PART III

LIABILITY

CHAPTER XVII

LIABILITY OF MUNICIPAL CORPORATIONS

IT is a well-established principle of law that the State, as the sovereign power, cannot be sued without its consent for wrongs done to individuals. Since such wrongs often occur in the course of the corporate activities of the State, the consent is readily given, and may be expressed in a constitution or by legislative enactment with provision for a suitable tribunal to hear all just claims.

A municipal corporation may be sued without its consent, but it cannot be held to be liable for certain types of wrongs. Municipal corporations, which include cities and incorporated towns and villages, are public corporations created by the State for governmental purposes. Their exact powers and duties are limited to those set forth in a charter granted by the State, and those that are expressed or may be reasonably implied from state legislation.

But municipal corporations have a dual character. Not only are they organized for the benefit of the State, but they are also created for the purpose of undertaking functions which are for the benefit of the community. When the activities of municipal corporations are performed for the welfare of the State, they are known as *governmental* functions; when they are for the benefit of the local inhabitants, they are known as *corporate* or *proprietary* functions. In other words, a municipal corporation may be said to be both a governmental and a business organization.

When acting in its governmental capacity, a municipal corporation is not liable for wrongs or injuries done to individuals by its officers or employees. When acting in its corporate or proprietary capacity, however, a municipal corporation will or may be liable for torts, or wrongs, resulting from the actions of its officers or employees.

This rule of law is definite, but its application sometimes presents difficulties, especially in determining whether a particular act is of a governmental or proprietary character. Governmental functions include all matters pertaining directly to the public health and safety and all matters affecting the general welfare. Thus, in maintaining police departments, fire departments, public schools, hospitals, and health departments, municipal corporations are acting in a governmental capacity, and cannot be held liable for the torts or negligence of their agents engaged in duties connected with these (and some other) departments.

Counties, townships, school districts, and sanitary districts are public corporations, but they usually are not strictly municipal corporations, although these political agencies are sometimes called quasi-municipal corporations. In a few States, boards of health have been incorporated as public corporations. None of these official bodies can be held to be liable for negligence in the exercise of their governmental powers, or for the wrongful acts of their officers and employees in carrying out such powers, unless made so by state legislation.

Public Health as a Governmental Function

Municipal corporations, such as cities, towns, and villages, and quasi-municipal corporations, such as counties, townships, and school boards, are never liable for the acts of their officers and employees in enforcing or executing public health laws, ordinances, and regulations, no matter how careless, negligent, arbitrary, capricious, unreasonable, or harmful such actions may be. For every legal wrong, however, there must be a right, so that the health officers or employees may be personally liable for negligence or improper acts, especially when such actions are beyond the scope of their authority, or *ultra vires*.[1] In the absence of specific legislation imposing the liability, a municipal corporation is not responsible to individuals for carrying out its public health duties, which are obligations of the State.

Injuries caused by improper diagnosis of infectious disease and mistakes in enforcing quarantine and isolation are typical instances of cases in which municipal corporations are free from liability.[2] A city is not liable for the malicious arrest of a person, the forcible testing of his blood, and his commitment to jail,[3] or for the arrest of a person who has been, or is alleged wrongfully to have been, in contact with communicable disease.[4]

If a person who has been arrested and placed in a city jail contracts a venereal disease from a fellow prisoner as a result of the negligence of the keeper of the jail, the city will be held liable, according

1. See Chapter XVIII.

2. *Bates* v. *Houston* (1896), 14 Tex. C.A. 287, 37 S.W. 383. *White* v. *City of San Antonio* (1901), 94 Tex. 313, 60 S.W. 427. *Valentine* v. *Englewood* (1908), 76 N.J.L. 509, 71 A. 344, 19 L.R.A. (N.S.) 262, 16 Ann. Cas. 731. *Butler* v. *Kansas City* (1916), 97 Kan. 239, 155 P. 12, L.R.A. 1916 D 626, Ann. Cas. 1918 D 801. *City of Shawnee* v. *Jeter* (1924), 96 Okla. 216, 221 P. 758.

3. *Franklin* v. *Seattle* (1920), 112 Wash. 671, 192 P. 1015, 12 A.L.R. 247.

4. *Pritchard* v. *Morganton* (1900), 126 N.C. 908, 36 S.E. 353, 78 A.S.R. 679. *Levin* v. *Burlington* (1901), 129 N.C. 184, 39 S.E. 822, 55 L.R.A. 396.

to a decision of the Supreme Court of Florida.[5] In this case, there was a state law making it unlawful for any person infected with a contagious venereal disease to expose another to the infection, and the court ruled that the city must be held to be responsible for injuries due to the negligent violation of an express statute.

Where, however, a person is injured by impure vaccine administered by a municipal officer who is enforcing a valid ordinance requiring vaccination of citizens, the municipal corporation will not be liable, since under the law it is exercising a governmental function.[6] Similarly, a schoolteacher who contracted tuberculosis through the negligence of a school district was unable to recover from the school authorities, because the school district as a quasi-public corporation was exercising governmental functions in furnishing educational facilities.[7]

Municipal corporations are not liable for injuries resulting from the maintenance of public hospitals,[8] but it has been held by the Maine Supreme Judicial Court that a city is liable for the premature removal of a patient with scarlet fever from a city isolation hospital, where the patient had been paying for hospital care.[9] Whenever a municipal corporation derives revenue from its activities, those activities are usually considered to be proprietary or corporate functions. A reasonable fee charged by a city for a license or permit is not regarded as revenue, but as a necessary charge to cover costs of inspection and administration.[10]

In a number of early cases it was held that a city is not liable for the death of a city employee who contracted smallpox while tearing

5. *Lewis* v. *City of Miami* (1937), 127 Fla. 426, 173 So. 150. In *Hunt* v. *Rowton* (1930), 143 Okla. 181, 288 P. 342, a sheriff was held personally liable for negligence in permitting a prisoner to contract smallpox in the county jail.

6. *Wyatt* v. *Rome* (1898), 105 Ga. 312, 31 S.E. 188, 42 L.R.A. 180, 70 A.S.R. 41. *Howard* v. *City of Philadelphia* (1915), 250 Pa. 184, 95 A. 388, L.R.A. 1916 B 917.

7. *Bang* v. *Independent School Dist.* (1929), 177 Minn. 454, 225 N.W. 449. *Washington Suburban Sanitary District* v. *Magruder* (1926), 56 App. D.C. 297, 12 F. (2d) 832. *Lynch* v. *North Yakima* (1905), 37 Wash. 657, 80 P. 79. For tort liability of schools, see 160 *American Law Reports* 7.

8. *City of Lexington* v. *Batson's Admr.* (1904), 118 Ky. 489, 81 S.W. 264, 26 Ky. L. 363.

9. *Anderson* v. *City of Portland* (1931), 130 Me. 214, 154 A. 572.

10. See page 90.

down a pesthouse, nor for the death of a patient who was placed in an overcrowded pesthouse.[11]

While a municipal corporation is not liable to individuals for damages to persons or property resulting from its governmental functions, it may be responsible to the State for negligence in carrying out those governmental duties.

Proprietary Functions of Municipal Corporations

The corporate, proprietary, private, or business functions of municipal corporations include all kinds of public works, such as the care and maintenance of streets and sidewalks, bridges, street lighting, water works and water supplies, sewers and sewage disposal, garbage disposal, dumps, parks and playgrounds, tourist camps, gas and electric works, markets, piers, and all other public works of the type usually undertaken by business corporations. Public buildings belong in the category of corporate functions when they are used for business purposes, but they are governmental when employed for that purpose, as in the cases of city halls, jails, firehouses, police headquarters, and hospitals.

There is some conflict of legal authority as to the proper status of certain of the duties enumerated above. Thus, in some jurisdictions the conduct of parks is held to be a governmental function, and many state courts have also ruled that garbage and refuse disposal and sometimes street cleaning are governmental functions. The courts have shown a tendency in recent years to broaden the scope of municipal governmental functions to include the performance of all public services which are legal duties, and from which the municipality obtains no revenue or other special benefit in its corporate capacity.

Garbage and Refuse Disposal

The collection, removal, and disposal of garbage and refuse has been held to be a governmental function by courts in a number of States,[12] but in other States torts committed by officers or employees

11. *Nicholson* v. *Detroit* (1902), 129 Mich. 246, 88 N.W. 695, 56 L.R.A. 601. *Twyman* v. *Frankfort* (1904), 117 Ky. 518, 78 S.W. 446, 64 L.R.A. 572, 4 Ann. Cas. 622. *Evans* v. *Kankakee* (1907), 231 Ill. 223, 83 N.E. 223, 13 L.R.A. (N.S.) 1190.

12. *Harris* v. *D.C.* (1921), 256 U.S. 650, 41 S. Ct. 610, 65 L. Ed. 1146, 14 A.L.R. 1471. *Love* v. *Atlanta* (1894), 95 Ga. 129, 22 S.E. 29, 51 A.S.R. 64. *Louisville* v. *Carter* (1911), 142 Ky. 443, 134 S.W. 468, 32 L.R.A. (N.S.) 637. *City of Harlan* v. *Peavely* (1928), 224 Ky. 338, 6 S.W. (2d) 270. *Manguno* v.

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of municipal corporations while engaged in the removal, disposal, or incineration of garbage, or the operation of dumps, have been held to entitle individuals to recover damages from the municipality, on the theory that these are proprietary functions.[13]

It is no infringement of the rights of individuals when a city prohibits by ordinance the removal of garbage by any person except the duly authorized employees of the city, or when the city makes an exclusive contract with an individual for the collection and removal of garbage within the municipality.[14]

Sewage Disposal

Although the proper and safe disposal of sewage is recognized as an important public health measure, it is a well-established rule of law in this country that a municipal corporation is liable to individuals for nuisances caused by the disposal of its sewage, since this is a corporate and not a governmental duty.[15]

New Orleans (La. 1934), 155 So. 41. *Haley* v. *Boston* (1906), 191 Mass. 291, 77 N.E. 888, 5 L.R.A. (N.S.) 1005. *James* v. *Charlotte* (1922), 183 N.C. 630, 112 S.E. 423. *Scales* v. *City of Winston-Salem* (1925), 189 N.C. 469, 127 S.E. 543. *Condict* v. *Jersey City* (1884), 46 N.J.L. 157. *Oklahoma City* v. *Baldwin* (1929), 133 Okla. 289, 272 P. 453. *Scibilia* v. *Philadelphia* (1924), 279 Pa. 549, 124 A. 273, 32 A.L.R. 981. *Bandos* v. *Philadelphia* (1931), 304 Pa. 191, 155 A. 279. *Ashbury* v. *City of Norfolk* (1929), 152 Va. 278, 147 S.E. 223. *City of Brunswick* v. *Volpian* (1942), 67 Ga. App. 654, 21 S.E. (2d) 442. *Hayes* v. *Town of Cedar Grove* (1944), — W. Va. —, 30 S.E. (2d) 726, 156 A.L.R. 702. *Baumgardner* v. *City of Boston* (1939), 304 Mass. 100, 23 N.E. (2d) 121.

13. *Chardkoff Junk Co.* v. *City of Tampa* (1931), 102 Fla. 501, 135 So. 457. *City of Newcastle* v. *Harvey* (1913), 54 Ind. App. 243, 102 N.E. 878. *State ex rel. Hog Haven Farms* v. *Pearcy* (1931), 328 Mo. 560, 41 S.W. (2d) 403. *Missano* v. *The Mayor* (1899), 160 N.Y. 123, 54 N.E. 744. *Nicoll* v. *Village of Ossining* (1927), 220 N.Y.S. 345, 128 Misc. 848. *Kneece* v. *City of Columbia* (1924), 128 S.C. 375, 123 S.E. 100. *City of Longview* v. *Stewart* (Tex. 1933), 66 S.W. (2d) 450.

14. *City of Canton* v. *Van Voorhis* (1939), 61 Oh. App. 419, 22 N.E. (2d) 651. *City Sanitary Service* v. *Rausch* (1941), 10 Wash. (2d) 446, 117 P. (2d) 225. Contra, See *City of Malden* v. *Flynn* (1945), 318 Mass. 276, 61 N.E. (2d) 107.

15. *City of Harrisonville* v. *Dickey Clay Co.* (1933), 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208. *Donnelly Brick Co.* v. *City of New Britain* (1927), 106 Conn. 67, 137 A. 745. *So. N.E. Ice Co.* v. *Town of West Hartford* (1932), 114 Conn. 496, 159 A. 470. *City of Barnesville* v. *Parham* (1931), 44 Ga. App. 151, 160 S.E. 879. *Barrington Hills Country Club* v. *Village of Barrington* (1934), 357 Ill. 11, 191 N.E. 239. *City of Frankfort* v. *Slipher* (1928), 88 Ind. App. 356, 162 N.E. 241. *Duncansen* v. *City of Fort Dodge* (1943), 233 Ia. 1325, 11 N.W. (2d) 583. *City of Harrodsburg* v. *Brewer* (1932), 243 Ky. 378, 48 S.W. (2d) 817. *City of*

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An exception to this rule is in the case of the discharge of sewage into tidal waters. The State and municipal corporations each have the right to dispose of sewage, either treated or untreated, in this way, and a city cannot be held liable for damages to growers of shellfish or others injured by this practice.[16] The State may, however, regulate the pollution of shellfish and the sale of shellfish from polluted waters.

Where private parties drain sewage and industrial waste into a public sewer or sewerage system owned and operated by a municipal corporation, they are, in general, not liable for damages caused by improper disposal of the sewage effluent,[17] and a city maintaining such a nuisance cannot offer as a defense the fact that the plaintiff in the case made personal use of the public sewers.[18] Where, however, a city and a private industrial concern each discharge sewage and wastes into a creek, each may be held independently but not jointly liable for the nuisance.[19]

Ludlow v. *Comm.* (1933), 247 Ky. 166, 56 S.W. (2d) 958. *Gundy* v. *Village of Merrill* (1930), 250 Mich. 416, 230 N.W. 163. *Johnson* v. *City of Fairmont* (1933), 188 Minn. 451, 247 N.W. 572. *Hodges* v. *Town of Drew* (1935), 172 Miss. 668, 159 So. 298. *Windle* v. *City of Springfield* (1928), 320 Mo. 459, 8 S.W. (2d) 61. *Newman* v. *City of Marceline* (1928), 222 Mo. App. 980, 6 S.W. (2d) 659. *Carpenter* v. *City of Versailles* (Mo. 1934), 65 S.W. (2d) 957. *Gray* v. *City of High Point* (1933), 203 N.C. 756, 166 S.E. 911. *Lightner* v. *City of Raleigh* (1934), 206 N.C. 496, 174 S.E. 272. *Town of Smithfield* v. *City of Raleigh* (1935), 207 N.C. 597, 178 S.E. 114. *Clinard* v. *Town of Kernersville* (1939), 215 N.C. 745, 3 S.E. (2d) 267. *City of Lawton* v. *Wilson* (1927), 127 Okla. 40, 259 P. 650. *City of Sayre* v. *Rice* (1929), 132 Okla. 95, 269 P. 361. *Oklahoma City* v. *West* (1931), 155 Okla. 63, 7 P. (2d) 888. *City of Edmond* v. *Billen* (1935), 171 Okla. 37, 38 P. (2d) 564. *Oklahoma City* v. *Eylar* (1936), 177 Okla. 616, 61 P. (2d) 649. *Conestee Mills* v. *City of Greenville* (1931), 160 S.C. 10, 158 S.E. 113, 75 A.L.R. 519. *Gotwals* v. *City of Wessington Springs* (1932), 60 S.D. 428, 244 N.W. 649. *Town of Merkel* v. *Patterson* (Tex. 1933), 56 S.W. (2d) 941. *City of Tyler* v. *House* (Tex. 1933), 64 S.W. (2d) 1007. *Chandler* v. *City of Olney* (1935), 126 Tex. 230, 87 S.W (2d) 250. *Boyer* v. *City of Tacoma* (1930), 156 Wash. 280, 286 P. 659. *Bales* v. *City of Tacoma* (1933), 172 Wash. 494, 20 P. (2d) 860. *Snavely* v. *City of Goldendale* (1941), 10 Wash. (2d) 453, 117 P. (2d) 221, 11 N.C.C.A. (N.S.) 674. *Mitchell Realty Co.* v. *West Allis* (1924), 184 Wis. 352, 199 N.W. 390, 35 A.L.R. 396. *Hasslinger* v. *Village of Hartland* (1940), 234 Wis. 201, 290 N.W. 647. For numerous earlier cases, see *Stream Pollution, A digest of judicial decisions and a compilation of legislation relating to the subject,* Public Health Bulletin No. 87, U.S. Public Health Service, 1917.

16. *Lovejoy* v. *City of Norwalk* (1930), 112 Conn. 199, 152 A. 210. *Darling* v. *Newport News* (1919), 249 U.S. 540, 39 S. Ct. 371, 63 L. Ed. 759.

17. *Hampton* v. *Spindale* (1936), 210 N.C. 546, 787 S.E. 775, 107 A.L.R. 1188.

18. *Zabst* v. *City of Angola* (1934), 99 Ind. App. 111, 190 N.E. 891.

19. *Johnson* v. *City of Fairmont* (1933), 188 Minn. 451, 247 N.W. 572.

It has been held in Texas that a city is not liable for injuries to a city employee while working in one of the pipes of the city's established sewer lines, since sanitation for the public health is a governmental function.[20] By the weight of legal authority, nevertheless, the construction and institution of a municipal sewer system is a governmental function, but its operation and upkeep is a proprietary function.[21]

Liability for Water-Borne Disease

Although pure water is as necessary to life as is food, and an adequate supply of water is likewise required for proper fire protection in a community, a municipal corporation that undertakes to furnish water to its citizens, either for convenience or for profit, stands in exactly the same position with respect to liability for water-borne diseases as does any private purveyor of water. The collection, treatment, storage, and distribution of a public water supply by a municipality is a proprietary and not a governmental function. There have been no exceptions to this rule in American jurisprudence.[22]

When water is furnished to a consumer by either a public or a private corporation, a contractual relationship is established between the seller or distributor and the consumer. Unlike the usual legal situation when food is sold, however, there is no implied warranty that the water is pure.[23] In other words, the municipal corporation or a private water company is not a guarantor of the purity of the water, but it must use all reasonable precautions to prevent dangerous contamination of the water, and if it knowingly supplies impure or polluted water to a consumer who is unaware of the hazard the corporation will be liable for damages for fraudulent breach of the contract.[24]

There is, however, another effective remedy in cases of injuries caused by impure water. If disease or other injuries are caused by

20. *Ballard* v. *City of Fort Worth* (Tex. 1933), 62 S.W. (2d) 594.

21. *City of Portsmouth* v. *Mitchell Mfg. Co.* (1925), 113 Oh. St. 250, 148 N.E. 846, 43 A.L.R. 961.

22. J. A. Tobey, Liability for water-borne typhoid, *Public Works*, 59:148, April 1928. *Manual of Water Works Practice*, New York, American Water Works Association, 1925. A. Wolman and A. E. Gorman, *Significance of Waterborne Typhoid Fever Outbreaks*, 1920-1930, Baltimore, Williams & Wilkins, 1931. See pages 309-312 *infra* for a discussion of liability of private water companies.

23. *Canavan* v. *City of Mechanicsville* (1920), 229 N.Y. 473, 128 N.E. 882, 13 A.L.R. 1123.

24. *Green* v. *Ashland Water Co.* (1898), 101 Wis. 258, 77 N.W. 722, 43 L.R.A. 117, 70 A.S.R. 911.

negligence on the part of the distributor of the water, this condition is a tort, or legal wrong, for which there is a remedy at law. In order to maintain a successful action for negligence, however, it must be shown that there has been no contributory negligence on the part of the person injured or afflicted.

Since 1910 the courts have awarded damages against municipal corporations in numerous instances in which typhoid fever has been contracted by individuals as a result of negligence by cities in the operation and maintenance of public water supplies. In the first of these cases, decided by the Supreme Court of Minnesota in 1910, an award of $5,000 was granted for a death caused by typhoid fever due to pollution of the city water supply with sewage.[25] In the course of this notable decision, the court stated:

> It is obvious that a sound public policy holds a city to a high degree of faithfulness in providing an adequate supply of pure water. Nor does it appear why the citizens should be deprived of the stimulating effects of the fear of liability on the energy and care of its officials; nor why a city should be exempt from liability while a private corporation under the same circumstances should be held responsible for its conduct and made to contribute to the innocent persons it may have damaged.

In order to be entitled to damages for typhoid fever contracted from a municipal water supply, an individual must not only prove negligence on the part of the municipality, but he must also show beyond reasonable doubt that the water was the actual cause of his illness. In a case decided by the Court of Appeals of New York it was held, however, that this fact may be shown "with reasonable certainty," despite a rule of law that where there are several possible causes of injury, the plaintiff must prove that his injury was sustained by a cause for which the defendant is responsible.[26]

In this case, evidence was presented to show that the city water supply was badly contaminated, and that there was an increase of typhoid fever cases during this period; there was also medical testimony to the effect that the plaintiff's attack of the disease was due to drinking the city water. These facts were held to be sufficient for a jury determination as to whether the disease was contracted from this or some other source.

25. *Keever* v. *City of Mankato* (1910), 113 Minn. 55, 129 N.W. 158, 33 L.R.A. (N.S.) 339, Ann. Cas. 1912 A 216.

26. *Stubbs* v. *City of Rochester* (1919), 226 N.Y. 516, 124 N.E. 137, 5 A.L.R. 1396. *Safransky* v. *City of Helena* (1935), 98 Mont. 456, 39 P. (2d) 644. *Stoker* v. *Ogden City* (1936), 88 Utah 389, 54 P. (2d) 849.

The rules of evidence, as well as the doctrine of negligence, in this decision were followed in a subsequent case, in which the Appellate Division of the New York Supreme Court upheld, and the Court of Appeals affirmed, an award of $2,000 to a minor and $1,000 to his father for typhoid fever contracted by the child from a city water supply which had become polluted with sewage from an old canal.[27]

Despite these unfortunate experiences with typhoid fever in cities in New York State, an epidemic of typhoid occurred in 1928 in Olean, N. Y., which was traced to the city water supply and resulted in the payment of claims against the city amounting to more than $400,000.[28] These claims were not the result of litigation in court, but were voluntarily paid by the city in order to avoid lawsuits. The city was authorized by the state legislature to issue bonds to pay the cost of this disastrous outbreak of disease, for which it was admittedly responsible.

A judgment for $6,000 damages for a death from typhoid fever contracted from a polluted city water supply was upheld by the Supreme Court of Washington in 1925.[29] In a companion case,[30] the court pointed out that it was a question of fact for the jury to determine in the light of all the evidence whether the city was negligent in permitting polluted material to gain access to the city water, and whether it was negligent in failing to remedy the situation after becoming aware of it. Where, however, claims against the city were required to be submitted within a certain time, it was held in a third case in the series due to this epidemic that failure to submit a claim within the prescribed period would debar recovery.[31]

Damages amounting to $47,000 for typhoid fever and dysentery caused by a city water supply were sustained by the California Supreme Court in nineteen cases brought before it in 1928.[32] In this instance, the city had permitted a chlorination plant, which was necessary for the purification of its polluted water supply, to become inoperative for about twelve hours, with the result that an epidemic occurred.

Where a city and a railroad company each maintained water sup-

27. *Wiesner* v. *City of Albany* (1928), 229 N.Y.S. 622, 224 App. Div. 239; affirm. 250 N.Y. 551, 166 N.E. 320.

28. A. S. Dean, The Olean City epidemic of typhoid fever in 1928, *Am. J. Pub. Health*, 21:390, April 1931.

29. *Aronson* v. *City of Everett* (1925), 136 Wash. 312, 239 P. 1011.

30. *Roscoe* v. *City of Everett* (1925), 136 Wash. 295, 239 P. 831.

31. *Scheer* v. *City of Everett* (1925), 134 Wash. 385, 235 P. 789.

32. *Ritterbusch et al* v. *City of Pittsburgh* (1928), 205 Cal. 84, 269 P. 930, 61 A.L.R. 448.

plies, which were connected, and typhoid fever resulted from contaminated water entering the city's water system from the railroad's supply, both the city and the railroad were held liable in damages for negligence.[33]

A city has likewise been held liable for typhoid fever caused by the act of its health officer in blocking a sewer so that sewage backed up and contaminated the city water supply.[34] Since the operation or maintenance of a sewer and the distribution of water are both corporate or proprietary functions, the city is liable for the negligent acts of its officers and employees in dealing with these matters, even though the officer responsible for the injuries may have thought that he was acting in the interests of the public health.

State laws creating state, county, and city boards of health do not take the control of water systems out of the hands of a city so as to relieve it of its duty to maintain a pure water supply, according to a decision of the Supreme Court of Montana in 1932,[35] in which it was also held that it is not necessary for the injured person to give notice to the city as a condition precedent to maintaining an action for damages due to typhoid fever resulting from the city water supply.

In a subsequent case, decided in 1935,[36] this same court upheld an award of $1,500 to a person who contracted typhoid fever in the same epidemic, which had occurred in 1929. In discussing the admissibility of evidence to prove the negligence of the city, the court ruled that circumstantial evidence that the city water contained typhoid bacilli was sufficient, and that evidence showing the presence of *B. coli* (*Esch. coli*) in the water could be admitted in view of the fact that this organism is an indication of pollution with fecal material and is often an accompaniment of the *B. typhosus*, which is itself difficult to detect by laboratory methods.

Where, however, the legal representatives of persons deceased from typhoid fever which was alleged to have been contracted from a city water supply failed to show by a preponderance of evidence that the city water was the actual source of the disease, a finding by a jury in favor of the city was upheld by the Supreme Court of Utah in 1936.[37]

33. *Penn. R. Co.* v. *Lincoln Trust Co.* (1929), 91 Ind. App. 28, 167 N.E. 721, 170 N.E. 92.

34. *City of Salem* v. *Harding* (1929), 121 Oh. St. 412, 169 N.E. 457.

35. *Campbell* v. *City of Helena* (1932), 92 Mont. 366, 16 P. (2d) 1.

36. *Safransky* v. *City of Helena* (1935), 98 Mont. 456, 39 P. (2d) 644.

37. *Stoker* v. *Ogden City* (1936), 88 Utah 389, 54 P. (2d) 849. *Chase* v. *Industrial Commission* (1932), 81 Utah 141, 17 P. (2d) 205. *Williams* v. *Standard Examiner Pub. Co.* (1933), 83 Utah 31, 27 P. (2d) 1.

In this case, expert witnesses for the plaintiffs testified that the city water showed the presence of colon bacilli, indicating contamination, and that the water was responsible for an epidemic of fifteen known cases of typhoid, but experts for the city testified that the water could be excluded because most of the persons having the disease had been in contact with other definite sources of infection, such as proven typhoid carriers, and, furthermore, that there were comparatively few cases of the disease in a population of 40,000 all of whom used the city water.

Proof that contaminated river water was admitted to a city water supply through a valve negligently left open, and that this water was the probable cause of a fatal case of typhoid fever, resulted in a judgment for damages against the city, which was sustained late in 1936 by the Supreme Court of Vermont.[38] In this case, it was shown that milk, fruit, or shellfish could not have caused the disease, and that at least seven other cases of typhoid fever in the city at the same time could have been attributed to drinking this polluted water supply.

As stated elsewhere,[39] a city may adopt and enforce reasonable legislation to protect its public water supplies. In carrying out such necessary public health measures, a municipal corporation will not be liable for injuries to persons or property. Where, for example, dairy cattle were driven from a city watershed by a city employee who used ordinary care in doing so, the city was held not to be liable for damages to the cattle.[40] The maintenance and operation of a water supply and the distribution of water for domestic consumption is a proprietary function of a municipality, but the protection of the water supply in the interests of the public health is a governmental function.

In the operation of a water works a city, as an employer of labor, must obey any statutes requiring the adoption of measures to prevent occupational diseases, and for failure to do so will be liable for injuries caused by such negligence.[41]

Typhoid fever and the intestinal diseases are not the only wrongs due to municipal water supplies that have given rise to actions for damages. Recovery against a town has been allowed on breach of warranty and negligence for lead poisoning contracted from the town water supply.[42]

38. *Boguski* v. *City of Winooski* (1936), 108 Vt. 380, 187 A. 808.
39. See page 226.
40. *Philips* v. *City of Golden* (1932), 91 Colo. 331, 14 P. (2d) 1013.
41. *Lockhart* v. *Kansas City* (1943), 351 Mo. 1218, 175 S.W. (2d) 814.
42. *Horton* v. *North Attleboro* (1939), 302 Mass. 137, 19 N.E. (2d) 15.

Nuisances

A municipal corporation is liable for the creation and maintenance of nuisances arising out of the exercise of its corporate or proprietary functions, and such liability will occur whether or not there has been negligence on the part of its officers and employees.[43]

While it is the duty of municipal corporations, acting through their health authorities, to order or bring about the prompt and effective abatement of nuisances that are dangerous to the public health, a municipal corporation cannot be held liable for damages for failure to cause the abatement of a nuisance on private property which was not authorized by it and to the maintenance of which the municipal corporation did not in any way contribute.[44] Legal redress in such instances must be obtained from the person responsible for the nuisance, and not from the municipality.

Liability for Contracts

In order to aid in the carrying out of its governmental or corporate functions, a municipal corporation may enter into contracts with individuals, partnerships, and corporations, although the scope, purposes, and even the terms of such contracts may be governed wholly or in part by the charter of the municipal corporation and by state and municipal legislation. When such contracts or agreements are lawfully entered into, the municipal corporation is liable for payment for the services rendered or for performance of the terms of the contract.

Boards of health are usually empowered to make contracts for certain purposes, and they too will be liable for payments on all lawful contracts. Thus, boards of health may be authorized to arrange for free medical services and supplies to indigent residents while suffering from contagious or infectious diseases which require quarantine or isolation; or they may be authorized by law to arrange for the administration of free vaccinations to indigents or to the entire resident populace regardless of indigency. Boards of health may also contract for the purchase of necessary supplies and equipment, for labor, and for such other matters as are necessary to their activities.

A board of health may not, as a rule, make a valid contract with one of its own members or with the health officer, since these public officers act in a fiduciary capacity for the benefit of the municipality,

43. *Hoffman* v. *City of Bristol* (1931), 113 Conn. 386, 155 A. 499, 75 A.L.R. 1191.

44. *City and County of Denver* v. *Ristau* (1934), 95 Colo. 118, 33 P. (2d) 387.

and such contracts are contrary to public policy.[45] The rule that no member of a municipal government shall be interested directly or indirectly in any contract entered into by the municipality while he is a member thereof is well established, and is often expressed in legislation.

While contracts made between a board of health and one of its members are not binding, compensation for services by a board member, which are arranged for in good faith and are satisfactorily undertaken, may be recovered under certain circumstances.[46] So, too, a board of health may justifiably arrange to pay extra compensation to a health officer for services which in the opinion of the board are extraordinary,[47] as where a physician who is a part-time local health officer is paid reasonable fees for vaccinations performed on his own time at the request of the board of health. Whether such arrangements may be considered legal depends in many instances upon the precise wording of applicable statutes and their interpretation by courts, attorney generals, or city solicitors. As a general rule, a board of health may not contract with a health officer for special compensation for services that are within the regular scope of his duties.[48]

A health officer can make contracts on behalf of a board of health only when he is authorized, either by action of the board or by statute, to do so. Where a physician reported a case of diphtheria to a local health officer, and was directed by him to treat other members of the family and did so, it was held by the New Hampshire Supreme Court that the physician could not recover from the town for medical

45. *Fort Wayne* v. *Rosenthal* (1881), 75 Ind. 156, 39 Am. R. 127. *Bjelland* v. *Mankato* (1910), 112 Minn. 24, 127 N.W. 397, 140 A.S.R. 460. *Gaw* v. *Ashley* (1907), 195 Mass. 173, 80 N.E. 790, 122 A.S.R. 229. *Eden* v. *Southwest Harbor* (1911), 108 Me. 489, 81 A. 1003. *Lesieur* v. *Inhabitants of Rumford* (1915), 113 Me. 317, 93 A. 838.

46. *Spearman* v. *Texarkana* (1894), 58 Ark. 348, 24 S.W. 883, 22 L.R.A. 855.

47. *Selma* v. *Mullen* (1871), 46 Ala. 411. *Schmidt* v. *Stearns County* (1885), 34 Minn. 112, 24 N.W. 358. *St. Johns* v. *Clinton County* (1897), 111 Mich. 609, 70 N.W. 131. *Hudgins* v. *Carter County* (1903), 115 Ky. 133, 72 S.W. 730, 24 Ky. L. 1980. *Cedar Creek Township* v. *Wexford County* (1903), 135 Mich. 124, 97 N.W. 409. *Buffalo Lake Board of Health* v. *Renville County* (1903), 89 Minn. 402, 95 N.W. 221. *Dewitt* v. *Mills County* (1904), 126 Ia. 169, 101 N.W. 766. *Plumb* v. *York County* (1914), 95 Neb. 655, 146 N.W. 938, Ann. Cas. 1915 D 1195.

48. *Reynolds* v. *Mt. Vernon* (1898), 50 N.Y.S. 473, 26 App. Div. 581, affirm. (1900) in 164 N.Y. 592, 58 N.E. 1091. *Sloan* v. *Peoria* (1902), 106 Ill. App. 151. *Cochran* v. *Vermillion County* (1903), 113 Ill. App. 140. *Yandell* v. *Madison County* (1902), 81 Miss. 288, 32 So. 918. *Congdon* v. *Nashua* (1904), 72 N.H. 468, 57 A. 686.

services and supplies, since the health officer lacked authority to contract for such medical services and there was no implied promise to pay.[49] On the other hand, where a board of health official requested a town physician to investigate the case of a child bitten by a dog suffering from rabies and the physician administered necessary antirabic treatment, it was held by the Supreme Judicial Court of Massachusetts that the physician could not recover for his services from the family, but if he rendered services outside the terms of his employment as town physician, he could recover from the town, since rabies was legally defined as a disease dangerous to the public health.[50] The town also had a remedy against the family if they were able to pay.

49. *Sweeney* v. *Town of Peterborough* (1929), 84 N.H. 155, 147 A. 412. *Pue* v. *Lewis and Clark County* (1926), 75 Mont. 207, 243 P. 573.

50. *Bryant* v. *Nolin* (1927), 261 Mass. 358, 158 N.E. 791.