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# COMMENTS

## LIABILITY OF WISCONSIN MUNICIPALITIES FOR NUISANCE

One of the traditionally troublesome areas of the law is that of the tort liability of municipal corporations. The confusion is probably caused by the rather artificial dichotomy between the municipality in its corporate or proprietary capacity and the municipality in its governmental capacity. When the municipality is acting in the latter capacity (or performing a governmental function) it is generally held to be immune from tort liability.<sup>1</sup> When the municipality is acting in its corporate or proprietary capacity it enjoys no special immunity. However, there is a split of authority between jurisdictions as to whether a given municipal function is corporate or governmental. For example, Wisconsin regards the maintenance of city parks and swimming pools as governmental.<sup>2</sup> Other jurisdictions regard these functions as corporate, while apparently using the same test for determining whether a function is governmental or corporate.

The importance of making the distinction was brought out in *Nemet v. City of Kenosha*.<sup>3</sup> A young man who could not swim was drowned on a municipal bathing beach when he fell into a trench dug from the beach for a waterworks intake pipe. In maintaining the bathing beach the city was acting in a governmental capacity and seemingly would not be held liable for the drowning of a person using the beach. However, in furnishing water to private consumers the city was acting in its proprietary capacity. The construction of this excavation, without giving notice of the existing danger, was held to constitute a nuisance, and the city was thus liable for the drowning caused thereby.

Another reason for confusion in the area of municipal tort liability is the attempt by the courts to circumvent the doctrine of governmental immunity of municipalities.<sup>4</sup>

It is the purpose of this article to consider one area of tort law which has made somewhat of an inroad upon the doctrine of municipal immunity—nuisance. An attempt will be made to demonstrate the present status of Wisconsin law concerning the liability

<sup>1</sup> 18 McQUILLAN, MUNICIPAL CORPORATIONS, §53.24.

<sup>2</sup> *Skiris v. Port Washington*, 223 Wis. 51, 269 N.W. 556 (1936); *Bernstein v. City of Milwaukee*, 158 Wis. 576, 149 N.W. 381 (1914); *Hoepner v. City of Eau Claire*, 264 Wis. 608, 60 N.W. 2d 392 (1953).

<sup>3</sup> 169 Wis. 379, 172 N.W. 711 (1919).

<sup>4</sup> "The whole matter of municipal liability for torts is in such confusion and uncertainty due to the efforts of the courts to limit what has been called 'the state's lordly prerogative of wrongdoing' that it may well be given consideration by the legislature." *Lindemeyer v. City of Milwaukee*, 241 Wis. 637, 644, 6 N.W. 2d 653 (1942).

of municipalities for nuisance, how it has developed, and possible trends in the area as evidenced by recent decisions. It is recognized that there is particular difficulty in proving the existence of a nuisance, but one of the ends of this article will be to show the advantages of taking the increased burden, in the appropriate case, of proving the existence of nuisance as the causal factor in an action against a municipal corporation.

This discussion will presuppose the existence of a nuisance created or maintained by the municipality and consider under what circumstances the municipality may be held liable in Wisconsin. As a basis for discussion a definition of nuisance approved by the Supreme Court of Wisconsin will be used:

As commonly used, it [nuisance] connotes a condition or activity which unduly interferes with the use of land or of a public place. Conduct which interferes solely with the use of a relatively small area of private land is tortious but not criminal and is called a private nuisance. Conduct which interferes with the use of a public place or with activities of an entire community is called a public nuisance. This is criminal, and is also tortious to those persons who are specially harmed by it.<sup>5</sup>

The nuisance itself is the condition or activity achieved; it can be prompted by conduct of municipal employees which may be either negligent or intentional,<sup>6</sup> and there are situations where there can be liability regardless of negligence or intent.<sup>7</sup>

Wisconsin adheres to the common law rule that a municipality is immune from liability for negligence in the performance of a governmental function. However, where that negligence precipitates a nuisance in fact, which causes damage, the municipality will not always enjoy immunity. In considering whether a municipality should be immune from liability for nuisance in a given situation, the Wisconsin Court appears to make no distinction between so-called private nuisance and special harm from a public nuisance. The court has excluded "attractive nuisance" from the legal concept of nuisance in fact; it is more properly a phase of negligence.<sup>8</sup>

## I. DEVELOPMENT OF NUISANCE LIABILITY OF WISCONSIN MUNICIPALITIES

### A. Governor to governed relationship

Although Wisconsin has held to the common law doctrine of

<sup>5</sup> *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 545, 78 N.W. 2d 580 (1956); also quoted in part in: *Hartung v. Milwaukee County*, 2 Wis. 2d 269, 284, 87 N.W. 2d 799 (1957); *Krejci v. Lojeski*, 275 Wis. 20, 24, 80 N.W. 2d 794 (1957).

<sup>6</sup> *Schiro v. Oriental Realty Co.*, *supra* note 5.

<sup>7</sup> *Winchell v. City of Waukesha*, 110 Wis. 101, 85 N.W. 668 (1901); *Hasslinger v. Cillage of Hartland*, 234 Wis. 201, 290 N.W. 647 (1940); *Briggson v. City of Viroqua*, 264 Wis. 47, 58 N.W. 2d 546 (1953).

<sup>8</sup> *Flamingo v. City of Waukesha*, 262 Wis. 219, 55 N.W. 2d 24 (1952).

municipal immunity from tort liability when the municipality is acting in a governmental capacity, broad language in several early cases indicated that there could be no immunity where the municipality had created or maintained a nuisance.<sup>9</sup> In *Harper v. City of Milwaukee*<sup>10</sup> an agent of the city blocked the flow of water along a gutter causing the water to back up and flood the plaintiff's cellar. The blocked gutter was held to constitute a nuisance, and the city was liable for damages caused by it.

[A] municipal corporation has no more right to erect and maintain a nuisance than a private individual.<sup>11</sup>

Other cases have indicated as follows :

A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual.<sup>12</sup>

When a city creates a nuisance, it is not exercising a governmental function, but it is doing something forbidden by law.<sup>13</sup>

It has been decided many times in this court that negligence in the performance of a governmental function by the officers or agents of a municipality does not give a right of action. . . . The exception to this rule is that a municipality may not maintain a public nuisance even where it is performing a public duty.<sup>14</sup>

However, in *Folk v. City of Milwaukee*<sup>15</sup> the court stated that the municipality can be liable only if it were acting in a proprietary relation to the person injured. In that case a child attending school became sickened by escaping gases from a defective sewer under the school building and allegedly died therefrom. The court held that the city was immune without deciding whether the condition which caused the injury amounted to a nuisance. In *Erickson v. Village of West Salem*<sup>16</sup> a child was playing in a village park at a pool of water formed from the overflow of a drainage ditch which passed through

<sup>9</sup> *Harper v. City of Milwaukee*, 30 Wis. 365 (1872); *Gilluly v. City of Madison*, 63 Wis. 518, 24 N.W. 137 (1885); *Hughes v. City of Fond du Lac*, 73 Wis. 380, 41 N.W. 407 (1889); *Jensen v. Town of Oconto Falls*, 186 Wis. 386, 202 N.W. 676 (1925).

<sup>10</sup> 30 Wis. 365 (1872).

<sup>11</sup> *Id.* at 372.

<sup>12</sup> *Hughes v. City of Fond du Lac*, 73 Wis. 380, 383, 41 N.W. 407 (1889). The case involved a public nuisance. A roller, "an unsightly object, naturally calculated to frighten horses," was left standing in the street overnight. The city was held liable for injury caused when the fright of his horse caused the plaintiff to be thrown from his carriage.

<sup>13</sup> *Bruhne v. La Crosse*, 155 Wis. 485, 488, 144 N.W. 1100 (1914). The city's operation of a wagon with a dumping device which made it attractive to children did not constitute a nuisance in fact.

<sup>14</sup> *Bernstein v. City of Milwaukee*, 158 Wis. 576, 578, 149 N.W. 381 (1914). Nuisance was not involved in this case.

<sup>15</sup> 108 Wis. 359, 84 N.W. 420 (1900).

<sup>16</sup> 205 Wis. 107, 236 N.W. 579 (1931).

the park. He slipped in and was drowned. The plaintiff, the child's father, contended that there was an exception to the non-liability of municipalities in the case of nuisance and that municipalities are liable for damages caused by the creation or maintenance of nuisances, whether in the performance of governmental or proprietary functions, to the same extent as private individuals. The court decided to the contrary. It recognized the broad language of the earlier cases, but held that such language should have no broader application than the facts of the cases in which they appeared. Upon analyzing these facts the court concluded that they involved municipal activity which was either unlawful, or performed in a proprietary capacity.

In *Virovatz v. City of Cudahy*<sup>17</sup> it was expressly decided that a municipality could not be held liable for maintaining a nuisance in a case where its relation to the injured person was that of governor to governed. The city maintained a public swimming pond in which there was some sort of hidden hole or trap. The court found that this condition constituted a nuisance to those swimming there. However, the city could not be held liable for a drowning caused by the existence of the nuisance. The child who was drowned was availing himself of the facility provided by the city at the time of injury; the relationship was that of governor to governed. The court held that where the relationship of the municipality to the person injured is that of governor to governed, the former is immune from liability, even though the injury was caused by a nuisance maintained by the municipality. Language to the contrary in earlier cases was overruled as dicta.

On the other hand, a case soon arose in which the municipal function was governmental, but the relationship was not that of governor to governed. (The court sometimes uses the term "governor and governed.") The leading case holding that the municipality could be liable in such a situation was *Robb v. City of Milwaukee*.<sup>18</sup> Here a pedestrian walking past a public park was struck by a ball. The closeness of the ball field to the sidewalk without a sufficient protective fence was found to have constituted a continuing danger, a nuisance, to persons walking past the park. The majority held that since the plaintiff was not availing herself of the park facilities at the time she was injured, her relationship to the municipality was not that of governor to governed. The city was held liable. It is interesting to note that the court found not only that there was no governor and governed relationship, but also that the relationship

<sup>17</sup> 211 Wis. 357, 247 N.W. 341 (1933).

<sup>18</sup> 241 Wis. 432, 6 N.W. 2d 653 (1942).

<sup>19</sup> *Holl v. City of Merrill*, 251 Wis. 203, 28 N.W. 2d 363 (1947).

was akin to that of proprietor to proprietor. In the *Folk* case, which apparently first gave rise to this limitation on nuisance liability, the court suggested that the municipality could be liable only when its relation to the person injured was proprietor to proprietor. In this case the court seemed to say that if the relationship is not that of governor to governed, it is that of proprietor to proprietor.

The *Robb* case was cited as precedent for holding a county liable to a pedestrian who was injured when she stumbled over a defect in the sidewalk next to the county jail. The county was not in a governor to governed relationship to the injured plaintiff since she, of course, was not using the jail at the time. The county was no more immune from liability for the injury than any other landowner. Later decisions have limited these two cases by noting that there must be a continuing and obvious hazard in order to find liability on the part of the municipality.<sup>20</sup>

B. Proprietor to proprietor relationship

While this rule (that a municipality would be immune from liability for creating or maintaining a nuisance where the relationship between the parties is governor to governed) was evolving, the rule of liability of the municipality where the relationship was proprietor to proprietor appears to have remained steadfast. In the latter instance, maintenance of a nuisance which causes damage to a party to whom a city was acting as one proprietor to another, will result in liability. In a case where a city, as it graded the street, pushed earth onto the plaintiff's premises, the city was held liable for the damages.<sup>22</sup>

That work was done in an improper or negligent manner, so as to invade the rights of the plaintiffs, not as members of the public, but as adjoining proprietors. Toward them the city's act was not governmental, but proprietary.<sup>23</sup>

It seems that even if the municipal function is generally considered governmental in character, it may be deemed proprietary if the party plaintiff has an obvious proprietary status.<sup>24</sup> When a municipality takes charge of land, as in maintaining streets and highways,<sup>25</sup> sewage disposal plants and dumps,<sup>26</sup> city parks and

<sup>20</sup> *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W. 2d 279 (1957).

<sup>21</sup> "The doctrine of liability of a municipal corporation in cases where the relation is that of one proprietor to another is so well entrenched in the jurisprudence of the state that it cannot be disturbed." *Young v. Juneau County*, 192 Wis. 646, 652, 212 N.W. 295 (1927).

<sup>22</sup> *Bunker v. City of Hudson*, 122 Wis. 43, 99 N.W. 448 (1904).

<sup>23</sup> *Id.* at 54.

<sup>24</sup> *Winchell v. The City of Waukesha*, 110 Wis. 101, 85 N.W. 668 (1901); *Young v. Juneau County*, 192 Wis. 646, 212 N.W. 295 (1927).

<sup>25</sup> *Matson v. Dane County*, 172 Wis. 522, 179 N.W. 774 (1920); *Stockstad v. Town of Rutland*, 8 Wis. 2d 528, 99 N.W. 2d 813 (1959).

stadiums,<sup>27</sup> it is considered to be performing a governmental function, at least in Wisconsin. But if these activities create a nuisance causing damage to neighboring landowners, as to those landowners, the function is considered proprietary. The municipality is then considered in the same position as a landowner with respect to possible liability. Of course it is held to no higher standard than another landowner; for example, a town has the same right to divert the natural flow of mere surface water as owners of private property. There will be no liability for building a structure which causes surface water to back up onto the land of a neighbor.<sup>28</sup>

Some states have limited the nuisance exception to municipal common law immunity by applying liability only for injuries to real property.<sup>29</sup> Wisconsin, however, has not adopted such a limitation. Once the existence of the nuisance and the proper relationship to the municipality has been established, a municipality could be held liable for any type of injury caused by the nuisance.<sup>30</sup> Thus, in cases where the negligent construction of a culvert has caused water to back up on adjoining land, the municipality has been held liable for drownings in a pool thereby formed on an adjoining farm,<sup>31</sup> or for illness from drinking from a well contaminated by the backed up water.<sup>32</sup>

In *Thompson v. City of Eau Claire*<sup>33</sup> the court expressed quite clearly just what is encompassed within the term "proprietor to proprietor relationship":

When speaking of the relationship of proprietor to proprietor the courts are referring to proprietors of land. Generally the rule applied between adjoining landowners. The word "proprietors" is sufficiently broad to include owners and others with a definite interest in the land that is less than that of owner. The word "adjoining" is not limited to abutting lands but also covers adjacent or neighboring lands.<sup>34</sup>

## II. RECENT REFINEMENT OF THE CONCEPT OF "GOVERNOR TO GOVERNED RELATIONSHIP"

The last mentioned case<sup>35</sup> poses an interesting problem. The city was found to have maintained a nuisance because of the condition of the city dump. When fire spread from the dump and destroyed

<sup>26</sup> *Briggson v. City of Viroqua*, 264 Wis. 47, 58 N.W. 2d 546 (1953); *Thompson v. City of Eau Claire*, 269 Wis. 76, 69 N.W. 2d 237, 24 A.L.R. 2d 241 (1955).

<sup>27</sup> *Hoepner v. City of Eau Claire*, 264 Wis. 608, 60 N.W. 2d 392 (1953); *Blake v. City of Madison*, 237 Wis. 498, 297 N.W. 422 (1941).

<sup>28</sup> *Lloyd v. Chippewa County*, 265 Wis. 293, 61 N.W. 2d 479 (1953).

<sup>29</sup> *Cf. City of Decatur v. Parkham*, 268 Ala. 585, 109 So. 2d 692 (1959).

<sup>30</sup> *Supra* note 25.

<sup>31</sup> *Matson v. Dane County*, *supra* note 25.

<sup>32</sup> *Stockstad v. Town of Rutland*, *supra* note 25.

<sup>33</sup> 269 Wis. 76, 69 N.W. 2d 237, 24 A.L.R. 2d 241 (1955).

<sup>34</sup> *Id.* at 82.

<sup>35</sup> *Thompson v. City of Eau Claire*, *supra* note 26.

the plaintiff's nearby home, the city was held liable. The plaintiff did not live within the city limits, but his own rubbish collector refused his refuse at the city dump. Problem—what would be the result if there was found to be both a proprietor to proprietor relationship and at the same time a governor to governed relationship between the city and the injured party? To answer the problem it would seem best to note how recent decisions have defined the concept of the “governor to governed relationship.”

The relationship exists where the injured party at the *time* of injury was “enjoying the benefit of a particular governmental activity which resulted in the injury”<sup>36</sup> or was “using the public facility for the purpose for which it is intended.”<sup>37</sup> The person drowned while swimming in a municipal pool,<sup>38</sup> or the person injured while playing ball in a city park,<sup>39</sup> or the person injured while sliding down a municipal toboggan slide<sup>40</sup> is making use of the facility at the *time* of injury and is therefore in a relationship of governed to governor to the municipality. In a recent case where a child playing on the sidewalk was burned by a kerosene warning lantern set out to mark a defect in the sidewalk,<sup>41</sup> the court did not have to decide whether leaving the lanterns burning in broad daylight constituted a nuisance. The city was in a governor to governed relationship to the little girl because she was using the sidewalk for one of the purposes intended. The nuisance, if any, was brought about by the manner in which the sidewalk was maintained. A pedestrian injured by some defect in the street is in the relation of governed to governor.<sup>42</sup> But if the injury to the pedestrian is caused by some nuisance other than a defect in the street, and the pedestrian is not making use of the service or facility which brought about the nuisance, as in the *Robb* case, then the relationship is not that of governor and governed. The use of the municipal facility which caused the injury at the time of injury is the “nexus” necessary to establish the relation of governor to governed.<sup>43</sup> Children playing at a municipal-maintained place or on municipal-owned machinery, neither of which were ever intended as places of play, are not in such relationship.<sup>44</sup>

<sup>36</sup> *Flamingo v. City of Waukesha*, 262 Wis. 219, 226, 55 N.W. 2d 24 (1952).

<sup>37</sup> *Hoepner, v. City of Eau Claire*, *supra* note 27.

<sup>38</sup> *Virovatz v. City of Cudahy*, 211 Wis. 357, 247 N.W. 341 (1933).

<sup>39</sup> *Supra* note 37.

<sup>40</sup> *Pohland v. City of Sheboygan*, 251 Wis. 20, 27 N.W. 2d 736 (1947).

<sup>41</sup> *Smith v. City of Jefferson*, 8 Wis. 2d 378, 99 N.W. 2d 119 (1959).

<sup>42</sup> *Laffey v. City of Milwaukee*, 4 Wis. 2d 111, 89 N.W. 2d 801 (1958).

<sup>43</sup> *Supra* note 18.

<sup>44</sup> The child injured while playing on a municipal road grader which has been parked in a vacant lot for the night, *Britten v. City of Eau Claire*, 260 Wis. 382, 51 N.W. 2d (1951), or on a mound of snow piled up from the plowing of city streets, *Flamingo v. City of Waukesha*, 262 Wis. 219, 55 N.W. 2d (1952), or in a village dump, *Champeau v. Village of Little Chute*, 275 Wis.



The court does not speak in terms of incidental benefit from the facility, but of specific benefit derived from the use of the municipal facility at the time of injury. There seem to be two requisites to the finding of a governor to governed relationship:

1. the injured party must have been making use of the municipal facility at the time of injury.
2. the particular facility must be the one out of which arose the nuisance which caused the injury.

From time to time the court has expressed the opinion that the distinction is rather arbitrary, and that it could lead to unjust results.<sup>45</sup> However, it is still the law. Several cases have stated that any change must be made by the legislature.<sup>46</sup>

The problem posed at the beginning of this section cannot arise. The municipality cannot be in a proprietor to proprietor and at the same time a governor to governed relationship with the injured party. If the injured party is making use of the facility which caused the injury at the time of injury, he is injured as one of the governed. The fact that he may also be in a relationship of proprietor to proprietor to the municipality for other purposes is immaterial.

### III. MUNICIPAL LIABILITY WHEN THERE IS NO IMMUNITY

#### A. Causation

Once it has been determined that the municipality is not immune from liability in a particular fact situation, liability does not follow by merely showing the existence of a nuisance maintained by the municipality and damages. Causation must still be proven. In *Champeau v. Village of Little Chute*<sup>47</sup> the condition of the village dump, (in which a boy was burned while setting fire to discarded fuel) might easily have been found to constitute a nuisance. It frequently caught fire; litter and unpleasant odors spread to surrounding private property; and it was a haven for rats and flies. However, the relationship between the village and the boy who was playing there was not governor to governed and the village was not liable.

We consider that the "nuisance exception" to the general rule which exempts municipalities from liability for injuries caused by their negligence in the performance of governmental functions demands a showing not only that a nuisance was created, but that those acts or defaults which caused the

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257, 81 N.W. 2d 562 (1957), is not using the facility for the purpose for which it was intended, and is therefore not in a governor to governed relationship with the municipality.

<sup>45</sup> *Britten v. City of Eau Claire*, 260 Wis. 382, 51 N.W. 2d 30 (1951); *Young v. Juneau County*, 192 Wis. 646, 212 N.W. 295 (1927).

<sup>46</sup> *Apfelbacher v. State*, 160 Wis. 565, 152 N.W. 144 (1915); *Erickson v. Village of West Salem*, 205 Wis. 107, 236 N.W. 579 (1931).

<sup>47</sup> 275 Wis. 257, 81 N.W. 2d 562 (1957).

nuisance to exist also had a causal connection with the injury complained of.<sup>48</sup>

Abatement of the above conditions would not have prevented this injury.

#### B. Defenses

A nuisance can be created and maintained by conduct which is either intentional or negligent. Since it appears (at least to this writer) the most, if not all public nuisances created or maintained by a municipality arise by reason of negligent conduct, the question of affirmative defenses takes on considerable importance.

In a case involving an individual defendant, the Wisconsin Court has held that contributory negligence is a defense to an action based on nuisance where the conduct creating it was negligent.<sup>49</sup> The court borrowed the reasoning from a New York decision<sup>50</sup> in which Justice Cardozza determined that whenever a nuisance has its origin in negligence the person injured should not be allowed to avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of "nuisance." The plaintiff could have brought his action in either negligence or nuisance. "It would be intolerable if the choice of a name were to condition liability."<sup>51</sup> The particular case involved a question of the liability of a municipality for damages caused when plaintiff was injured by falling on a defective sidewalk.

The rule in Wisconsin then is that an individual defendant has available the same affirmative defenses (e.g., contributory negligence, assumption of risk) to an action for nuisance created or maintained by negligent conduct as he would have to an action for negligence alone.<sup>52</sup> Although the question has never been decided in Wisconsin, there seems to be no logical reason why these defenses should not be available to the municipality in an action for damages caused by a nuisance occasioned by the negligent conduct of municipal employees.<sup>53</sup>

It might be noted that the Wisconsin court, through Justice Wingert, has called nuisance little more than a label,<sup>54</sup> a name to be used after it has been determined upon the facts that there should be liability.<sup>55</sup> Yet the court has held that the concept of nuisance

<sup>48</sup> *Id.* at 260.

<sup>49</sup> *Schiro v. Oriental Realty Co.*, *supra* note 5.

<sup>50</sup> *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928).

<sup>51</sup> *Id.* at 392.

<sup>52</sup> *Supra* note 49.

<sup>53</sup> Although in *Thompson v. City of Eau Claire*, *supra* note 35, Justice Broadfoot noted that if negligence were a factor in that action against a municipality, there was no evidence of contributory negligence.

<sup>54</sup> *Bratonja v. City of Milwaukee*, 3 Wis. 2d 120, 87 N.W. 2d 775 (1958).

<sup>55</sup> *Wisconsin Power and Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W. 2d 279 (1957).

has enough substance to be distinguishable from negligence,<sup>56</sup> and the choice of bringing an action in nuisance rather than in negligence can, as noted above, be the determining factor for deciding whether the municipality should enjoy governmental immunity.

#### IV. WISCONSIN STATUTES

There are some situations in which the legislature has stepped in to provide a statutory remedy where the injured party might otherwise have sought his remedy in nuisance. A person injured on a public highway has been provided a remedy by Wisconsin Statute section 81.15 (1959) which imposes liability for tort upon any town, city, village or county for "insufficiency and want of repair" of their highways. The section has been construed to cover streets and sidewalks as well as "highways."<sup>57</sup> Since the statute is in derogation of common law governmental immunity it is strictly construed; the test of liability is whether the highway was "insufficient" or in "want of repair" within the meaning of the statute.<sup>58</sup> The statute is not applicable where the injury was occasioned by the active negligence of a municipal employee, for instance, where a bridge tender raises a drawbridge without warning those on or approaching the bridge.<sup>59</sup> Contributory negligence and comparative negligence apply to an action under section 81.15 since it is in legal contemplation an action for negligence.<sup>60</sup>

On several occasions after determining that the municipality is immune from liability for nuisance, the court has remanded the case suggesting that there might be liability under this section.<sup>61</sup> The remedy is available only to those who are using the highway or sidewalk for the purpose of travel when injured. The definition of "traveler" has been construed as broadly for the purposes of the statute as the term has been construed in those cases finding a governor to governed relationship blocking nuisance liability. For example, a child playing on the sidewalk is a "traveler."<sup>62</sup>

It has been held that the liability of a municipality for injuries sustained by reason of defects in streets or public sidewalks is solely statutory under section 81.15 for insufficiency and want of repair.

<sup>56</sup> *Bell v. Gray-Robinson Construction Co.*, 265 Wis. 652, 62 N.W. 2d 390 (1953).

<sup>57</sup> *Smith v. City of Jefferson*, 8 Wis. 2d 378, 99 N.W. 2d 119 (1959); *Francke v. City of West Bend*, 12 Wis. 2d 574, —N.W. 2d— (1961).

<sup>58</sup> *Morley v. City of Reedsburg*, 211 Wis. 504, 248 N.W. 431 (1933).

<sup>59</sup> *Bremer v. City of Milwaukee*, 166 Wis. 164, 164 N.W. 840 (1917).

<sup>60</sup> *Hales v. City of Wauwatosa*, 275 Wis. 445, 82 N.W. 2d 301 (1957).

<sup>61</sup> *Smith v. City of Jefferson*, 8 Wis. 2d 378, 99 N.W. 2d 119 (1959); *Francke v. City of West Bend*, 12 Wis. 2d 574, —N.W. 2d— (1961). In this last case the plaintiff fell into an unmarked open manhole, but his action in nuisance was blocked because of the governor to governed relationship. In *Ziegler v. City of West Bend*, 102 Wis. 17, 78 N.W. 164 (1899) an improperly fitted cover slipped off the manhole as the plaintiff stepped on it and he fell into it.

<sup>62</sup> *Supra* note 41.

Where the defect was held not substantial enough to constitute an insufficiency or want of repair under this statute, it was held that it could not logically amount to a nuisance.<sup>63</sup>

The Wisconsin Safe Place Statute<sup>64</sup> has eliminated the immunity doctrine so far as "public structures" and "places of employment" of municipal corporations are concerned.<sup>65</sup>

#### V. CONCLUSION

Wisconsin apparently considers that nuisance liability stands as an exception to the doctrine of tort immunity of municipalities, as do the majority of jurisdictions.<sup>66</sup> The Wisconsin court has set up a rather unique qualification to this exception. If the relationship between the municipality and the person injured was that of governor to governed at the time of injury, the nuisance will not be an exception to immunity. It thus becomes necessary to determine the character not only of the function of the municipality (i.e., capacity in which it was acting), but also of the relationship between the municipality and the party injured.

In analyzing a fact situation to determine whether the municipality will be immune from liability for damages caused by nuisance the following results will occur :

1. If it was a corporate or proprietary function of the municipality which occasioned the nuisance, the municipality will not be immune from liability.
2. Even if the function is generally considered governmental in character, as to one in a proprietor to proprietor relationship with the municipality, it will be regarded as a proprietary function. The municipality will not be immune.
3. If the function is governmental in character, but there is no governor to governed relationship between the municipality and the injured party, there is no immunity.
4. If the function is governmental and the relationship is that of governor to governed, the municipality is immune from liability.

As the law stands today, in an action for damages against a municipality there is an advantage in showing that the injury was caused by a nuisance. One alleging only negligence will find himself blocked by the doctrine of municipal immunity. But if it can be shown that the negligence resulted in a nuisance which caused the damage, the problem of municipal immunity might be overcome. It is only in the case of a governor to governed relationship between

<sup>63</sup> *Lindemeyer v. City of Milwaukee*, 241 Wis. 637, 6 N.W. 2d 653 (1942).

<sup>64</sup> Wis. Stat. §§101.01, 101.06 (1959).

<sup>65</sup> *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922 (1937); *Flesch v. City of Lancaster*, 264 Wis. 234, 58 N.W. 2d 710 (1953).

<sup>66</sup> Annot., 56 A.L.R. 2d 1415 (1957).

the municipality and the plaintiff that the immunity doctrine continues to pose a problem to an action based on nuisance.

It could be argued that even this last stronghold of municipal immunity should be dropped in actions based on nuisance. The distinction based upon the relationship of the parties at the time of injury is arbitrary, and as has been pointed out by the court itself, could lead to absurd and unjust results.<sup>67</sup>

If a city creates or maintains a condition that is dangerous to children, what logical reason is there for holding that the municipality is immune in those cases where children should be expected to be present, when it is not immune in unexpected situations? The city should expect that children will play in a city park<sup>68</sup> or on a public sidewalk,<sup>69</sup> yet if the dangerous condition occurs in these places the relationship is that of governor to governed. But children are not expected to play on unattended road graders,<sup>70</sup> or in the village dump,<sup>71</sup> or at dangerous conditions on their own property.<sup>72</sup> Yet in the latter case there is no immunity. A dangerous condition which arises because of the manner in which a city park is maintained cannot be the basis of liability for one using park facilities.<sup>73</sup> It can be, if the person injured was not using the park at the time of injury.<sup>74</sup>

It should be noted that a "governor to governed relationship" could be covering a defense of assumption of risk in many cases where the nuisance arose because of negligent conduct. But if there

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<sup>67</sup> In *Young v. Juneau County*, 192 Wis. 646, 212 N.W. 295 (1927) Justice Rosenberg recognized that a rule of non-liability where the relation is governor to governed and liability where the relationship is that of one proprietor to another might lead to "devious" results if pushed to the extreme. He gave his famous example of the burning haystacks: If sparks from highway equipment should ignite a haystack in a neighboring field there could be liability, but if the haystack is placed on a wagon being drawn along the highway there can be on a wagon being drawn along the highway there can be no liability. A more shocking and actual example of resulting inconsistency is seen in the comparison of *Matson v. Dane County*, *supra* note 25, where there was liability for drownings caused by a pool of water negligently allowed to form on a neighboring farm and become a nuisance, while in the case where the pool formed in a city park where children were expected to play and maintenance of the nuisance created a specific hazard to them, there could be no liability for the drowning of a child playing there. *Erickson v. Village of West Salem*, *supra* note 16. In *Britten v. City of Eau Claire*, *supra* note 45, a case involving attractive nuisance, the court stated that the doctrine of municipal immunity rested on a weak foundation but hesitated to abandon it because of its long standing. By simply determining that the city, in leaving a road grader in an empty lot, was acting in a proprietary capacity, there being no precedent to the contrary, the court sidestepped the immunity doctrine. Such *ad hoc* determinations have been the cause of the confusion in the area of municipal tort liability.

<sup>68</sup> *Supra* note 37.

<sup>69</sup> *Supra* note 41.

<sup>70</sup> *Britten v. City of Eau Claire*, *supra* note 45.

<sup>71</sup> *Champeau v. Village of Little Chute*, 275 Wis. 257, 81 N.W. 2d 562 (1956).

<sup>72</sup> *Matson v. Dane County*, *supra* note 25.

<sup>73</sup> *Supra* note 37.

<sup>74</sup> *Robb v. City of Milwaukee*, *supra* note 18.

is such a defense it can be proven; it need not be protected under a blanket of municipal immunity.

Several recent decisions from other jurisdictions indicate that the doctrine of tort immunity of municipalities is weakening. At least three jurisdictions have dropped municipal immunity.<sup>75</sup> The Illinois court considered that it had the power to drop the doctrine of municipal immunity, apparently on the belief that it was not part of the common law. A vigorous dissent was based upon a legislative act which made the common law the law of the state. Although the Wisconsin court has repeatedly spoken against the doctrine of municipal tort immunity, it has always concluded that the legislature alone has power to change the rule.<sup>76</sup>

The Wisconsin court recently dropped the doctrine of charitable immunity, at least in cases where a paying patient is seeking recovery for negligence.<sup>77</sup> However, before making the decision the court pointed out that the doctrine was court made and therefore could be changed by the court. The tort immunity of municipal corporations perhaps rests on firmer ground. If it was accepted as part of the common law, then the Wisconsin constitution may prevent its change by the court.<sup>78</sup>

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<sup>75</sup> *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957). The Florida court recognized the incongruities and confusion caused by the attempt to "prune and pare the rule of immunity rather than uproot it." It was held that a municipality could be held liable for wrongful death caused by the negligence of a city jailor. California has dropped immunity of at least quasi-municipal corporations, hospital districts, in *Muskopf v. Corning Hospital District*, — Cal. — 359 P.2d 457 (1961). Illinois dropped the rule as to municipal corporations in *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959). These courts faced most of the arguments which the Wisconsin Court would encounter in considering whether to drop municipal immunity: the archaic rule of sovereign immunity, that the rule is part of the common law and may only be changed by the legislature, that previous cases have said any change must come from the legislature, that the legislature has abrogated immunity for certain situations thereby indicating an intent to keep it for all other cases, and that the rule has been too long standing to be dropped.

<sup>76</sup> *Supra* note 45.

<sup>77</sup> *Kojis v. Doctors Hospital*, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961). In a supplemental opinion the court made it clear that the ruling was made prospective from the date of filing of the decision except as to that immediate case.

<sup>78</sup> Wis. Const. Art. XIV, sec. 13.