Comment

GOVERNMENTAL TORT LIABILITY AND IMMUNITY IN WISCONSIN

In recognition of the gross inequities that result from the common law doctrine of governmental tort immunity, a growing number of courts have abrogated the rule.[1] One writer has described this trend as "an overwhelming opinion throughout the world in favor of the assumption of liability. . . ."[2] This trend invites a critical evaluation of the common law rule, the statutory abrogations, and the current status of Wisconsin's law of governmental immunity.[3]

PRESENT LIABILITY AND IMMUNITY

Common Law Municipal Negligence

Municipal liability for negligence under the common law of Wisconsin is generally in accord with the views adopted by most other jurisdictions in this country. Along with every state except Florida and South Carolina,[4] Wisconsin has categorized the functions of municipal corporations as either governmental or proprietary.[5] The significance of this dichotomy is that municipalities are liable for negligent acts committed pursuant to proprietary functions[6] but are immune from those committed pursuant to governmental functions.[7] Likewise, the doctrine of respondent superior[8] applies to the

[1] See Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Molitor v. Kaneland Community Unit. Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

[2] Comment, 42 YALE L.J. 241, 244 (1932).

[3] For an excellent historical survey of the law of governmental tort immunity, see Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. I (1926). See also Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924).

[4] PROSSER, TORTS § 109, at 775 (2d ed. 1955).

[5] See Comment, 1941 WIS. L. REV. 540, 542-49, for an extensive discussion of proprietary and governmental functions in Wisconsin. See also 18 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 53.23-.59 (3d ed. 1950).

[6] Paper Makers Importing Co. v. City of Milwaukee, 165 F. Supp. 491 (E.D. Wis. 1958); Stockstad v. Town of Rutland, 8 Wis.2d 528, 99 N.W.2d 813 (1959); Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956); Carlson v. Marinette County, 264 Wis. 423, 59 N.W.2d 486 (1953); Victora v. Village of Muscoda, 228 Wis. 455, 279 N.W. 663 (1938); Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee, 209 Wis. 656, 245 N.W. 856 (1932).

[7] Smith v. City of Jefferson, 8 Wis.2d 378, 99 N.W.2d 119 (1959); Champeau v. Village of Little Chute, 275 Wis. 257, 81 N.W.2d 562 (1957); Flesch v. City of Lancaster, 264 Wis. 234, 58 N.W.2d 710 (1953); Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W.2d 24 (1952); Eulrich v. City of Clintonville, 238 Wis. 481, 300 N.W. 219 (1941).

[8] See 18 MCQUILLIN, *op. cit. supra* note 5, §§ 53.65-.77.

municipality when the act is committed pursuant to a proprietary function[9] but does not apply when the act is committed pursuant to a governmental function.[10] Primary consideration is given to the character of the function being performed rather than the character of the negligent act. Hence, a municipality may be liable for an act of negligence in one situation and immune from liability for an identical act in another.

Although the courts have almost unanimously accepted the principle that municipal functions are of a dual character, "no satisfactory test has been devised for distinguishing governmental from proprietary functions."[11] Harper and James suggest that the criteria most often invoked by the courts are:

(1) whether the function is allocated to the municipality for its profit or special advantage or whether for the purpose of carrying out the public functions of the state without advantage to the city, and
(2) whether the function is one historically performed by the government.[12]

American Jurisprudence suggests that "the underlying test is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity."[13] Practically, these statements serve only as vague and general guides. A careful examination of the authority in each forum is necessary to determine the character of a particular function.[14] The Wisconsin Supreme Court has held that governmental functions include: maintaining a city dump,[15] keeping a toboggan slide,[16] operating a draw bridge,[17] laying out streets and opening and preparing streets for public use,[18] repairing sidewalks,[19] operating a sewage disposal plant,[20] lighting a street,[21] operating a fire department,[22]

[9] Apfelbacher v. State, 160 Wis. 565, 152 N.W. 144 (1915).
[10] Waisman v. Wagner, 227 Wis. 193, 278 N.W. 418 (1938); City of Milwaukee v. Meyer, 204 Wis. 350, 235 N.W. 768 (1931). See Note, 7 WIS. L. REV. 53 (1932), for a discussion of the *Meyer* case.
[11] 2 HARPER & JAMES, TORTS § 29.6, at 1621 (1956).
[12] *Ibid.*
[13] 38 AM. JUR. *Municipal Corporations* § 574, at 267 (1941).
[14] "[T]here is a wide divergence in the decisions as to what functions are governmental or public and what are private or corporate, and functions held to be governmental in some jurisdictions are held to be corporate in others." 18 McQUILLIN, *op. cit. supra* note 5, at 187.
[15] Flamingo v. City of Waukesha, *supra* note 7.
[16] Cegelski v. City of Green Bay, 231 Wis. 89, 285 N.W. 343 (1939). See Note, 1940 WIS. L. REV. 142.
[17] Bruhnke v. City of La Crosse, 155 Wis. 485, 144 N.W. 1100 (1914); Evans v. City of Sheboygan, 153 Wis. 287, 141 N.W. 265 (1913).
[18] Matson v. Dane County, 172 Wis. 522, 179 N.W. 774 (1920).
[19] Hogan v. City of Beloit, 175 Wis. 199, 184 N.W. 687 (1921).
[20] Hasslinger v. Village of Hartland, 234 Wis. 201, 290 N.W. 647 (1940).

and the conducting of such activities as parks, playgrounds, swimming pools, and bathing beaches.[23] The court has held proprietary functions to include: managing a power plant,[24] operating an electric railway,[25] furnishing water,[26] treating full-pay patients in municipal hospitals,[27] and operating harbor and dock facilities.[28] Perhaps the only generalization that can be made from these decisions is that governmental functions are those in which the municipality engages as a subdivision of the state and which are "political" or "public" in nature; and proprietary functions are those in which the municipality engages as a corporate entity and which are "private" or "ministerial" in nature.[29]

Common Law Municipal Nuisance

Nuisances maintained by municipalities constitute the second significant category of municipal torts. The liability of a municipal corporation for damages which are proximately caused by a nuisance that it maintains differs substantially from its negligence liability. Although the Wisconsin court continues to recognize the dual character of municipal functions,[30] the fact that a nuisance has been maintained pursuant to a governmental function does not necessarily immunize the municipality from liability.[31] For immunity to exist, the relationship between the municipality and the injured party must be that of governor to governed.[32] This relationship is said to exist when the injured party is using the public facility which causes the injury for the purpose for which it is intended to be used.[33] If, however, the relationship of governor to governed

[23] Wisconsin Traction, Light, Heat & Power Co. v. City of Menasha, 157 Wis. 1, 145 N.W. 231 (1914). For comments on this case, see Note, 1940 WIS. L. REV. 567.
[24] Eulrich v. City of Clintonville, *supra* note 7.
[25] Flesch v. City of Lancaster, *supra* note 7.
[26] Victora v. Village of Muscoda, *supra* note 6.
[27] Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee, *supra* note 6.
[28] State Journal Printing Co. v. City of Madison, 148 Wis. 396, 134 N.W. 909 (1912).
[29] Carlson v. Marinette County, *supra* note 6.
[28] Paper Makers Importing Co. v. City of Milwaukee, *supra* note 6.
[29] For specific discussions respecting governmental functions in Wisconsin, see McIntyre, *Governmental Function in Wisconsin*, 1 MARQ. L. REV. 166 (1916-17); Note, 2 WIS. L. REV. 250 (1923); Note, 21 MARQ. L. REV. 96 (1937).
[30] See Comment, 1941 WIS. L. REV. 540, 554-561.
[31] Young v. Juneau County, 192 Wis. 646, 212 N.W. 295 (1927); Jensen v. Town of Oconto Falls, 186 Wis. 386, 202 N.W. 676 (1925); Bernstein v. City of Milwaukee, 158 Wis. 576, 149 N.W. 382 (1914); Winchell v. City of Waukesha, 110 Wis. 101, 85 N.W. 668 (1901).
[32] Smith v. City of Jefferson, *supra* note 7; Laffey v. City of Milwaukee, 4 Wis.2d 111, 89 N.W.2d 801 (1958); Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W.2d 736 (1947), noted in 1948 WIS. L. REV. 116; Virovatz v. City of Cudahy, 211 Wis. 357, 247 N.W. 341 (1933), noted in 9 WIS. L. REV. 202 (1934).
[33] Laffey v. City of Milwaukee, *supra* note 32, at 116, 89 N.W.2d at 803-04.

does not exist, the municipality will be held liable for the damages caused by the nuisance.[34]

Several case examples may be helpful in characterizing the relationship of governor to governed. The court held that the relationship did not exist when a child was injured while playing in a municipal dump.[35] Likewise, the court held that the relationship did not exist when the injured party was struck by a batted ball which had caromed off the top of a baseball diamond enclosure. At the time of the accident, plaintiff was a pedestrian on a public sidewalk adjacent to the baseball diamond.[36] However, the court held that the relationship of governor to governed existed when a boy drowned while swimming in a municipal bathing pool.[37] Similarly, the court held that the relationship existed when plaintiff slid into an abandoned stone quarry which was not protected by barriers. At the time of the accident, plaintiff was using a public toboggan slide leading to the quarry.[38]

Statutory Abrogations of Municipal Immunity

Common law nuisance and negligence immunity of a municipal corporation exists only in the absence of a statute to the contrary. The Wisconsin Legislature has enacted several statutory provisions which partially abrogate the common law rule.

Safe Place Statute

In 1911, the Wisconsin Legislature substantially expanded the liability of municipal corporations by enacting the safe place statute.[39] Under the provisions of the statute, a municipality as an employer[40] must furnish a safe place of employment;[41] and as an owner[42] of a public building it must render the building safe.[43] This

[34] Champeau v. Village of Little Chute, *supra* note 7; Thompson v .City of Eau Claire, 269 Wis. 76, 69 N.W.2d 239 (1955); Smith v. Congregation of St. Rose, 265 Wis. 393, 61 N.W.2d 896 (1953); Lloyd v. Chippewa County, 265 Wis. 293, 61 N.W.2d 479 (1953); Flamingo v. City of Waukesha, *supra* note 7.

[35] Champeau v. Village of Little Chute, *supra* note 7.

[36] Robb v. City of Milwaukee, 241 Wis. 432, 6 N.W.2d 222 (1942). See Note, 1948 WIS. L. REV. 116.

[37] Pohland v. City of Sheboygan, *supra* note 32.

[38] Virovatz v. City of Cudahy, *supra* note 32.

[39] WIS. STAT. §§ 101.01-.06 (1959).

[40] WIS. STAT. § 101.01 (3) (1959) defines employer to include "county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations. . . ."

[41] WIS. STAT. § 101.01 (1) (1959) defines place of employment as a place where a "trade or business is carried on . . . for direct or indirect gain or profit. . . ." This has placed a significant limitation on municipal liability. See Hoepner v. City of Eau Claire, 264 Wis. 608, 60 N.W.2d 392 (1953).

[42] WIS. STAT. § 101.01 (13) (1959) defines owner to include those governmental units included in the definition of employer. See discussion at note 40 *supra*.

[43] WIS. STAT. § 101.06 (1959).

statute applies to municipal corporations when they are acting pursuant to either governmental or proprietary functions.[44]

Motor Vehicle Accident Statute

The Wisconsin motor vehicle accident statute provides that a claim may be filed against the appropriate governmental unit by any "person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by the state or a municipality, which damage was occasioned by the operation of such motor vehicle in the course of its business."[45] If the claim is disallowed or if the municipality fails to act upon the claim, the injured party may sue. Under the terms of the statute, "business" is defined to include both governmental and proprietary functions.[46]

Highway Defects Statute

One of the most significant abrogations of municipal immunity is in the area of highway defects. The statute, section 81.15, provides that municipalities shall be liable for the "insufficiency or want of repair" of highways and bridges.[47] Although liability under the statute is extensive, the facilities need not be kept absolutely safe.[48] A municipal corporation must only maintain facilities that are reasonably safe for travelers using ordinary care.[49] The statute

[44] Flesch v. City of Lancaster, *supra* note 7. For an excellent discussion of the statute, see Wilcox, *Wisconsin Safe Place Statute,* Wis. Bar Bull. Oct. 1959, p. 7.

Although the words "owner" and "employer" as used in the Safe Place Statute have been defined to include the state [Wis. Stat. §§ 101.01 (3), (13) (1959)], it has been held that the statute will not support a negligence action against the state. Holzworth v. State, 238 Wis. 63, 298 N.W. 163 (1941). Even though the state may violate the standard of care set forth by the statute, the state is still held to be immune from all tort claims. The court construed the Safe Place Statute as not including a consent to be sued by the state. Paradoxically, the statute has been held to apply to the federal government for an injury at the Post Office Building in Madison; since, the United States has consented to be sued under the Federal Tort Claims Act, 60 Stat. 843 (1946), 28 U.S.C.A. § 2674 (1950); American Exchange Bank v. United States, 257 F.2d 938 (7th Cir. 1958).

[45] Wis. Stat. § 345.05 (2) (a) (1959). In respect to the requirement that the vehicle be owned and operated by the governmental unit, see Kuettner v. City of Eau Claire, 243 Wis. 80, 9 N.W.2d 583 (1943); Jorgenson v. City of Sparta, 224 Wis. 260, 271 N.W. 926 (1937).

[46] Wis. Stat. § 345.05 (1) (c) (1959). See Kanios v. Frederick, 10 Wis.2d 358, 103 N.W.2d 114 (1960) (operation of a county road sweeper); Schroeder v. Chapman, 4 Wis.2d 285, 90 N.W.2d 579 (1958) (operation of a county maintenance truck); Schumacher v. City of Milwaukee, 209 Wis. 43, 243 N.W. 756 (1932) (fire department vehicle returning from a response to a fire alarm).

[47] See Note, 1956 Wis. L. Rev. 19; Note, 38 Marq. L. Rev. 211 (1954).

[48] Reynolds v. City of Ashland, 237 Wis. 233, 296 N.W. 601 (1941).

[49] Smith v. Clayton Constr. Co., 189 Wis. 91, 206 N.W. 67 (1926); Leannah v. City of Green Bay, 180 Wis. 84, 192 N.W. 388 (1923); Johnson v. Town of Iron River, 149 Wis. 139, 135 N.W. 522 (1912).

has been construed to apply to highways,[50] streets,[51] sidewalks,[52] curbs and gutters,[53] and bridges.[54] Notwithstanding this liberal construction, the court has held that certain facilities, such as driveways in public parks,[55] stairways in public parks,[56] public baseball fields,[57] and privately owned facilities used by the public,[58] are beyond the scope of the statute.[59]

The municipal liability under the highway defects statute is subject to two significant restrictions: first, written notice must be given to the municipality within 30 days after the injury;[60] and second, recovery is limited to $10,000.[61]

Judgments Against Public Officers

One writer has described section 270.58 of the statutes as having "opened up a novel field of municipal liability."[62] The statute reads as follows:

> Where the defendant in any action, writ or special proceeding is a public officer and is proceeded against in his official capacity and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer shall be paid by the state or political subdivision of which he is an officer. . . .[63]

Although the statute was enacted in 1943,[64] it has been invoked in

[50] Swiergul v. Town of Suamico, 204 Wis. 114, 235 N.W. 548 (1931); Lindquist v. Town of Bradley, 161 Wis. 175, 152 N.W. 827 (1915).

[51] Byington v. City of Merrill, 112 Wis. 211, 88 N.W. 26 (1901).

[52] McChain v. City of Fond du Lac, 7 Wis.2d 286, 96 N.W.2d 607 (1959); Walley v. Patake, 271 Wis. 530, 74 N.W.2d 130 (1956).

[53] Frankfurt Gen. Ins. Co. v. City of Milwaukee, 164 Wis. 77, 159 N.W. 581 (1916).

[54] Johnson v. City of Eau Claire, 149 Wis. 194, 135 N.W. 481 (1912); Green v. Town of Nebagamain, 113 Wis. 508, 89 N.W. 520 (1902).

[55] Kernan v. City of Eau Claire, 232 Wis. 587, 288 N.W. 198 (1939).

[56] Weiss v. City of Milwaukee, 268 Wis. 377, 68 N.W.2d 13 (1955).

[57] Hoepner v. City of Eau Claire, *supra* note 41.

[58] Curtiss v. Town of Bovina, 138 Wis. 660, 120 N.W. 401 (1909).

[59] The state has no liability for damages resulting from defects in state highways or bridges. 40 OPS. WIS. ATT'Y GEN. 178 (1951). Likewise, counties are not liable for damages due to defects in state highways, 20 OPS. WIS. ATT'Y GEN. 824 (1931), even though the county may have agreed to maintain the state highway. Lickert v. Harp, 213 Wis. 614, 252 N.W. 296 (1934); Larsen v. Kewaunee County, 209 Wis. 204, 244 N.W. 578 (1932).

[60] WIS. STAT. § 81.15 (1959).

[61] *Ibid.* This amount was recently raised from $5,000 by Wis. Laws 1959, ch. 305. See Campbell, *Recent Developments of the Law of Negligence in Wisconsin —Part II,* 1956 WIS. L. REV. 4, 19-20.

[62] Cunningham, *Survey of Wisconsin Municipal Law, 1947-1953,* 1954 WIS. L. REV. 222, 234.

[63] WIS. STAT. § 270.58 (1) (1959).

[64] Wis. Laws 1943, ch. 377. The statute was amended by Wis. Laws 1957, ch. 576, §§ 1, 2, to include actions for false arrest and provide for the payment of reasonable attorney fees.

only three reported cases, each involving a municipal defendant. In *Larson v. Lester*,[65] the village of Grantsburg was sued for damages inflicted by a village policeman when he negligently discharged a revolver while on duty. The court decided that the village could properly be made a co-defendant in the action and upheld the jury's finding of negligence. In *Matczak v. Mathews*,[66] the city of Green Bay was held responsible for the damages sustained by a plaintiff who was wounded by one of the city's police officers. In *Smith v. City of Jefferson*,[67] the chief of police placed flares in front of his home to warn persons of a sidewalk defect. A young girl was severely burned by the flares. The court held that the municipality was not a proper party defendant because the chief of police had not been acting in his official capacity.[68]

Statutory Abrogations of State Immunity

Neither the United States nor any of the several states may be sued without its consent.[69] Therefore, in the absence of a statute consenting to suit, the state is completely immune from negligence and nuisance damages.[70] Likewise, the rule of respondent superior does not apply to the state in the absence of a statute.[71]

In recognition of the state's broad immunity from suit, the Wisconsin Constitution provides that: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."[72] Pursuant to this constitutional provision, the legislature has enacted several statutes waiving the immunity.[73]

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[65] 259 Wis. 440, 49 N.W.2d 414 (1951).

[66] 265 Wis. 1, 60 N.W.2d 352 (1953).

[67] 8 Wis.2d 378, 99 N.W.2d 119 (1959).

[68] For additional commentary on section 270.58, see 45 OPS. WIS. ATT'Y GEN. 152 (1956); 41 OPS. WIS. ATT'Y GEN. 103 (1952).

A statute similar to section 270.58 applies to cities. "Damages, if any, in an action against a city officer in his official capacity, except the action directly involve the title to his office, shall not be awarded against such officer, but may be awarded against the city." WIS. STAT. § 62.25 (2) (a) (1959).

Although this section has been in force since 1921 (Wis. Laws 1921, ch. 242, § 255), there has been no reported case in which it has been used to force a city to respond for the negligence of an officer.

[69] Osborn v. President, Directors, & Co. of the Bank of the United States, 22 U.S. (9 Wheat.) 251 (1824); Schlesinger v. State, 195 Wis. 366, 218 N.W. 440 (1928).

[70] Apfelbacher v. State, 160 Wis. 565, 152 N.W. 144 (1915).

[71] Holzworth v. State, *supra* note 44.

[72] WIS. CONST. art. IV, § 27.

[73] The first statute passed pursuant to this provision, Wis. Laws 1850, ch. 249, §§ 1, 2, provides that "upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state. . . ." WIS. STAT. § 285.01 (1959). The language of this provision could be construed so as to extend to tort claims. However, the court held that the statute applies only to those claims which would render the state a debtor. Trempealeau County v. State, 260 Wis. 602, 51 N.W.2d 499 (1952). This construction excludes both equitable

Section 285.05 was enacted to provide a commission with power to compensate innocent convicts.[74] Under this statute, the state is liable for damages to any innocent person who has been imprisoned after the conviction of a crime.[75]

In 1953, the legislature enacted section 285.06 which established "a commission for the relief of law enforcement officers employed by the state who have judgments against them for damages caused while in their line of duty where they acted in good faith. . . ."[76] Although no reported cases have interpreted this statute, it appears to be narrower than section 270.58 which applies to all public officers.[77]

The legislature has also provided that, under the motor vehicle accident statute, the state is liable for damages caused by the negligent operation of a motor vehicle which is both owned and operated by the state and is being used in the course of state business at the time of the accident.[78]

State Claims Commission

Section 15.94 of the statutes provides for a claims commission to receive, investigate, and make recommendations on all claims presented against the state. The commission consists of the chairmen of the senate and assembly finance committees and representatives of the attorney general's office, the Governor's office, and the Department of Administration. The commission is directed to afford each claimant a hearing and to present to the legislature its recommendations on all claims. The statute further provides:

> If from its finding of fact the commission concludes that any such claim is one on which the state is legally liable, or one which involves the casual negligence of any officer, agent or

and tort claims. Chicago, M. & St. P. Ry. v. State, 53 Wis. 509, 10 N.W. 560 (1881); Petition of Wausau Inv. Co., 163 Wis. 283, 158 N.W. 81 (1916) (equitable claim). Holzworth v. State, *supra* note 44; Houston v. State, 98 Wis. 481, 74 N.W. 111 (1898) (tort claim).

[74] WIS. STAT. § 285.05 (1959). See 40 OPS. WIS. ATT'Y GEN. 178 (1951); Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 WIS. L. REV. 214.

[75] See Le Fevre v. Goodland, 247 Wis. 512, 19 N.W.2d 884 (1945); Petition of Long, 176 Wis. 361, 187 N.W. 167 (1922).

[76] Wis. Laws 1953, ch. 621, § 2; WIS. STAT. § 285.06 (1) (1959).

[77] See text accompanying note 62 *supra*, for discussion of section 270.58. Section 285.06 was amended in 1959 to include reasonable attorney fees. Wis. Laws 1959, ch. 299.

[78] WIS. STAT. § 345.05 (1959). See Jorgenson v. Sparta, 224 Wis. 260, 271 N.W. 926 (1937), and 37 OPS. WIS. ATT'Y GEN. 162 (1948) in regard to the requirement that the vehicle be both owned and operated by the state. See also Narloch v. Church, 234 Wis. 155, 290 N.W. 595 (1940). See 38 OPS. WIS. ATT'Y GEN. 54 (1949) for a discussion of the claim procedure under this section.

> employee of the state, or one which on equitable principles the state should in good conscience assume and pay, it shall cause a bill to be drafted covering its recommendations and shall report its findings and conclusions and submit the drafted bill to the joint committee on finance at the earliest available time.[79]

Once the bill has been submitted to the joint committee on finance, the committee makes a recommendation to the legislature based on the reports of the claims commission and any further hearings the joint committee holds. The legislature may then vote on the bill. Under the provisions of section 15.94, a party may receive compensation for his injuries even though the state is immune from suit. However, if the commission disapproves the claim or if the legislature refuses to pass a bill in accord with the commission's approval of a claim, no further remedy is afforded under this section.

During the 1957-59 fiscal period, 19 claims were paid by the state under section 15.94. These claims varied in amount from $26 to more than $29,000.[80] Many of these claims come within the scope of the state's tort immunity.[81]

Present Trends in Governmental Liability and Immunity

Municipal Corporations

On several occasions the Wisconsin Supreme Court has criticized the doctrine of governmental immunity. In *Britten v. City of Eau Claire*,[82] the court stated:

> The doctrine that immunity from liability should be granted to the state and municipalities while engaged in governmental operations rests upon a weak foundation. Its origin seems to be found in the ancient and fallacious notion that the king can do no wrong. . . .[83]

However, the court has clearly indicated that it will not change the rule. "If it is desirable to change the established law so as to impose greater liability upon municipalities for negligence in carrying out governmental functions, the legislature and not the courts should make the change."[84]

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[79] Wis. Stat. § 15.94 (6) (1959).

[80] Wis. Blue Book 330 (1960).

[81] Interview with Mr. Bruce Thomas, Executive Department Representative on the Claims Commission, in Madison, Wis., March 30, 1961. Mr. Thomas suggests that the powers of the Claims Commission be broadened to allow the Commission to pay claims for amounts less than $500, thereby saving the state considerable expense by eliminating the necessity for formal legislative approval.

[82] 260 Wis. 382, 51 N.W.2d 30 (1952).

[83] *Id.* at 386, 51 N.W.2d at 32.

[84] Flamingo v. City of Waukesha, 262 Wis. 219, 225, 55 N.W.2d 24, 27 (1952).

Even though the court has refused to abolish the municipal immunity doctrine, the court has taken steps toward mitigating its effects. For example, in the *Britten* case plaintiff's child was seriously injured while playing on a city road grader parked in a vacant lot. The court held that the city was functioning in its proprietary capacity at the time of the accident and, therefore, was subject to negligence liability. This determination was reached notwithstanding numerous decisions holding that a municipality is functioning in its governmental capacity while actually operating such road machinery.[85] The court said: "[W]e do consider that the precedent, lacking support in both logic and reason, should not be so construed as to extend the exemption beyond the boundaries of its previous application."[86] Thus, by strictly construing precedent, the court was able to impose liability upon the municipality.

It is submitted that the *Britten* case may indicate a future trend in which the court may significantly restrict the effects of the negligence immunity doctrine. However, this policy of restricting precedent results in confusion and criticism. Commenting on the *Britten* decision, one writer recognized the court's desire to establish liability but stated that it would have been more logical for the court to have concluded that the grader was stored pursuant to a governmental function. "Its purpose was not changed simply because it was temporarily stored waiting for the next road maintenance work. Machinery should be classified as devoted to the function for which it is used."[87]

Perhaps the court's interpretation of section 270.58 (state and political subdivision liability for judgments against public officers) represents the most significant judicial expansion of the liability of municipal corporations.[88] In *Larson v. Lester*, the court concluded that "the legislative history of this enactment discloses that it was the intention of the legislature to make its scope as broad as possible."[89] Under this broad interpretation, section 270.58 could be used to support municipal negligence liability in many cases in which the immunity doctrine has been applied in the past. For example, in *Schulze v. Kleeber*[90] plaintiff sued a police officer of the city of Reedsburg for damages resulting from the use of undue

[85] See De Baere v. Town of Oconto, 208 Wis. 377, 243 N.W. 221 (1932).
[86] Britten v. City of Eau Claire, *supra* note 82, at 387, 51 N.W.2d at 32.
[87] Cunningham, *Survey of Wisconsin Municipal Law, 1947-1953*, 1954 WIS. L. REV. 222, 232.
[88] See text accompanying note 62 *supra*.
[89] Larson v. Lester, *supra* note 65, at 446, 49 N.W.2d at 417.
[90] 10 Wis.2d 540, 103 N.W.2d 560 (1960).

force in ejecting plaintiff from a public meeting. Although the court sustained the cause of action against the police officer in his personal capacity, plaintiff could have joined the city as a party defendant which would have made more secure the collection of his judgment. In *Baker v. Mueller*[91] and *Miller v. Forster*,[92] city building inspectors were sued for the wrongful condemnation of private buildings. In both cases, the court held that such inspectors could not be held liable because their acts were within the scope of their official capacity and duty. However, a contrary result might have been reached had plaintiffs sued the respective municipalities under section 270.58.

Section 270.58 may well have opened up a novel area of municipal liability, but many uncertainties surround this section. For example, it is not clear whether the court will construe this section as a consent by the state to be sued.[93] Likewise, the scope of the section is not clear due to the various constructions of "public officer" and "official capacity" in other areas of the law.[94] Also, there is a question under the section as to whether a municipality or the state may settle claims before suit. Finally, there has been no case that has indicated the significance of the "good faith" provision of the statute. However, in line with the trend to restrict the immunity doctrine, the court will probably continue to liberally construe the section.

State Immunity

Although critical of the unfairness of the state's tort immunity,[95] the court has been unable to mitigate the effects of the doctrine as it has done to a limited extent with municipal immunity. The reason for this is that, in absence of a statutory provision to the contrary, the state may not be sued. The court, however, could use sections 270.58 and 285.06 to hold the state liable in cases involving negligent acts of public officers.[96] For example, in *Flynn v. City of Kaukauna*[97] plaintiff sued the municipality for damages he suffered as the result of another's use of fireworks. The mayor had

[91] 222 F.2d 180 (7th Cir. 1955).
[92] 244 Wis. 99, 11 N.W.2d 674 (1943).
[93] See Holzworth v. State, *supra* note 44, with respect to state liability under the safe place statute.
[94] See Heffernan v. City of Janesville, 248 Wis. 299, 21 N.W.2d 651 (1946). The *Heffernan* case was distinguished in Matczak v. Mathews, *supra* note 66, at 4-6, 60 N.W.2d at 354-55.
[95] See Lindemeyer v. City of Milwaukee, 241 Wis. 637, 6 N.W.2d 653 (1942); Britten v. City of Eau Claire, *supra* note 82.
[96] See text accompanying note 76 *supra*.
[97] Flynn v. City of Kaukauna, 241 Wis. 163, 5 N.W.2d 754 (1942).

issued a permit for the fireworks even though they were to be set off in a manner contrary to the appropriate statutory provisions. The court held that the city was immune because the mayor was acting as an officer of the state in issuing the permit. Perhaps, if section 270.58 had been in effect when this case arose, plaintiff would have been able to join the state as a party defendant.

CONCLUSION

Although the court has been able to make inroads in mitigating the effect of governmental immunities, the present law is still unjust, inequitable, and patently unfair. A person's right to recover for damages inflicted upon him by another's negligence or nuisance should not depend upon such nebulous and vague principles as governmental function and the relationship of governor to governed. Congress recognized these problems when it passed the Federal Tort Claims Act.[98] To a much more limited extent, the Wisconsin Legislature has recognized these problems and has abrogated state and municipal tort immunity in certain situations.

The court's attempt to mitigate the inequitable effects of the immunity rule has provoked substantial criticism. One writer comments that "the Wisconsin court has developed a mass of fiction and formulae in an effort to circumvent the rule of nonliability without the aid of the legislature."[99] The court, however, is perfectly aware of the confusion and uncertainty that it may have created in avoiding the governmental immunity rule. The late Chief Justice Rosenberry said:

> The whole matter of municipal liability for tort is in such confusion and uncertainty due to the efforts of the courts to limit what has been called 'the state's lordly perogative of wrongdoing' that it may well be given consideration by the legislature. The 'nuisance doctrine' has so far developed as to indicate that there is a growing belief that any wrong committed by a municipality may be redressed on the theory it is a nuisance. . . . This is a consideration not peculiar to Wisconsin but exists in many other jurisdictions.[100]

If the rule of sovereign immunity is to be abrogated in Wisconsin, the action must come through the legislature. In 1959, the court declared that "recent attempts made in the Wisconsin legislature to abolish the tort immunity for negligence of municipalities have failed. . . . This is strong evidence of legislative intent that such

[98] See note 44 *supra*.
[99] Comment, 1941 WIS. L. REV. 540, 541.
[100] Lindemeyer v. City of Milwaukee, *supra* note 96, at 644, 6 N.W.2d at 657.

immunity should not be abolished."[101] Thus, the court is unable to abrogate a doctrine that it recognizes as confusing and unfair. In addition, the legislature has recognized the inequities of the rule as are manifest in the present statutory abrogations. In light of these considerations, it is respectfully submitted that the Wisconsin Legislature should completely abrogate the common law sovereign immunity rule in respect both to the state and municipal corporation.[102]

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[101] Smith v. City of Jefferson, 8 Wis.2d 378, 382-83, 99 N.W.2d 119, 123 (1959).

[102] The court, of course, is not foreclosed from abrogating the immunity rule notwithstanding its refusal to do so in the past. In Kojis v. Doctors Hospital, 12 Wis.2d 367, 107 N.W.2d 131, 107 N.W.2d 292 (1961) (discussed in Note, 1961 Wis. L. REV. 509), the court overruled several prior decisions respecting the doctrine of charitable immunity. The court said that "the rule of *stare decisis*, however desirable from the standpoint of certainty and stability, does not require us to perpetuate a doctrine that should no longer be applicable. . . ." *Id.* at 372, 107 N.W.2d at 133. See McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960), where the court overruled a strong line of precedent by applying the rule of respondeat superior to a municipality notwithstanding the governmental function defense. The court there said: "Surely it cannot be urged successfully that an outmoded, inequitable, and artificial curtailment of a general rule of action created by the judicial branch of the government cannot or should not be removed by its creator." *Id.* at 193, 162 A.2d at 832. See also Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957), where the court said that "judicial consistency loses its virtue when it is degraded by the vice of injustice." The court went on to find the municipality liable.