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MUNICIPALITY'S COMMON LAW LIABILITY FOR POLICE TORTS

Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973)

An off-duty officer of the District of Columbia Police Department became intoxicated and for no apparent reason shot plaintiff with his service revolver.¹ Plaintiff sued the District of Columbia, alleging (a) that the District was liable, either directly for its own negligence, or vicariously for the negligence of the police chief, in hiring, training, and supervising the policeman, and (b) that the District was vicariously liable for the policeman's intentional tort by virtue of the agency theory of respondeat superior.² The Court of Appeals for the District of Columbia Circuit reversed the district court's dismissal of the action,³ and *held*: The District of Columbia is liable at common law to the victims of its policemen's torts.⁴

At early common law, municipalities were not liable for torts committed by their employees.⁵ Later, in the nineteenth century, courts

1. Police regulations required that policemen carry their service revolvers at all times. Manual of the Metropolitan Police Department of the District of Columbia § 2.3:1 (1972).

2. Causes of action were also alleged against the police officer personally for an intentional tort, against the police chief for negligence, and against the officer, the police chief, and the District of Columbia under 42 U.S.C. § 1983 (1970). See notes 3 & 4 *infra*. The officer was never served with process, however, and hence was not a party to the litigation. *Marusa v. District of Columbia*, 484 F.2d 828, 830 (D.C. Cir. 1973).

3. The actions against the District of Columbia and the police chief had been dismissed by the district court on the ground that plaintiff's cause of action was barred by the one-year statute of limitations for "wounding" in D.C. CODE ANN. § 12-301(4) (1973). 484 F.2d at 830.

4. 484 F.2d 828 (D.C. Cir. 1973). The court held that the applicable statute of limitations was the three-year statute for negligence actions imposed by D.C. CODE ANN. § 12-301(8) (1973), and therefore reversed the common law claims against the other defendants. 484 F.2d at 833. The dismissals of the § 1983 claims, see note 2 *supra*, were affirmed on the basis of *District of Columbia v. Carter*, 409 U.S. 418 (1973), which held that the District is not a "state or territory" within the terms of that statute.

5. *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788); cf. 1 W. BLACKSTONE, COMMENTARIES *246. *Russell* was incorporated into American law in *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 249 (1812), *Farnum v. Town of Concord*, 2 N.H. 392, 393 (1821), and *Board of Chosen Freeholders v. Strader*, 18 N.J.L. 108, 116 (Sup. Ct. 1840). Cf. *Dargan v. Mayor of Mobile*, 31 Ala. 469 (1858); *Bailey*

in most jurisdictions drew a distinction between torts committed by municipal employees in the course of proprietary activities, for which the municipality was liable, and torts committed in the course of governmental activities, for which the municipality remained immune from liability.⁶

This distinction between governmental and proprietary activities is still recognized in twenty-two jurisdictions.⁷ In these states, the opera-

v. Mayor of City of New York, 3 Hill 531 (Sup. Ct. N.Y. 1842), *aff'd*, 2 Denio 433 (Ct. Err. N.Y. 1845); Fox v. Northern Liberties, 3 W. & S. 103 (Pa. 1841).

6. The terms "governmental" and "proprietary" were not widely used until the twentieth century, but soon after the first decisions on municipal immunity were handed down, the division of functions of municipal corporations was recognized. See, e.g., Dargan v. Mayor of Mobile, 31 Ala. 469, 474 (1858); Jewett v. City of New Haven, 38 Conn. 368, 377 (1871); Cook v. Mayor & Council, 54 Ga. 468, 469 (1875); Wilcox v. City of Chicago, 107 Ill. 334, 338 (1883); Brinkmeyer v. City of Evansville, 29 Ind. 187, 191 (1867); Ogg v. City of Lansing, 35 Iowa 495, 499 (1872); City of Atchison v. Challiss, 9 Kan. 603, 613 (1872); Moulton v. Inhabitants of Scarborough 71 Me. 267, 270 (1880); Bigelow v. Inhabitants of Randolph, 80 Mass. (14 Gray) 541, 545 (1860); City of Detroit v. Blackeby, 21 Mich. 84, 106 (1870).

The distinction between governmental and proprietary activities was stated by Professor Prosser:

Certain functions and activities, which can be performed adequately only by the government, are more or less generally agreed to be "governmental" in character, and so immune from tort liability.

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On the other hand, when the city performs a service which might as well be provided by a private corporation, and particularly when it collects revenue from it, the function is considered a "proprietary" one, as to which there may be liability. . . .

W. PROSSER, LAW OF TORTS § 131, at 979-81 (4th ed. 1971) (footnotes omitted). See also Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1925).

7. See Bryant v. Mullins, 347 F. Supp. 1282, 1284 (W.D. Va. 1972); City of Bay Minette v. Quinley, 263 Ala. 188, 189-91, 82 So. 2d 192, 193-95 (1955); Walker v. Tucker, 131 Colo. 198, 204, 280 P.2d 649, 652 (1955); Lambert v. City of New Haven, 129 Conn. 647, 649, 30 A.2d 923, 925 (1943); Kelley v. Mayor & Council, 35 Del. 9, 13-14, 156 A. 867, 869 (Super. Ct. 1931); Lively v. City of Blackfoot, 91 Idaho 80, 82, 416 P.2d 27, 29 (1966); Allen v. City of Ogden, 210 Kan. 136, 139, 499 P.2d 527, 531 (1972); Bale v. Ryder, 286 A.2d 344 (Me. 1972); Wynkoop v. Mayor & Council, 159 Md. 194, 198-201, 150 A. 447, 448-50 (1930); Kenyon v. City of Chicopee, 320 Mass. 528, 536, 70 N.E.2d 241, 246 (1946); City of Meridian v. Beeman, 175 Miss. 527, 536, 166 So. 757, 758 (1936); Hinds v. City of Hannibal, 212 S.W.2d 401, 403 (Mo. 1948); Croom v. Town of Burgaw, 259 N.C. 60, 61, 129 S.E.2d 586, 587-88 (1963) (by implication); Aldrich v. City of Youngstown, 106 Ohio St. 342, 343-44, 140 N.E. 164, 165 (1922); City of Lawton v. Harkins, 34 Okla. 545, 547-48, 126 P. 727, 728 (1912), *cited with approval in Oklahoma City v. Bailey*, 405 P.2d 115, 117 (Okla. 1965), and Grimes v. City of Henryetta, 208 Okla. 217, 218, 254 P.2d 980, 981 (1953); Graysneck v. Heard, 422 Pa. 111, 113, 220 A.2d 893, 894 (1970); Buc-holtz v. City of Sioux Falls, 77 S.D. 322, 326-27, 81 N.W.2d 606, 608-09 (1958); Bur-

tion of a police department is considered a governmental activity, either on the theory that police work is done in the public interest,⁸ or that, since municipalities are required by the state constitution to maintain police departments, the department partakes of the state's sovereign immunity.⁹ Apart from the governmental-proprietary distinction as a

nett v. City of Houston, 422 S.W.2d 919, 920 (Tex. Civ. App. 1969); Wade v. Salt Lake City, 10 Utah 2d 374, 375, 353 P.2d 914, 915 (1960); Marshall v. Town of Brattleboro, 121 Vt. 417, 421-22, 160 A.2d 762, 765-66 (1960); Haney v. Town of Rainelle, 125 W. Va. 397, 402, 25 S.E.2d 207, 210 (1943); Davis v. Board of Comm'rs, 495 P.2d 21, 24 (Wyo. 1972).

Some cases focus on the particular tortious police activity, and if that is proprietary, hold the city liable. *City of Anniston v. Hillman*, 220 Ala. 505, 126 So. 169 (1930) (police supervision of prisoners in street maintenance work held proprietary); *Jones v. Sioux City*, 185 Iowa 1178, 1188, 170 N.W. 445, 449 (1919) (driving policemen to their beats held proprietary); *City of Meridian v. Beeman*, 175 Miss. 527, 536, 166 So. 757, 758 (1936) (patrolling police beat held "corporate" rather than governmental insofar as municipal ordinances required police to maintain lookout for defects in public utilities); *Carrington v. City of St. Louis*, 89 Mo. 208, 215-16, 1 S.W. 240, 242 (1886) (municipality liable for injury caused by condition negligently maintained on sidewalk by police); *Levin v. City of Omaha*, 102 Neb. 328, 331, 167 N.W. 214, 215 (1918) (policeman working as foreman of city garage held working in proprietary capacity); *Oklahoma City v. Bailey*, 405 P.2d 115, 117 (Okla. 1965) (policeman driving police car home after work held proprietary); *Oklahoma City v. Foster*, 118 Okla. 120, 124, 247 P. 80, 83 (1926) (maintenance of police garage held proprietary); *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958) (police rifle range used by public for recreational purposes held proprietary); *Crow v. City of San Antonio*, 157 Tex. 250, 253, 301 S.W.2d 628, 629 (1957) (police blocking traffic to help children go to Bible class held proprietary).

8. *McAuliffe v. City of Victor*, 15 Colo. App. 337, 339, 62 P. 231, 231 (1900); *Kelley v. Mayor & Council*, 35 Del. 9, 14, 156 A. 867, 869 (Super. Ct. 1931); *McConnell v. City of St. Charles*, 204 S.W. 1075, 1075-76 (Mo. 1918); *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 344, 140 N.E. 164, 165 (1922); *City of Lawton v. Harkins*, 34 Okla. 545, 547-48, 126 P. 727, 728 (1912), *cited with approval in Oklahoma City v. Bailey*, 405 P.2d 115, 117 (Okla. 1965), *and Grimes v. City of Henryetta*, 208 Okla. 217, 218, 254 P.2d 980, 981 (1953); *Owensby v. Morris*, 79 S.W.2d 934, 936 (Tex. Civ. App. 1935); *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 300, 12 S.E. 707, 707 (1890), *cited with approval in Haney v. Town of Rainelle*, 125 W. Va. 397, 402, 25 S.E.2d 207, 210 (1943).

9. *Buttrick v. City of Lowell*, 83 Mass. (1 Allen) 172, 173-74 (1861); *Stouffer v. Morrison*, 400 Pa. 497, 500, 162 A.2d 378, 380 (1960); *O'Rourke v. City of Sioux Falls*, 4 S.D. 47, 51-52, 54 N.W. 1044, 1045-46 (1893), *cited with approval in Bucholz v. City of Sioux Falls*, 77 S.D. 322, 326, 91 N.W.2d 606, 608 (1958); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 59, 338 P.2d 808, 817 (1959); *cf. Wilde v. Inhabitants of Town of Madison*, 145 Me. 83, 72 A.2d 635 (1950); *Burch v. Hardwicke*, 71 Va. (30 Gratt.) 24, 32-36 (1878), *cited with approval in Bryant v. Mullins*, 347 F. Supp. 1282, 1284 (W.D. Va. 1972), *and Hoggard v. City of Richmond*, 172 Va. 145, 148, 200 S.E. 610, 611 (1939) (dictum).

South Carolina holds that municipalities are immune from liability for police torts on the ground of the state's sovereign immunity, but does not use the governmental-

means for avoiding liability, some of these states refuse to hold municipalities liable for policemen's torts on an agency theory by reasoning that police torts are necessarily outside the scope of employment.¹⁰ Other courts hold that they simply lack the power to overrule the immunity doctrine,¹¹ while still other courts reason that they lack the administrative competence to subject the diverse range of governmental activities to tort liability.¹² Whatever reasoning is used to justify the

proprietary distinction in police tort cases. *McKenzie v. City of Florence*, 234 S.C. 428, 433, 108 S.E.2d 825, 827 (1959).

10. *Bryant v. Mullins*, 347 F. Supp. 1282, 1284 (W.D. Va. 1972) (alternative holding); *McSheridan v. City of Talladega*, 243 Ala. 162, 163, 8 So. 2d 831, 833 (1942); *Coker v. Sammons*, 54 Del. 488, 493, 180 A.2d 622, 624 (Super. Ct. 1962); *Peters v. City of Lindsborg*, 40 Kan. 654, 656, 20 P. 490, 491 (1889); *Buttrick v. City of Lowell*, 83 Mass. (1 Allen) 172, 174 (1861); *Salazar v. Town of Bernalillo*, 62 N.M. 199, 202, 307 P.2d 186, 188 (1956); *City of Lawton v. Harkins*, 34 Okla. 545, 547, 126 P. 727, 728 (1912), *cited with approval in Oklahoma City v. Bailey*, 405 P.2d 115, 117 (Okla. 1965), and *Grimes v. City of Henryetta*, 208 Okla. 217, 218, 254 P.2d 980, 981 (1953); *Archer v. City of Cisco*, 211 S.W.2d 955, 956 (Tex. Civ. App. 1948).

11. *Gerber v. City of Worcester*, 294 N.E.2d 451, 452 (Mass. 1973); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 668, 44 S.E.2d 85, 86 (1947); *cf. State v. Baltimore County*, 218 Md. 271, 273, 146 A.2d 28, 29 (1958).

A reason often given for such holdings is that the state legislatures, by passing legislation affecting certain areas of governmental immunity, preempt the entire field. *See Parish v. Pitts*, 244 Ark. 1239, 1255-59, 429 S.W.2d 45, 53-55 (1968) (dissenting opinion); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 221-24, 359 P.2d 457, 463-64, 11 Cal. Rptr. 89, 95-96 (1961) (dissenting opinion); *Parker v. City of Hutchinson*, 196 Kan. 148, 152-54, 410 P.2d 347, 350-52 (1966); *Montoya v. City of Albuquerque*, 82 N.M. 90, 95, 476 P.2d 60, 65 (1970); *Conway v. Humbert*, 82 S.D. 317, 322-24, 145 N.W.2d 524, 527-29 (1970). In *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 16, 163 N.E.2d 89, 91, *cert. denied*, 362 U.S. 968 (1959), however, the Illinois Supreme Court believed that such legislation merely evidenced the legislature's dissatisfaction with the immunity rule.

Other courts agree with the reasoning of the court in *Abeyta v. City & County*, 165 Colo. 58, 59, 437 P.2d 67, 68 (1968), which held: "Once such a doctrine has become so deeply embedded in the law of this state, it is the legislature which must change it, and not the judiciary." *See Haney v. City of Lexington*, 386 S.W.2d 738, 743 (Ky. 1964); *Kingfisher v. City of Forsyth*, 132 Mont. 39, 45, 314 P.2d 876, 879-80 (1957); *McKenzie v. City of Florence*, 234 S.C. 428, 433-36, 108 S.E.2d 825, 827-28 (1954).

In *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 43-44, 338 P.2d 808, 811 (1959), the court held:

Section 16-301, W.C.S. 1945, says the Common Law of England prior to the fourth year of James I (1607) "shall be the rule of decision in this state."

Thus, by statute the doctrine of municipal immunity became the rule of decision in our state and it is only by statute that the doctrine should be abrogated.

Accord, *Parish v. Pitts*, 244 Ark. 1239, 1255-56, 1268, 429 S.W.2d 45, 53, 59 (1968) (dissenting opinions); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 29-30, 163 N.E.2d 89, 98 (dissenting opinion), *cert. denied*, 362 U.S. 968 (1959).

12. *Liber v. Flor*, 143 Colo. 205, 239, 353 P.2d 590, 608 (1960) (dissenting opin-

immunity rule, it appears that some courts are motivated to retain the rule by a fear that imposing liability on municipalities would precipitate a flood of litigation¹³ that would dissipate city treasuries.¹⁴

In fifteen jurisdictions, however, it has been held that municipalities are liable for police torts.¹⁵ These jurisdictions have criticized the doc-

ion); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 35, 163 N.E.2d 89, 101, *cert. denied*, 362 U.S. 968 (1959) (dissenting opinion); *Anderson v. Vander-slice*, 240 Miss. 55, 58, 126 So. 2d 522, 523 (1961); *Fette v. St. Louis*, 366 S.W.2d 446, 448 (Mo. 1963); *Gossler v. City of Manchester*, 107 N.H. 310, 313-14, 221 A.2d 242, 245 (1966); *Coffman v. City of Pulaski*, 220 Tenn. 642, 651, 422 S.W.2d 429, 432-33 (1967); *Hayes v. Town of Cedar Grove*, 126 W. Va. 828, 846-47, 30 S.E.2d 726, 735 (1944).

Typical of the reasoning behind such a holding is the following statement in *Bale v. Ryder*, 286 A.2d 344, 348 (Me. 1972):

As a Court we lack the ability to create a system such as the Federal Tort Claims Act or to place limits upon the extent of liability in any case in which experience might indicate such limits ought to be imposed.

We do not hold the purse strings. We have no power to levy taxes or otherwise provide funds to meet liability which would result from a decision abrogating the immunity doctrine. The Legislature has the power, the capacity, and the administrative machinery for conducting investigations and for giving consideration to several plans which could be advanced to solve the problem with relatively minor impact upon the municipal treasury.

This argument is presented in greater detail in *Parish v. Pitts*, 244 Ark. 1239, 1260-68, 429 S.W.2d 45, 56-59 (1968) (dissenting opinion).

13. *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 37, 163 N.E.2d 89, 102, *cert. denied*, 362 U.S. 968 (1959) (dissenting opinion); *Coffman v. City of Pulaski*, 220 Tenn. 642, 650, 422 S.W.2d 429, 433 (1967).

The court in *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 666, 231 N.E.2d 161, 172 (1967), noted this possibility but nevertheless overruled municipal immunity from liability for police torts.

14. *Parish v. Pitts*, 244 Ark. 1239, 1257, 1260-61, 429 S.W.2d 45, 54, 55 (1968) (dissenting opinions); *Morash & Sons, Inc. v. Commonwealth*, 296 N.E.2d 461, 468 n.6 (Mass. 1973); *Hinds v. City of Hannibal*, 212 S.W.2d 401, 402 (Mo. 1948); *Brown v. City of Craig*, 350 Mo. 836, 841, 168 S.W.2d 1080, 1083 (1943); *Gossler v. City of Manchester*, 107 N.H. 310, 313, 221 A.2d 242, 244 (1966); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 666, 44 S.E.2d 85, 86 (1947); *Coffman v. City of Pulaski*, 220 Tenn. 642, 650, 422 S.W.2d 429, 433 (1967).

15. *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973) (vicarious liability for police intentional tort); *Graham v. District of Columbia*, 433 F.2d 536 (D.C. Cir. 1961) (negligent tort); *Scheele v. City of Anchorage*, 385 P.2d 582 (Alas. 1963) (intentional tort); *City of Phoenix v. Camfield*, 97 Ariz. 316, 400 P.2d 115 (1965) (negligent tort); *City of Scottsdale v. Kokaska*, 17 Ariz. App. 120, 495 P.2d 1327 (1972) (negligent tort); *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 60 Cal. Rptr. 355 (1967) (intentional tort under statute imposing vicarious liability for municipal employees' torts); *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965) (punitive damages not recoverable for police torts); *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965) (liability on agency theory for police intentional tort); *Hargrove v. Town of Cocon Beach*, 96 So. 2d 130 (Fla. 1957) (liability on agency theory for police negligent

trine of municipal immunity in general,¹⁶ and particularly the govern-

tort); *Andrews v. City of Chicago*, 37 Ill. 2d 309, 226 N.E.2d 597 (1967) (liability under statute for police negligent tort); *Strong v. Town of Lansing*, — Iowa —, 179 N.W. 2d 365 (1970) (liability under statute); *City of Lexington v. Yank*, 431 S.W.2d 892 (Ky. 1968) (liability on agency theory for police intentional tort); *Jones v. Anderson*, 277 So. 2d 697 (La. App. 1973) (liability on agency theory for police intentional tort); *Jackson v. City of Detroit*, 35 Mich. App. 591, 192 N.W.2d 658 (1971) (intentional tort); *Chapman v. City of Reno*, 85 Nev. 365, 455 P.2d 618 (1969) (liability under statute for police intentional tort); *McAndrew v. Mularchuk*, 56 N.J. Super. 219, 152 A.2d 372 (1959) (municipality liable for police tort without regard to agency theory upon showing that tort was within scope of policeman's employment and was proximately caused by some "active wrongdoing" by a high municipal official), *aff'd*, 33 N.J. 172, 162 A.2d 820 (1960) (agency theory proposed as alternative basis for municipal liability for police negligent or intentional tort); *Thain v. City of New York*, 35 App. Div. 2d 545, 313 N.Y.S.2d 484 (1970), *aff'd mem.*, 30 N.Y.2d 524, 280 N.E.2d 892, 330 N.Y.S.2d 67 (1973) (negligent tort); *Becker v. Beaudoin*, 106 R.I. 562, 261 A.2d 896 (1970) (negligent tort). See also notes 27 & 28 *infra* and accompanying text.

16. *Colorado Racing Comm'n v. Brush Racing Ass'n*, 136 Colo. 279, 284, 316 P.2d 582, 585 (1957): "In Colorado, 'sovereign immunity' may be a proper subject for discussion by students of mythology, but finds no haven or refuge in this Court." *But see Abeyta v. City & County*, 165 Colo. 58, 437 P.2d 67 (1968); *Faber v. State*, 143 Colo. 240, 353 P.2d 609 (1960); *Liber v. Flor*, 143 Colo. 205, 353 P.2d 590 (1960); *City & County v. Madison*, 142 Colo. 1, 351 P.2d 826 (1960).

Sovereign immunity has been referred to as: a "defense . . . based on neither justice nor reason." *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 285, 118 N.W.2d 795, 799 (1962); "an anachronism that has long outlived its purpose, design, or reasoning," *Newman v. State ex rel. Bd. of Regents*, 490 P.2d 1079, 1081 (Okla. 1971) (dissenting opinion). Judge Musmanno, dissenting in *Graysneck v. Heard*, 422 Pa. 111, 114-16, 220 A.2d 893, 895-96 (1966), referred to municipal immunity from tort liability as

an imperfect rule. Governmental immunity is so wrong in principle, so contrary to the most elementary principles of justice, and so opposed to the modern and healthy doctrine that the government should not enjoy any privilege denied to the people who constitute it, that this Court should welcome the opportunity—any opportunity—to eradicate, abolish, and forever wipe out the fallacious, unjust, cruel proposition that the king can do no wrong.

The immunity rule is said to be based on the idea that "the King can do no wrong," which has been characterized as un-American. *Parish v. Pitts*, 244 Ark. 1239, 1250, 429 S.W.2d 45, 51 (1968), *overruled by implication by ARK. STAT. ANN. § 12-2901* (Supp. 1973); *Liber v. Flor*, 143 Colo. 205, 228, 353 P.2d 590, 603 (1960) (dissenting opinion); *Graysneck v. Heard*, 422 Pa. 111, 114, 220 A.2d 890, 895 (1966) (Musmanno, J., dissenting); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 30-31, 115 N.W.2d 618, 620 (1962).

The floodgates argument, *see* note 13 *supra*, and the possibility of financial disaster, *see* note 14 *supra*, have been dismissed as unlikely or unconvincing compared to the need to discourage police abuse of power and spread the loss evenly among the taxpayers. *See Parish v. Pitts*, 244 Ark. 1239, 1246-50, 429 S.W.2d 45, 49-50 (1968), *overruled by implication by ARK. STAT. ANN. § 12-2901* (Supp. 1973); *Scruggs v. Hanes*, 252 Cal. App. 2d 256, 267, 60 Cal. Rptr. 355, 362 (1967); *Molitor v. Kaneland*

mental-proprietary distinction, which is said to produce "legalistic distinctions only remotely related to fundamental considerations of municipal tort responsibility."¹⁷ Having concluded that the immunity rule must be abolished, these courts reject the argument that they lack the power to do so, reasoning that since the rule was created by courts,

Community Unit Dist. No. 302, 18 Ill. 2d 11, 21-24, 163 N.E.2d 89, 94-96, *cert. denied*, 362 U.S. 968 (1959); *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 666, 231 N.E.2d 169, 172 (1967); *cf. Hernandez v. County of Yuma*, 91 Ariz. 35, 36, 369 P.2d 271, 272 (1962).

Some doubts have been expressed about the constitutionality of municipal immunity. *See Liber v. Flor*, 143 Colo. 205, 209-10, 230-32, 353 P.2d 590, 593, 604 (1960) (dissenting opinions); *cf. Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972), *noted in* 1973 WASH. U.L.Q. 716. *Contra, Abeyta v. City & County*, 165 Colo. 58, 59-60, 437 P.2d 67, 68 (1968); *Faber v. State*, 143 Colo. 240, 241-42, 353 P.2d 609, 610 (1960).

17. *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 665, 231 N.E.2d 169, 171 (1967). *Accord, Stone v. Arizona State Highway Comm'n*, 93 Ariz. 384, 392-93, 381 P.2d 107, 112 (1963); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 214, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961); *Liber v. Flor*, 143 Colo. 205, 218, 235, 353 P.2d 590, 597-98, 606 (1960) (dissenting opinions); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 17-18, 163 N.E.2d 89, 92, *cert. denied*, 362 U.S. 968 (1959); *Gossler v. City of Manchester*, 107 N.H. 310, 315, 221 A.2d 242, 245 (1966) (dissenting opinion); *Weeks v. City of Newark*, 62 N.J. Super. 166, 162 A.2d 314 (1960), *aff'd*, 34 N.J. 250, 168 A.2d 11 (1961); *Stouffer v. Morrison*, 400 Pa. 497, 506-07, 162 A.2d 378, 382-83 (1960) (Musmanno, J., dissenting); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 32-33, 115 N.W.2d 618, 621 (1962).

The governmental-proprietary distinction has caused typical line-drawing difficulties, and the decisions often are inconsistent. In *Scibilia v. Philadelphia*, 279 Pa. 549, 124 A. 273 (1924), a municipal garbage truck going to the municipal dump was held a governmental activity, but in *Hill v. Allentown Housing Author.*, 373 Pa. 92, 95 A.2d 519 (1953), the maintenance of a municipal dump was held proprietary. In *Marshall v. Town of Brattleboro*, 121 Vt. 417, 423, 160 A.2d 762, 766 (1966), the court stated:

The application of this doctrine has produced anomalous results in particular cases. In the case of *Welsh v. Village of Rutland*, *supra*, 56 Vt. 228 [(1883)], the plaintiff was denied recovery for injuries to his wife because the ice upon which she slipped and fell was produced by water escaping from a fire hydrant connected to the village water system while a routine thawing operation was being carried out by the village firemen. But in *Wagner v. Village of Waterbury*, 109 Vt. 368, 196 A. 745 [(1938)], the plaintiff prevailed against the municipality for the death of his son on the grounds that the ice which caused a car to skid and strike the son was on the highway due to a leak in the village water main.

In *Haney v. Town of Rainelle*, 125 W. Va. 397, 25 S.E.2d 207 (1943), the court recognized that the town could be liable for injuries caused by negligent maintenance of sidewalks, but held that because the walkway where plaintiff was injured led up to the town police station, its maintenance was a governmental activity and therefore the town was immune from liability for plaintiff's injuries. *See generally Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); 1973 WASH. U.L.Q. 716.

it can be judicially overruled.¹⁸

Prior to *Marusa v. District of Columbia*,¹⁹ the Court of Appeals for the District of Columbia Circuit had ceased using the governmental-proprietary distinction and had held the District of Columbia liable only for torts arising out of ministerial as opposed to discretionary activities.²⁰ The *Marusa* court did not mention the ministerial-discretionary

18. *Spencer v. General Hosp.*, 425 F.2d 479, 484 (D.C. Cir. 1969); *Parish v. Pitts*, 244 Ark. 1239, 1251-53, 429 S.W.2d 45, 51-52 (1968), *overruled by implication by* ARK. STAT. ANN. § 12-2901 (Supp. 1973); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 218-19, 359 P.2d 457, 461, 11 Cal. Rptr. 89, 93 (1961); *Liber v. Flor*, 143 Colo. 205, 219, 353 P.2d 590, 598 (1960) (dissenting opinion); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 25-27, 163 N.E.2d 89, 96, *cert. denied*, 362 U.S. 968 (1959); *Haney v. City of Lexington*, 386 S.W.2d 738, 740-41 (Ky. 1964); *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 284, 118 N.W.2d 795, 803 (1962); *McAndrew v. Mularchuk*, 33 N.J. 172, 193, 162 A.2d 820, 832 (1960); *Becker v. Beaudoin*, 106 R.I. 562, 569-71, 261 A.2d 896, 900-01 (1970); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 36-39, 115 N.W.2d 618, 623-25 (1962).

Typical of the reasoning employed by these courts is that in *Stone v. Arizona State Highway Comm'n*, 93 Ariz. 384, 393, 381 P.2d 107, 113 (1963):

[W]e realize that the doctrine of governmental immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.

19. 484 F.2d 828 (D.C. Cir. 1973).

20. The governmental-proprietary distinction as applied to police torts, *see* *Capital Trans. Co. v. District of Columbia*, 225 F.2d 38, 41 (D.C. Cir. 1955), was modified by dividing activities into discretionary and ministerial acts. *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964); *Urow v. District of Columbia*, 316 F.2d 351 (D.C. Cir.), *cert. denied*, 375 U.S. 826 (1963). Since discretionary acts involve formulating policy, subjecting them to judicial scrutiny would seriously interfere with the quality and efficiency of government. Ministerial acts merely involve executing policy. *See* *Baker v. Washington*, 448 F.2d 1200, 1201 (D.C. Cir. 1971) (unprovoked assault by prison guard held ministerial); *Carter v. Carlson*, 447 F.2d 358, 366 (D.C. Cir. 1971) (arrest without probable cause held ministerial); *Graham v. District of Columbia*, 433 F.2d 536, 537 (D.C. Cir. 1970) (arrest without probable cause and failure to supervise jail adequately held not discretionary as a matter of law); *Thomas v. Johnson*, 295 F. Supp. 1025, 1031-32 (D.D.C. 1968) (hiring of policeman and police assault held ministerial). *But cf.* *Urow v. District of Columbia*, 316 F.2d 351, 352 (D.C. Cir.), *cert. denied*, 375 U.S. 826 (1963) (failure to provide traffic control device at intersection held discretionary).

Later, the District of Columbia Circuit used the discretionary-ministerial distinction in police tort cases without mentioning the governmental-proprietary distinction. *Baker v. Washington*, 448 F.2d 1200 (D.C. Cir. 1971); *Carter v. Carlson*, 447 F.2d 358, 365-68 (D.C. Cir. 1971).

It will be observed that the District of Columbia's pre-*Marusa* discretionary-ministerial distinction bears no relationship to the governmental-proprietary distinction. *See* note 7 *supra*.

Two of the three jurisdictions applying a ministerial-discretionary distinction as a http://openscholarship.wustl.edu/law_lawreview/vol1973/iss4/8

distinction, but instead spoke simply of the District's "duty to minimize the risk"²¹ it had created by requiring its policemen to be armed at all times. This duty demanded prudent hiring, training, and supervising procedures:

Thus, if the officer misuses his weapon, a judge or jury might reasonably find that misuse to have been proximately caused by the government's negligence in hiring, training, or supervising the policeman.²²

The court rejected the argument that the Federal Tort Claims Act,²³ which grants immunity to the federal government for most intentional torts, indicates a congressional intent that immunity be extended to the District of Columbia government.²⁴ Similarly, the court rejected the theory that the District's police department is necessarily a federal agency simply because tort judgments against it are satisfied with federal funds.²⁵

test for municipal liability for employees' torts have given the distinction a much narrower meaning than that used by the District of Columbia courts in the pre-*Marusa* line of cases. See *Boucher v. Fuhlbruck*, 26 Conn. Supp. 79, 81-82, 213 A.2d 455, 457 (Super. Ct. 1965), in which the court defined a ministerial duty as

a duty which is to be performed by an official in a given state of facts in a prescribed manner without regard to or in the exercise of his own judgment or discretion upon the propriety of the act being done. A ministerial duty might be illustrated in the factual situation where a town clerk must record an instrument.

Accord, *Patterson v. City of Phoenix*, 103 Ariz. 64, 67-68, 436 P.2d 613, 616 (1968) (overruling the distinction and adopting an agency standard). See also *McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (1969); *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

21. 484 F.2d at 831.

22. *Id.*

23. The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970), grants federal district courts original jurisdiction over tort claims against the United States. 28 U.S.C. § 2680 (1970), however, provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) . . . a discretionary function or duty

. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

24. *Accord*, *Carter v. Carlson*, 447 F.2d 358, 366 (D.C. Cir. 1971); *Spencer v. General Hosp.*, 425 F.2d 479, 484 (D.C. Cir. 1969). *Contra*, *Graves v. District of Columbia*, 287 A.2d 524, 525-27 (D.C. App. 1972) (dissenting opinion).

This argument is based on the unique relationship between the federal government and the District of Columbia.

25. 484 F.2d at 832. *But see* *Graves v. District of Columbia*, 287 A.2d 524, 527 (D.C. App. 1972) (dissenting opinion). The court in the principal case noted that if the source of funds were to determine whether a District government activity were local

The court conceded that abolition of municipal immunity from liability for police torts might decrease police efficiency,²⁶ but stated:

[T]he threat of damage suits does not significantly impede the effective operation of a police department, when the impediment is weighed against the public interest in a tort remedy for police misconduct.²⁷

In several states where courts have abrogated municipalities' immunity from liability for their employees' torts, the legislatures have responded either by reinstating immunity to some degree²⁸ or by codifying the judge-made liability.²⁹ Either alternative seems preferable to a

or federal, the District would have no local government at all. 484 F.2d at 832.

26. 484 F.2d at 832. The possibility that municipal liability for police torts would impair police effectiveness was discussed in *Graves v. District of Columbia*, 287 A.2d 524, 527-28 (D.C. App. 1972); cf. *Kingfisher v. City of Forsyth*, 132 Mont. 39, 44, 314 P.2d 876, 879 (1957). *But cf.* *Baker v. Washington*, 448 F.2d 1200, 1201 (D.C. Cir. 1971); *Carter v. Carlson*, 447 F.2d 358, 366 (D.C. Cir. 1971).

27. 484 F.2d at 832, quoting *Carter v. Carlson*, 447 F.2d 358, 363 n.9 (D.C. Cir. 1971). For a similar balancing test, see *Johnson v. State*, 69 Cal. 2d 78, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

28. ARK. STAT. ANN. § 12-2901 (Supp. 1973) (enacted following *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968)); IDAHO CODE § 6-904(1) (Supp. 1973) (immunity for intentional torts) (enacted following *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970)); N.J. REV. STAT. § 59:1-2 (Supp. 1973) (immunity for intentional torts) (enacted following *Peer v. Newark*, 71 N.J. Super. 12, 176 A.2d 249 (1961)); WIS. STAT. ANN. § 895.43(3) (1966) (immunity for intentional torts) (enacted following *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)). *See also* CONN. GEN. STAT. REV. § 7-465 (1958) (immunity for intentional torts); GA. CODE ANN. § 69-301 (1967), *strictly construed* in *Thomas v. Williams*, 105 Ga. App. 321, 124 S.E.2d 409 (1962), and *City of Cumming v. Chastain*, 97 Ga. App. 13, 102 S.E.2d 97 (1958); ILL. ANN. STAT. ch. 85, § 2-202 (Smith-Hurd 1966) (immunity for negligent torts) (enacted following *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89, *cert. denied*, 362 U.S. 968 (1959)), *constitutionality upheld* in *Arnolt v. City of Highland Park*, 52 Ill. 2d 27, 282 N.E.2d 144 (1972); NEB. REV. STAT. §§ 23-2401 to -2409(5) (1970); N.M. STAT. ANN. § 14-9-7 (1953), *construed* in *Montoya v. City of Albuquerque*, 82 N.M. 90, 95, 476 P.2d 60, 65 (1970); OKLA. STAT. ANN. tit. 11, §§ 1751-66 (Supp. 1972) (waiving immunity for cities over 200,000, but limiting recovery to \$2,000); UTAH CODE ANN. §§ 63-30-1 to -34 (1953).

29. ALAS. STAT. § 09.65.070 (1962) (enacted following *City of Fairbanks v. Schai-ble*, 375 P.2d 201 (Alas. 1962)); CAL. GOV'T CODE §§ 815-18.8 (Deering 1973) (enacted following *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961)); MINN. STAT. ANN. §§ 466.01-.17 (1963) (enacted following *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962)); NEV. REV. STAT. §§ 41.031-.039 (1971) (enacted following *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963)), *liberally construed* in *State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1970); R.I. GEN. LAWS ANN. §§ 9-31-1 to -7 (Supp. 1972) (enacted following *Becker v. Beaudoin*, 106 R.I. 562, 261 A.2d 896 (1970)). *See also* IOWA CODE ANN. § 613A.2 (Supp. 1973); KAN. STAT. ANN. §§ 74-4715 to -4716 (1972) (authorizing municipalities to purchase liability insurance and waiving immunity to the extent of

rule of blanket immunity that would appear increasingly anachronistic in contemporary tort law.³⁰ *Marusa*, by requiring the District of Columbia to compensate victims of its policemen's torts out of public revenues, enhances the modern tendency to assign tort liability according to considerations of risk-shifting and deep pockets rather than according to fault.³¹

purchase); MICH. STAT. ANN. § 3.996(107) (1969), held unconstitutional in *Maki v. City of East Tawas*, 385 Mich. 151, 188 N.W.2d 593 (1971); MONT. REV. CODES ANN. § 83-706.1 (Supp. 1973); Act of April 10, 1929, ch. 467, § 12a, [1929] N.Y. Laws 994 (codified at N.Y. Cr. CL. Act § 8 (McKinney 1963)) (waiving state immunity), construed as waiving municipal immunity in *Bernadine v. City of New York*, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945); N.D. CENT. CODE § 40-43-07 (1968) (same as Kansas); ORE. REV. STAT. §§ 30.260-300 (1969); TENN. CODE ANN. § 6-640 (Supp. 1972) (liability for negligent torts); WASH. REV. CODE ANN. § 4.92.090 (1962) (waiving state immunity).

30. Fairweather, *Test of Sovereign Immunity for Municipal Corporations*, 13 CLEV.-MAR. L. REV. 151 (1964); Green, *Freedom of Litigation (III): Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Mathes & Jones, *Towards a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965); Price & Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953); Seasongood, *supra* note 17; Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475 (1963); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919; Van Alstyne, *Governmental Tort Liability: A Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963).

31. See *Parish v. Pitts*, 244 Ark. 1239, 1247, 429 S.W.2d 45, 49 (1968):

The considered conclusion of legal commentators has been that this burden [of bearing the loss to the tort victim] should be treated as any other cost of administration of municipal activity and thereby be spread by taxes among the public receiving the benefits.

Cf. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 21-24, 163 N.E. 2d 89, 94-96, *cert. denied*, 362 U.S. 968 (1959); *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 666, 231 N.E.2d 169, 172 (1967).

The former, and contrary, view was expressed in O. HOLMES, *THE COMMON LAW* 96 (1881):

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.