IOWA MUNICIPAL TORT IMMUNITY

Few subjects have caused the practicing lawyer more problems than suits against municipalities. The doctrine of governmental immunity is an immediate barrier which the lawyer must overcome. To make matters worse, an analysis of the Iowa cases does little to help predict whether or not the doctrine will apply. It can hardly be said that there exists a doctrine of governmental immunity in Iowa municipal tort law; for in truth, there exists a series of exceptions into which the skillful lawyer must try to pigeonhole his case. It is the purpose of this article to attempt to analyze the present state of Iowa municipal immunity and, admittedly, to urge abandonment of it.

Municipalities have two separate functions; one is labeled governmental and the other proprietary. The significance of this distinction is that acts done in the performance of corporate functions are termed proprietary and the usual tort principles apply; but as to governmental or sovereign acts, the municipality enjoys tort immunity.[1]

The court has never adequately articulated a test to determine what is governmental and what is proprietary; however, at least two attempts to state a generalized test have been made.[2] Combining the two statements one can say that if the act was for the general public benefit and the municipality derived no peculiar advantage (pecuniary or otherwise) or the act provided for the safety and protection of the property of the public, it is governmental and the rule of municipal immunity applies.

Using these tests, it has been held that acts done in execution of police powers are performance of services for the benefit of the public and therefore governmental,[3] while transferring policemen to and from their beats is a proprietary function;[4] maintenance of sewers by the municipality itself, a proprietary function;[5] operation of a municipal airport, a governmental function;[6] operation of a municipal bathing beach, a governmental function (even though a ten cent fee was paid);[7] and finally selling electricity is a proprietary function,[8] while hauling garbage is a governmental function.[9] The list could go on and on, but as Justice Moore said in an excellent dissent: "Any attempt to distinguish between them . . . would only add another

1 Bradley v. City of Oskaloosa, 193 Iowa 1072, 188 N.W. 896 (1922).
2 Norman v. City of Chariton, 201 Iowa 279, 283, 207 N. W. 134, 136 (1926) ". . . where the act is one from which the city as a municipality derives no peculiar advantage, pecuniary or otherwise, and which is for the benefit of its inhabitants generally, as distinguished from the corporation, it is clearly the exercise of a governmental function." and Madris v. City of Des Moines, 240 Iowa 105, 113, 34 N.W. 2d 620, 625 (1948). ". . . the test whether or not an activity is a governmental function is whether it is for the general public benefit or provides for the safety and protection of the property of the general public rather than being of the nature of a public undertaking or of a corporate benefit or in a corporate interest."
3 Madris v. City of Des Moines, *supra* note 2.
4 Jones v. City of Sioux City, 185 Iowa 1178, 170 N.W. 445 (1919).
5 Hines v. City of Nevada, 150 Iowa 620, 130 N.W. 181 (1911).
6 Abbot v. City of Des Moines, 230 Iowa 494, 298 N.W. 649 (1941).
7 Mocha, v. City of Cedar Rapids, 204 Iowa 51, 214 N.W. 587 (1927).
8 Miller v. Town of Milford, 224 Iowa 753, 276 N.W. 826 (1938).
9 Madris v. City of Des Moines, 240 Iowa 105, 34 N.W.2d 620 (1948).

ridiculous example of the doctrine. Our decisions have already created far too many."[10]

Fortunately, the lawyer does not have to rely exclusively on a judicial determination of what is a governmental function and what is proprietary. He has other alternatives. First, he can attempt to show that the defendant municipality is maintaining a nuisance, the theory being that maintenance of a nuisance by a municipality could never be a governmental function.[11] As another alternative, one may use Iowa Code § 389.12 (1962), a legislative exception to municipal tort immunity. The statute provides: "They [municipalities] shall have the [duty of] care supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city and shall cause the same to be kept open and in repair and free from nuisance." The duty created by this statute has been held to supersede any theory of governmental immunity.[12] Further, "public squares and commons," has been held to mean city parks.[13]

Because the statute has been in substantially the same form for nearly one hundred years, most of the municipal tort cases have been argued as § 389.12 exceptions. The statute has been a most prolific producer of litigation, and to analyze all of the cases under this statute would be impossible. However, a few of these cases have substantially changed the doctrine of municipal tort immunity.

That the city could no longer exclusively rely upon governmental immunity became apparent in 1951 with *Brown v. City of Sioux City*.[14] In that case, Brown leased about three acres from defendant city's airport at an annual rental of twenty-five dollars. Brown used the three-acre plot to raise bees. The city, without notifying Brown, sprayed the airport. The spray adversely affected Brown's bees and as a result, his honey production decreased. The city's defense was governmental immunity. In spite of *Abbot v. City of Des Moines*,[15] which just a few years before, held that operation and care of an airport was a governmental function, the court held the city liable for the loss of the bees. In reaching its decision the court quoted with approval a New Mexico case, stating, "Where there is doubt as to whether the city is liable, the question will be construed against the municipality."[16] And going further, the court stated: "The city cannot accept and exercise the special privilege of leasing its property to tenants without assuming the responsibility and liabilities flowing from the relationship."[17]

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[10] Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 349, 127 N.W. 2d 606, 613 (1946).

[11] Sparks v. City of Pella, ... Iowa ....., 137 N.W.2d 909 (1965). See also PROSSER, TORTS, 1010 (3d ed. 1964) where he states: "It seems reasonable to say that there is no sound argument behind the distinction itself, and that resort to the more or less undefined concept of nuisance is merely one method by which the courts have retreated from municipal nonliability."

[12] Walker v. City of Cedar Rapids, 251 Iowa 1032, 103 N.W.2d 727 (1960).

[13] Cox v. City of Des Moines, 233 Iowa 272, 7 N.W.2d 32 (1943).

[14] Brown v. City of Sioux City, 242 Iowa 1196, 49 N.W.2d 853 (1951).

[15] Abbot v. City of Des Moines, 230 Iowa 494, 298 N.W. 649 (1941).

[16] Brown v. City of Sioux City, 242 Iowa 1196, 1204, 49 N.W.2d 853, 857 (1951).

[17] *Id.* at 1205, 49 N.W.2d at 858.

The case pointed to things yet to come. The court had held that the doctrine of municipal immunity is to be strictly construed and also that a city was liable for damages as a result of spraying an airport, an activity which easily could have been held governmental.

Four years after the *Brown* case, the court decided its most significant case in the field of municipal immunity, *Florey v. City of Burlington,*[18] which has made the doctrine of municipal immunity nearly meaningless. The plaintiff, a 13 year old girl, was walking in a municipal park. While she was standing on a bluff overlooking the Mississippi River, she fell and suffered personal injuries. Plaintiff sued alleging negligent failure to maintain a fence around the observation point, and the city pled municipal immunity. In deciding the case, the court very carefully distinguished between cases of municipal non-liability for injuries inflicted by public servants while negligently performing governmental functions and municipal liability for injury caused by dangerous conditions due to the municipalities' own negligent failure to perform its delegated (by statute Iowa Code § 389.12 (1962)) duty. The court said:

> . . . and it [the municipality] is not immune from liability for damages due to dangerous conditions resulting from its own misfeasance or non-misfeasance in governmental matters.
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> . . . Nevertheless, tort liability may arise if the municipal corporation negligently fails to perform its *governmental* duty and dangerous conditions result which cause injury to one properly availing himself of the tendered service.[19]

The conclusion to be drawn from this is that municipal immunity *only* applies where municipal employees are engaged in performing a governmental duty. The case holds that the Iowa municipal immunity doctrine is limited to the non-liability on agency principles when a city employee is performing a governmental function. Applying this to the principal case, since liability of the city of Burlington was predicated upon its own negligence in not maintaining a fence, rather than on the negligence of a city employee, the court held that municipal immunity (despite the fact that maintaining a park is governmental) was not a good defense.

One year after the *Florey* case, in *Hall v. Town of Keota,* the court explained the reasoning of the *Florey* case:

> The reasoning of the *Florey* case is that if failure to perform the statutory duty imposed under Iowa Code 389.12 results in injury to one lawfully using the service offered by the municipality, liability results notwithstanding that the function involved is a purely governmental one.[20]

And still more recently in *Lindstrom v. City of Mason City,* the court said:

> The theory of governmental immunity has faded in the face of statutory responsibility for streets and public places . . . The opinion [*Florey* case] points out that in connection with governmental functions liability of a city does not rest on any theory of respondeat superior. To that extent, there is no governmental immunity.[21]

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[18] Florey v. City of Burlington, 247 Iowa 316, 73 N.W. 2d 770 (1955).
[19] *Id.* at 319-321, 73 N.W.2d at 772.
[20] Hall v. Town of Keota, 248 Iowa 131, 136, 79 N.W.2d 784, 787 (1956).
[21] Lindstrom v. City of Mason City, 256 Iowa 83, 91, 126 N.W.2d 292, 296 (1964).

Combining all of these statements, the following principles may be stated:

(1) Even though engaged in governmental functions, municipalities may be liable for their *own* misfeasance or non-feasance which results in dangerous conditions.

(2) Municipal immunity exists only to the extent that the municipality cannot be held liable under respondeat superior for negligence of its employees performing governmental functions.

With the doctrine whittled away to this extent, the court will continually be faced with the question of deciding whether a particular case does or does not fit within the exceptions. *Gorman v. Adams*[22] is an excellent example. The plaintiff sued as a result of an intersection collision. Defendant cross petitioned against the city seeking indemnity, alleging that the city installed new traffic lights and maintained them dangerously and defectively so that both plaintiff and defendant had green lights at the same time. The court correctly held that governmental immunity was not a defense for even if maintaining street lights is governmental, liability could still arise if the city itself was negligent in performing its duties.

The doctrine as now applied makes little sense and has no rational justification. The trend has been to abolish municipal tort immunity. In 1957, Florida did away with the antiquated doctrine;[23] in 1959, Illinois followed;[24] in 1961, California[25] and Michigan[26] followed; in 1962, Wisconsin,[27] Minnesota[28] and Alaska[29] felt the doctrine was outmoded; in 1963, Nevada[30] declared the same; in 1964, three more states, Kentucky,[31] Arizona[32] and Washington[33] agreed and in 1965, Louisiana[34] joined the list.

The Iowa legislature in passing the Iowa Tort Claims Act, has indicated its feeling about the doctrine of governmental immunity.[35] The supreme court in recently upholding the constitutionality of this act, specifically excluded the possibility of counties or municipalities coming within the terms of the act.[36] This leaves Iowa in an incongruous position. The doctrine of governmental immunity had its origins in the sovereign and therefore the only reason that the lower governmental bodies have immunity is because the state itself does. Their immunity is purely derivative and if the state itself abolishes the doctrine, it follows that there can no longer be any derivative immunity.[37] Whether by this method or by adoption of the

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22 Gorman v. Adams, ... Iowa ....., 143 N.W.2d 648 (1966).
23 Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
24 Moliter v. Kaneland Community School Dist., ... Ill. ....., 163 N.E.2d 93 (1959).
25 Muskopf v. Corning Hosp. Dist. 55 Cal.2d 211, 11 Cal. Rep. 89, 359 P2d 457 (1961).
26 Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).
27 Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
28 Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W.2d 795 (1962).
29 City of Fairbanks v. Schaible, 375 P2d 201 (Alaska 1962).
30 Rice v. Clark County, 79 Nev. 253, 382 P2d 605 (1963).
31 Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964).
32 Stone v. Arizona, 93 Ariz. 384, 381 P.2d 10 (1964).
33 Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964).
34 Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529 (1965). The court construed a constitutional amendment so as to waive governmental immunity.
35 "Iowa Tort Claims Act," Acts 1965 (61 G.A.) Ch. 791.
36 Graham v. Worthington, *et al*, ... Iowa ....., ... N.W. 2d ..... (1966).
37 See Kelso v. City of Tacoma, *supra* at note 33, where a Washington statute in the form, "The State of Washington . . . hereby consents . . ." was construed to

reasoning of Justice Moore's dissent in *Boyer v. Iowa High School Athletic Ass'n*,[38] the court should face the problem and abandon the few remaining traces of the doctrine of municipal tort immunity.

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authorize suits against municipalities whether acting in a governmental or proprietary capacity. The court concluded that the common law right of sovereign immunity is not in the municipality, but in the sovereign from which the immunity was derived and since the sovereign state had abandoned immunity, it followed that the municipality no longer was immune.

[38] Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 349, 127 N.W.2d 606, 613 (1964).

REPROSECUTION AND FOURTEENTH AMENDMENT DUE PROCESS OF LAW

In 1949, petitioner, George Hetenyi, was indicted for murder in the first degree, with circumstantial evidence supporting the charge. The jury was given the alternatives of finding him guilty of first degree murder, guilty of second degree murder, guilty of first degree manslaughter or not guilty. He was found guilty of second degree murder and in January, 1950, sentence of fifty years to life was imposed. On appeal by petitioner judgment of conviction was reversed and a new trial was granted.[1] The state appealed from this reversal but the order of the appellate division was affirmed.[2] Petitioner in 1951 was tried the second time under the same indictment charging first degree murder, resulting in a verdict of guilty of murder in the first degree and Hetenyi was sentenced to be executed. On his appeal directly to the court of appeals this judgment of conviction was also reversed, and a new trial was ordered.[3] Hetenyi was tried for the third time in 1963 on the indictment of first degree murder, found guilty of second degree murder and sentenced to prison for forty years to life, which conviction was affirmed on appeal.[4] He then sought a writ of habeas corpus from the state courts, which was dismissed and the dismissal affirmed on appeal,[5] reargument was denied,[6] leave to appeal was denied,[7] and appeal was dismissed.[8]

Writ of habeas corpus was sought in the United States District Court on the basis of the federal constitution, which application was denied

[1] People v. Hetenyi, 277 App. Div. 310, 98 N.Y.S.2d 990 (1950).
[2] People v. Hetenyi, 301 N.Y. 757, 95 N.E.2d 819 (1950).
[3] People v. Hetenyi, 304 N.Y. 80, 106 N.E.2d 20 (1952).
[4] People v. Hetenyi, 282 App. Div. 1008, 125 N.Y.S.2d 689 (1953).
[5] People *ex rel.* Hetenyi v. Johnston, 10 App. Div. 2d 121, 198 N.Y.S.2d 18 (1960).
[6] People *ex rel.* Hetenyi v. Johnston, 12 App. Div. 2d 574, 209 N.Y.S.2d 287 (1960).
[7] People *ex rel.* Hetenyi v. Johnston, 8 N.Y.S.2d 706, 168 N.E.2d 395, 202 N.Y.S.2d 1025 (1960).
[8] People *ex rel.* Hetenyi v. Johnston, 8 N.Y.S.2d 913, 168 N.E.2d 831, 204 N.Y.S.2d 158 (1960).

without prejudice and without reaching the merits. His application for a certificate of probable cause was denied by the district court and by the United States Court of Appeals, and certiorari was denied by the United States Supreme Court.[9] The prisoner then renewed his application for habeas corpus proceeding against Walter H. Wilkins, Warden of Attica State Prison in federal district court,[10] which, although considered on the merits, held that there was no double jeopardy. Appeal from this denial was made to the United States Court of Appeals, Second Circuit. *Held,* reversed. The retrial of Hetenyi on a first degree murder indictment, after a reversal of a prior conviction for second degree murder under the same indictment, deprived him of his liberty without due process of law.[11] *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d 844 (2d Cir. 1965).

Although to this date, the United States Supreme Court has not invalidated any state court convictions on the ground that the state has transgressed the federal constitutional limitations on its power to reprosecute for the same crime, Circuit Judge Marshall in his opinion held that "[T]he Due Process Clause of the Fourteenth Amendment imposes some limitations on a state's power to reprosecute . . . ."[12] His holding is based partly on premises and presumptions revealed in Supreme Court holdings in cases where the double jeopardy claim was asserted against the state,[13] and partly from the doctrine of selective incorporation, which he believes is supported by a majority of the present Supreme Court, whereby certain guarantees found in the Bill of Rights are absorbed by the due process clause of the fourteenth amendment and made applicable to the states. With other fundamental rights of the first,[14] fourth,[15] fifth,[16] sixth,[17] and eighth[18]

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9 Hetenyi v. Wilkins, 375 U.S. 980 (1964).

10 United States *ex rel.* Hetenyi v. Wilkins, 227 F. Supp. 460 (W.D.N.Y. 1964).

11 The holding was spelled out in three parts:

> I. The Due Process Clause of the Fourteenth Amendment imposes some limitations on the power of the states to reprosecute an individual for the same crime. II. New York transgressed these limitations by reprosecuting Hetenyi for first degree murder following the completion of the first trial, notwithstanding Hetenyi's successful appeal of the second degree murder conviction obtained in that trial. III. There is a reasonable possibility that Hetenyi was prejudiced in his third trial by the fact that he was indicted, prosecuted and charged with first degree murder; and both this possibility of prejudice and the fact that it was created by conduct that violated the accused's constitutional rights rendered this trial constitutionally inadequate. United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844, 867 (2d Cir. 1965).

12 *Id.* at 850. In 1965 Circuit Judge Thurgood Marshall was appointed Solicitor General of the United States.

13 In his opinion, Judge Marshall traced in detail the evolution of the Court's interpretation of double jeopardy from Dreyer v. Illinois, 187 U.S. 71 (1902), where the Court avoided the issue, to Bartkus v. Illinois, 359 U.S. 121 (1959), where all of the Justices recognized the existance of some double jeopardy content in the fourteenth amendment.

14 Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

15 Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from search and seizure).

16 Malloy v. Hogan, 378 U.S. 1 (1964) (compulsory self-incrimination).

17 Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation). Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel).

18 Robinson v. California, 370 U.S. 660 (1962) (prohibition against cruel and unusual punishment).