

1963

Municipal Corporations—Tort Liability for Governmental Functions—*Holytz v. City of Milwaukee* (Wisconsin 1962)

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Recommended Citation

Merritt E. James, *Municipal Corporations—Tort Liability for Governmental Functions—Holytz v. City of Milwaukee (Wisconsin 1962)*, 42 Neb. L. Rev. 710 (1963)

Available at: <https://digitalcommons.unl.edu/nlr/vol42/iss3/7>

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MUNICIPAL CORPORATIONS—TORT LIABILITY FOR GOVERNMENTAL FUNCTIONS—*Holytz v. City of Milwaukee* (Wisconsin 1962).

I. ABROGATION OF MUNICIPAL TORT IMMUNITY

An infant was injured because of the negligent maintenance of a drinking fountain in a playground operated by the city of Milwaukee. The infant girl's father brought this action against the municipal corporation of Milwaukee for the personal injuries sustained by her, plus consequential damages resulting from such injuries. The Circuit Court of Milwaukee County sustained the city's demurrer, and the plaintiff appealed. *Held*, reversed for the plaintiff, granting recovery against the municipality for negligence in the exercise of a governmental function.¹ This decision thus overruled all Wisconsin case law which previously denied recovery against a municipal corporation for torts committed in the exercise of a governmental function.²

The opinion of the Wisconsin court is of interest and significance primarily because of the almost unanimous disapproval among legal scholars and writers of the present governmental-proprietary distinction³ (under which a municipal corporation is liable if its agent is negligent in the performance of a proprietary function, but is not liable if the negligence occurred in the performance of a governmental function). This decision may indicate the direction

¹ *Holytz v. City of Milwaukee*, 115 N.W.2d 618 (Wis. 1962). This decision does not alter the present status of an employee's or agent's liability. It merely holds that when the agent is liable, the doctrine of respondeat superior applies, thus granting liability against the municipal corporation.

² *Hayes v. City of Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760 (1873) (initiated doctrine of governmental immunity in Wisconsin).

³ Serious attention was early focused on the problem of tort immunity by a series of essays written by Professor Edwin M. Borchard. See Borchard, *Governmental Liability in Tort*, 36 YALE L. J. 1, 757, 1039 (1926-1927). For a study of the status of tort immunity in the various states see Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954). Among the more cogent criticisms of the current situation are: Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LA. L. REV. 720 (1941); Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 293, 700, 854 (1942); Price & Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 FLA. L. REV. 330 (1953); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932); Note, 12 RUTGERS L. REV. 526 (1958).

courts of other states will take in an area of the law that is ripe for judicial change.

The concept of governmental immunity had its beginning in the case of *Russel v. Men of Devon*,⁴ which held that an individual could not maintain an action against an unincorporated county for its negligent maintenance of a bridge. This decision was improperly applied to an incorporated town in an early Massachusetts case,⁵ and gained widespread acceptance from its adoption in *Bailey v. Mayor of the City of New York*.⁶ In its application the doctrine has produced some bizarre results. Recovery has been allowed or refused on the basis of distinctions inconsistent with any system of justice or logic.⁷ There is hardly a legal doctrine so universally criticized as municipal tort immunity, which is at the same time so universally followed by the courts. At the present time the courts of all but three states still grant at least partial immunity for governmental functions.⁸ Only Florida, in a 1957 decision, *Hargrove v. Town of Cocoa Beach*,⁹ and California, in a 1961 decision, *Muskopf v. Corning Hospital District*,¹⁰ have preceded the Wisconsin court in completely abolishing municipal tort immunity.

⁴ 2 T.R. 667, 100 Eng. Rep. 359 (1788).

⁵ *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812).

⁶ 3 Hill 531 (N.Y. 1842).

⁷ In Florida the courts have held maintenance of a fire department, police department, jails, and traffic signals to be governmental functions. Yet it is held that the operation of an incinerator, collection of garbage, operation of a hospital and the maintenance of streets are proprietary functions. Such distinctions hardly seem to be based on any abstract notions of justice. Cases making these distinctions respectively are: *Tallahassee v. Kaufman*, 87 Fla. 117, 100 So. 150 (1924); *Kennedy v. Daytona Beach*, 132 Fla. 675, 182 So. 228 (1938); *Williams v. City of Green Cove Springs*, 65 So. 2d 56 (Fla. 1953); *Avey v. West Palm Beach*, 152 Fla. 717, 12 So. 2d 881 (1943); *Chardkoff Junk Co. v. Tampa*, 102 Fla. 501, 135 So. 457 (1931); *Smoak v. Tampa*, 123 Fla. 716, 167 So. 528 (1936); *Miami v. Oates*, 152 Fla. 21, 10 So. 2d 721 (1942); *Ballard v. Tampa*, 124 Fla. 457, 168 So. 654 (1936).

⁸ *Leflar & Kantrowitz, Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363-1415 (1954). New York has, however, in effect abolished governmental immunity by statute. N.Y. COURT OF CLAIMS ACT § 8 (1939); *Bernadine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945). In South Carolina a municipal corporation is immune from tort liability completely, even for proprietary functions, except where liability is imposed by statute. *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911).

⁹ 96 So. 2d 130 (Fla. 1957).

¹⁰ 55 Cal. 2d 211, 359 P.2d 457 (1961).

II. SCOPE OF ABROGATION

The scope of the decision in *Holytz v. City of Milwaukee* can best be summed up by the court's own words:¹¹

[H]enceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity. In determining the tort liability of a municipality it is no longer necessary to divide its operations into those which are proprietary and those which are governmental.

On the facts of *Holytz* alone, the holding would have to be limited to a municipal corporation. However, the court, by dicta, clearly indicated that:¹²

The case at bar relates specifically to a city; however, we consider that abrogation of the doctrine applies to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state—whether they be incorporated or not. By reason of the rule of respondeat superior a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body.

Thus this court, while specifically abolishing *municipal* tort immunity only, concludes that all governmental immunity at and below the state level should be abrogated. Whether the Wisconsin courts will take the obvious step of extending the abrogation beyond municipal corporations, however, remains to be seen. This issue has not yet been decided in either Florida or California under subsequent interpretations of *Hargrove* or *Muskopf*.

Holytz also extended liability to torts, whether of commission or omission.¹³ In so doing, the court indicated that any commission-omission distinction was unjustified and as such should be disregarded.

The court did make clear, however, that its decision to abolish governmental immunity would not alter any constitutional provision preserving the state's sovereign right to be immune from suit. Nor would it impose liability on a governmental body in the exercise of its legislative, judicial, quasi-legislative, or quasi-judicial functions.¹⁴ These remaining bases of immunity are deeply ingrained within the principles of our constitution¹⁵ and tort law¹⁶

¹¹ 115 N.W.2d 618, 625 (Wis. 1962).

¹² *Id.* at 625.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Cases collected in 49 AM. JUR. STATES § 91 (1943).

¹⁶ PROSSER, TORTS § 109 at 780 (2d ed. 1955).

respectively, and are based on public policy considerations entirely different from those involved in the governmental-proprietary distinction.¹⁷ There is much confusion regarding the distinction between the procedural immunity of a state provided in its constitution and the substantive immunity municipalities and other governing bodies have acquired as a result of the governmental-proprietary distinction. The tendency of lawyers and courts to look upon them as one and the same, has led to the opinion in some cases that when a state did consent to be sued, this fact alone was evidence of its liability.¹⁸ This is clearly not the case, however. A state's act of consenting to be sued is not an admission of liability *per se*, but merely leaves a claim open for settlement by the courts.¹⁹ It is clear from *Holytz* that even after *substantive* tort immunity has been abolished, a plaintiff must still meet all the *procedural* requirements of the various state constitutions for bringing suit against a state or an agent of the state.

As the court in *Holytz* indicated,²⁰ they did not, by their holding, interpret that state's legislative provision which authorizes suit against the state in accordance with article IV, section 27 of the Wisconsin Constitution. The statute authorizing suit against the state in Wisconsin provides:²¹

Upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state by serving the summons and complaint on the attorney-general or by leaving copies at his office and by filing with the clerk of court a bond, not exceeding \$1,000, with two or more sureties, to be approved by the attorney-general, to the effect that he will indemnify the state against all costs that may accrue in such action and pay to the clerk of court all costs, in case he shall fail to obtain judgment against the state.

In spite of the broad language of the statute, the court indicated

¹⁷ *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P.2d 457 (1961). In *Muskopf* the court indicated that the governmental immunity abolished did not include any immunity based on the state's sovereign right to be free from suit as provided by article XX, § 6 of that state's constitution, and that article XX, § 6 merely provided for legislative consent for the state to be sued.

¹⁸ *Id.* at 217, 359 P.2d at 460, 461.

¹⁹ *Ibid.*

²⁰ 115 N.W.2d 618, 626 (Wis. 1962).

²¹ WIS. STAT. ANN. § 285.01 (1958); WIS. CONST. art. IV § 27 (1957) provides that the "legislature shall direct by law in what manner and in what courts suit may be brought against the state."

that in view of an old Wisconsin case²² construing the statute, there was at least some doubt that a suit could be procedurally maintained against an agent of the state. The court in *Holytz* did recognize, however, that they would subsequently have to face this issue.²³ Recognizing this fact, it would seem ludicrous for a court to overthrow a doctrine adhered to by a preponderance of jurisdictions, if it did not likewise intend to overturn an equally hard-to-justify statutory interpretation in its own jurisdiction which would completely cancel the effectiveness of its own decision.

The legislative, judicial, quasi-legislative, and quasi-judicial immunity for governing bodies which *Holytz* retains would still grant immunity to governing bodies and their officials who exercise "discretionary"²⁴ functions in the performance of their duties. This immunity would extend to such situations as the following: state legislators carrying out their legislative functions;²⁵ judges making judicial pronouncements;²⁶ a city's enforcement of an unconstitutional ordinance;²⁷ an assessor evaluating property for taxes;²⁸ acts of a prosecuting attorney in connection with an indictment;²⁹ and a school board dismissing a pupil.³⁰ All these acts are still to remain immune from liability even if done wrongfully, so long as they are performed in good faith.³¹

²² *Houston v. State*, 98 Wis. 481, 74 N.W. 111 (1898) (action cannot be maintained against the state for damages for the wrongful and tortious destruction of plaintiff's property by its officers under color of police regulations duly passed by the legislature).

²³ 115 N.W.2d 618, 626 (Wis. 1962).

²⁴ PROSSER, *TORTS* § 109 at 780-83 (2d ed. 1955).

²⁵ *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

²⁶ *Bricton v. Woodrough*, 164 F.2d 107 (8th Cir. 1947); *Fletcher v. Wheat*, 100 F.2d 432 (D.C. Cir. 1938); *Broom v. Douglass*, 175 Ala. 268, 57 So. 860 (1912); *Webb v. Fisher*, 109 Tenn. 701, 72 S.W. 110 (1903).

²⁷ *Elrod v. City of Daytona Beach*, 132 Fla. 23, 180 So. 378 (1938).

²⁸ *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530 (1890); *Stewart v. Case*, 53 Minn. 62, 54 N.W. 938 (1893); *Harmer v. Petersen*, 151 Neb. 412, 37 N.W.2d 511 (1949) (road overseer); *Fawcett v. Dole*, 67 N.H. 168, 29 Atl. 693 (1892); *Nadeau v. Marchessault*, 112 Vt. 309, 24 A.2d 352 (1942) (overseer of poor).

²⁹ *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926); *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896); *Kittler v. Kelsch*, 56 N.D. 227, 216 N.W. 898 (1927); *Watts v. Gerking*, 111 Ore. 641, 222 Pac. 318 (1924). See generally Note, 12 MINN. L. REV. 665 (1928).

³⁰ *Gibson v. Reynolds*, 172 F.2d 95 (8th Cir. 1949); *Wilson v. Hirst*, 67 Ariz. 197, 193 P.2d 461 (1948) (hospital board discharging employee); *Sweeney v. Young*, 82 N.H. 159, 131 Atl. 155 (1925).

³¹ *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163 (1880); *Rehmann v. City of Des Moines*, 204 Iowa 798, 215 N.W. 957 (1927); *Roerig v. Houghton*,

A very important question which *Holytz* seemingly leaves unresolved is whether that court has incorporated into its decision all the limitations on liability adopted by *Hargrove*, or, if not all, specifically which ones. In *Hargrove*, a case which undoubtedly served as a precedent for *Holytz*, the court limited municipal liability to direct personal injury received while the municipality's agent was acting within the scope of his employment,³² and not while engaged in the performance of an ultra vires act.³³ The language of *Holytz* definitely indicates that whatever acts are "within the course of business"³⁴ are the only acts for which the municipality will be held liable. If all the present limitations of *Hargrove* become incorporated into *Holytz*, it would mean that a tort victim could not recover either for negligence or an intentional tort if the tortious official had exceeded the authority of his office.³⁵ One Florida lower court interpreting *Hargrove* held that a policeman's intentional tort committed while on duty was ultra vires within the meaning of *Hargrove* merely because the municipal corporation did not authorize the tortious act or have authority to do so.³⁶ The most serious limitation of *Hargrove*, however, is that the lower courts in Florida have subsequently interpreted the decision to allow recovery against a municipality only when an official has been negligent in the performance of his duty, but not when he commits an intentional tort in pursuance of his duties.³⁷ Such an interpretation seems unfortunate and contradicts some very explicit language to the contrary in *Hargrove* itself.³⁸ Another Florida court held that a municipality is not liable for a policeman's

144 Minn. 231, 175 N.W. 542 (1919); State *ex rel.* Robertson v. Farmers State Bank, 162 Tenn. 499, 39 S.W.2d 281 (1931).

³² Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938).

³³ City of Miami v. Bethel, 63 So. 2d 34 (Fla. 1953); City of Orlando v. Pragg, 31 Fla. 111, 12 So. 2d 368 (1893). See generally 52 AM. JUR. TOWNS § 41 (1944).

³⁴ See note 12 *supra*.

³⁵ 96 So. 2d 130, 133 (Fla. 1957).

³⁶ City of Coral Gables v. Giblin, 127 So. 2d 914 (Fla. 1961) (policeman made illegal arrest outside city boundary, causing immediate wrongful imprisonment of plaintiff).

³⁷ Gordon v. City of Belle Glade, 132 So. 2d 449, 454 (Fla. 1961) (dictum); Middleton v. City of Fort Walton Beach, 113 So. 2d 431 (Fla. 1959).

³⁸ 96 So. 2d 130, 133 (Fla. 1957). The court stated: "Under the rule we have followed, if a police officer assaults and injures a prisoner, the municipality is immune, but if the police officer is working the prisoner on the public streets and negligently permits his injury, the municipality can be held liable. If the police officer is driving an automobile and

malicious arrest because such an act is quasi-judicial³⁹ and, therefore, specifically exempted from liability under *Hargrove*. It was even feared that the Florida courts might seize upon the "direct personal injury" language used in *Hargrove* and exclude liability for property damage.⁴⁰ However, it is clear that such an injudicious limitation as this has not been imposed upon *Hargrove*.⁴¹

The lower courts in Florida have largely disregarded the seemingly obvious intent of *Hargrove* and have limited it to as narrow a holding as the facts will allow. In addition, it seems that Florida courts may even further limit *Hargrove* by adopting strict interpretations of agency law, and by giving a liberal interpretation to acts which are to be considered legislative or judicial, and as such remain immune.⁴²

It would seem unfortunate if *Holytz* subsequently undergoes the judicial limitations which *Hargrove* experienced, but it would not be entirely unexpected in view of the judicial history of the latter case. In addition, the results achieved under *Hargrove* have in some respects closely paralleled the statutory precedent of the Federal Tort Claims Act.⁴³

III. CONSTITUTIONALITY OF MUNICIPAL TORT IMMUNITY

In jurisdictions which adhere to the doctrine of governmental immunity for municipalities there is much sentiment, if not legal pronouncement, in favor of holding such immunity unconstitu-

negligently injures a citizen, the municipality is liable but if the same officer gets out of the same automobile and wrongfully assaults a citizen, the municipality is immune from responsibility. We have mentioned these incongruities in the application of the immunization doctrine in Florida merely to justify the position which we take here, that the time has arrived to face this matter squarely in the interest of justice and place the responsibility for wrongs where it should be." Despite this language, *Hargrove* is interpreted as not granting liability for intentional torts.

³⁹ *Middleton v. City of Fort Walton Beach*, 113 So. 2d 431 (Fla. 1959).

⁴⁰ Note, 12 *RUTGERS L. REV.* 526 (1958).

⁴¹ *Hewitt v. Venable*, 109 So. 2d 185 (Fla. 1959).

⁴² *Middleton v. City of Fort Walton Beach*, 113 So. 2d 431 (Fla. 1959).

⁴³ In addition to the precedent of *Hargrove*, a court wishing to restrict the application of *Holytz* could reason by analogy from the limitations of liability imposed by statute in suits against the federal government. Cf. *FEDERAL TORT CLAIMS ACT*, 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411 2412, 2671-80 (1958); Gellhorn & Schenk, *Tort Actions Against the Federal Government*, 47 *COLUM. L. REV.* 722 (1947).

tional.⁴⁴ Challenges have usually been on the basis of state constitutional provisions⁴⁵ such as Nebraska's article I, section 13, which provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." A literal interpretation of constitutional provisions such as this would seem to demand that governmental immunity be abrogated. However, such is generally not the case. A negligent or intentional act is not always regarded as an injury or wrong in comprehension of the law, or in terms such as the constitutions comprehend. Many acts result in actual harm, but for public policy reasons the law regards them as being *damnum absque injuria*, and, in effect, they are legally injury without wrong.⁴⁶ The reasoning adopted by the Nebraska Supreme Court in a charitable immunities case, *Muller v. Methodist Hospital*,⁴⁷ would deny the possibility of holding governmental immunity unconstitutional under any state constitutional provision similar to that in Nebraska. In affirming the constitutionality of charitable immunity under article I, section 13 of the Nebraska Constitution, the court stated: ⁴⁸

This provision of the Constitution does not create any new right but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but where no right of action is given or remedy exists, under either the common law or some statute, this constitutional provision creates none.

It might be argued that this opinion ignores the plain words of the constitution. The court is in effect arguing that a tort committed by a charity is regarded as *damnum absque injuria* at common law, and that therefore it is likewise no constitutional wrong. There is no question but that a tortious act by a municipality is by definition a wrong. The question is then whether article I, section 13 comprehends actual wrongs, or only wrongs as recognized by the common law. In *Hanks v. City of Port Arthur*,⁴⁹ the only case holding governmental immunity unconstitutional, the court assumed that a municipality's tort injured the plaintiff within the meaning of a Texas constitutional provision almost identical

⁴⁴ 96 So. 2d 130, 133 (Fla. 1957).

⁴⁵ Pullen v. Eugene, 77 Ore. 320, 146 Pac. 822 (1915).

⁴⁶ PROSSER, TORTS § 109 (2d ed. 1955).

⁴⁷ 160 Neb. 279, 70 N.W.2d 86 (1955).

⁴⁸ Muller v. Methodist Hospital, 160 Neb. 279, 280, 70 N.W.2d 86, 87 (1955).

⁴⁹ 121 Tex. 196, 48 S.W.2d 944 (1932).

to Nebraska's article I, section 13. *Hanks* is probably distinguishable from *Muller v. Methodist Hospital*, however. In *Hanks* a statute created municipal liability under certain conditions, and it was the conditions of the statute which were held unconstitutional rather than the doctrine of immunity.

None of the three cases thus far abolishing governmental immunity have done so on the basis of constitutional provisions similar to Nebraska's. In *Holytz* and *Muskopf* the issue was not even raised, and in *Hargrove* it was stated that the constitutional provision "should" forbid governmental immunity,⁵⁰ but the case was not decided on that basis. Although persuasive arguments can be made to support the contention that governmental immunity is unconstitutional,⁵¹ the main value of the arguments so far has been to point out the natural repugnance of the common law system to granting such immunity. Such use of the constitutionality argument was effective in *Hargrove*. There the court stated:⁵²

If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule [of immunity] cannot be supported.

Such constitutional arguments undoubtedly add to the equities which are essential to justify a reversal on public policy grounds.

The constitutionality of governmental immunity has also been challenged occasionally on grounds that it violates both the equal protection and privileges and immunities clauses of the fourteenth amendment to the United States Constitution.⁵³ The courts have thus far upheld the doctrine's constitutionality against these challenges, however, and on the basis of *stare decisis* at least, these challenges would seem fruitless.

IV. PROSPECTIVE JUDICIAL ABROGATION

Holytz abolished the doctrine of governmental immunity prospectively effective forty days after the decision, except that the decision would apply to the litigants themselves.⁵⁴ The intent was

⁵⁰ 96 So. 2d 130, 132 (Fla. 1957).

⁵¹ See generally Note, 41 NEB. L. REV. 609 (1961). This article discusses the constitutionality, under art. I, § 13 of the Nebraska Constitution, of abolishing a common law right.

⁵² 96 So. 2d 130, 132 (Fla. 1957).

⁵³ *Stocker v. City of Nashville*, 174 Tenn. 483, 126 S.W.2d 339 (1939).

⁵⁴ 115 N.W.2d 618, 626 (Wis. 1962).

to prevent an ensuing flood of litigation resulting from claims decided under the old doctrine on which the statute of limitations had not yet run. Such a method of abolishing the doctrine seems both wise and practical and has become widely accepted.⁵⁵

In analyzing the propriety of the courts, rather than the legislature, abolishing such a well established doctrine, Judge Currie, concurring in *Holytz*,⁵⁶ indicated that the court would probably not interfere with any rule the legislature indicated should be retained. Even though the Wisconsin legislature had specifically disapproved the abrogation of governmental immunity, the Wisconsin court reasoned that the legislators may have so voted because they felt it was up to the courts to abolish a court-made rule.⁵⁷ However, many courts now merely follow the rule that they may abolish any doctrine which they have initiated.⁵⁸ Such a rule avoids the necessity of the courts having to rationalize to produce the desired result such as was done by the Wisconsin court.

V. CONCLUSION

In a society which has increasingly realized that the law should spread the burden of loss so that it can be absorbed by society generally, municipal or governmental immunity seems out of place. In most instances immunity will absolve from blame a tortious municipality or other governing body which is financially in a position to spread its losses, and impose upon an innocent victim the crushing burden of individually bearing the loss inflicted upon him by another's tort. In the analogous area of charitable immunity most jurisdictions have already seen fit to abolish the immunity myth.⁵⁹ It would seem that the same policy arguments which have

⁵⁵ See *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W.2d 292 (1961). Note also the cases and articles cited therein.

⁵⁶ 115 N.W.2d 618, 626 (Wis. 1962) (separate opinion).

⁵⁷ *Ibid.*

⁵⁸ *Malloy v. Fong*, 37 Cal. 2d 356, 234 P.2d 241 (1951); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W.2d 247 (1946); *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.W.2d 410 (1956); *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W.2d 292 (1961).

⁵⁹ *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942); *Moats v. Sisters of Charity Providence*, 13 Alaska 546 (1952); *Durney v. St. Francis Hospital*, 46 Del. 350, 83 A.2d 753 (1951); *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W.2d 247 (1946); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950). *Rodkey, A Tale of a Law in Flux*, 48 ILL. B.J. 644 (1960).

led to the widespread destruction of charitable immunity, must necessarily apply with equal force to governmental immunity. The fact that governmental bodies are ever increasing their role in the individual's daily life, makes it imperative that they be held liable for their torts. Any expansion of governmental liability is a step in the right direction, and it is submitted that the broadest possible interpretation of *Holytz* would be most consistent with justice.

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