municipal tort immunity, and California<sup>57</sup> and Wisconsin<sup>58</sup> have given much thought to the matter.

(2) Has the city or one of its agents been negligent? Several of the cases cited in this paper have given a nucleus of cases one may cite in support of the contention that municipal corporations are responsible for negligence.<sup>59</sup> Several cases previously cited have indicated that failure to provide protection and failure to enforce statutes do not make the city responsible.<sup>60</sup>

(3) Has there been a statute passed by the state legislature specifically providing for municipal liability? Could some other statute be construed as allowing municipal liability, such as one concerning a policeman's or fireman's specific duties, or one re-

<sup>52</sup> *City of Columbus v. McIlwain*, *supra* n. 13.

<sup>53</sup> *George v. City of Danville*, 315 Ill. App. 17, 42 N. E. 2d 300 (1942), *aff'd*, 383 Ill. 454, 50 N. E. 2d 467 (1943).

<sup>54</sup> *Hargrove v. Town of Cocoa Beach*, *supra* n. 42.

<sup>55</sup> *City of Fairbanks v. Schaible*, *supra* n. 24; *Scheele v. City of Anchorage*, *supra* n. 24; *Williams v. City of Detroit*, 364 Mich. 231, 111 N. W. 2d 1 (1961).

<sup>56</sup> *Maier, Sovereign Immunity: Will Ohio Follow Michigan's Lead?*, *supra* n. 25.

<sup>57</sup> *Stang v. City of Mill Valley*, *supra* n. 12.

<sup>58</sup> *Coste v. City of Superior*, *supra* n. 2; *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N. W. 2d 618 (1962).

<sup>59</sup> *City of Fairbanks v. Schaible*, *supra* n. 24; *McAndrew v. Mularchuk*, *supra* n. 34; *Lewis v. City of Miami*, *supra* n. 44.

<sup>60</sup> *Von Der Haar v. City of St. Louis*, *supra* n. 4; *McCorkell v. City of Northfield*, *supra* n. 41.



quiring that the fire and police department carry certain equipment?

(4) Is a city constitutionally able to waive its own immunity?<sup>61</sup> This question has a different answer in every jurisdiction, but it could be important in a plaintiff's brief that this question be discussed.

(5) Has a city waived its immunity by the purchase of insurance? While it has not yet been held that a city waives its immunity entirely by purchasing insurance, it may be liable to the extent of its policy.<sup>62</sup>

(6) Has the municipality made a contract with a private company to supply fire or police protection, or with something else to provide such necessary protection, e.g., water? If the municipality is immune from financial responsibility, perhaps the private company is not.

### Means by which the community can solve the problem

The community can solve the problems caused by immunity of municipal corporations by:

(1) urging state legislatures to pass statutes limiting or abolishing municipal tort immunity.

(2) urging state legislatures to require that all cities have liability insurance. The cost would not be great, unless city employees were habitually careless and negligent. In 1962, for example, Mount Prospect, Illinois (population 20,000) paid \$15,200 in premiums for workmen's compensation and municipal liability insurance.<sup>63</sup>

(3) treating fire departments as public utilities which charge for fire protection on a fee basis.<sup>64</sup>

<sup>61</sup> Schoening v. U. S. Aviation Underwriters, Inc., *supra* n. 21.

<sup>62</sup> Rogers v. City of Oconomowoc, *supra* n. 23.

<sup>63</sup> Note, Municipal Insurance Costs, 5 Current Municipal Problems (1) 11 (1963).

<sup>64</sup> As an example of a general article on fees: Stevens, Municipal Service Charges, 5 Current Municipal Problems (3) 101 (1964).