

## MUNICIPAL TORT LIABILITY: AN ABANDONMENT OF SOVEREIGN IMMUNITY

**H**ISTORICALLY, a municipal corporation was subject in all respects to the same tort liability as any private corporation.<sup>1</sup> But in 1842, in *Bailey v. New York*,<sup>2</sup> the court indicated that the defendant city would not have been liable had it been performing a "governmental" rather than a "proprietary" function, thus establishing a dichotomy which has persisted for over one hundred years<sup>3</sup> and which, although criticized as

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<sup>1</sup> *People v. Albany*, 11 Wend. 539, (N.Y. 1834); *Martin v. Brooklyn*, 1 Hill 545 (N.Y. 1844). See also RHYNE, *MUNICIPAL LAW* §§ 30, 31 (1957). *Contra*, *Mower v. Leicester*, 9 Mass. 247 (1812); *Riddle v. Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. 169 (1810).

When a municipality is acting in a governmental or public capacity, or fulfilling the state's functions, it generally enjoys the same immunity as the states. However, this immunity does not apply to its liability for failure to perform certain statutory or common law duties, as keeping streets and highways committed to its care in a reasonably safe condition. Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97, 100 (1932).

<sup>2</sup> 3 Hill 531 (N.Y. 1842).

<sup>3</sup> As to the dual character of the municipal corporation, see *New York v. United States*, 326 U.S. 572 (1946); *Krantz v. City of Hutchinson*, 165 Kan. 449, 196 P.2d 227 (1948); *Wold v. City of Portland*, 166 Ore. 455, 112 P.2d 469 (1941); *Memphis Power and Light Co. v. City of Memphis*, 172 Tenn. 346, 112 S.W.2d 817 (1937); *Hagerman v. City of Seattle*, 189 Wash. 694, 66 P.2d 1152 (1937); *Loeb v. City of Jacksonville*, 101 Fla. 429, 134 So. 205 (1931).

The municipality, acting as a public agency, is a subdivision of the state, endowed with governmental powers and charged with governmental functions and responsibilities. *City of High Point v. Duke Power Co.*, 120 F.2d 866 (4th Cir. 1941); *Department of Treasury v. City of Evansville*, 223 Ind. 435, 60 N.E.2d 952 (1945). Acting as a corporate body, it is capable of the same acts as a private corporation. *City of Beewood v. Interstate Bridge Co.*, 30 F. Supp. 952 (D.C. W. Va. 1940); *Board of Councilmen of City of Frankfort v. White*, 224 Ky. 570, 6 S.W.2d 699 (1928).

The courts have attempted to distinguish between governmental and corporate functions, holding that in so far as a municipality attempts to represent the state in its governmental or public capacity, it is immune from tort liability, and when acting in its corporate or proprietary capacity it may be liable in tort. See generally, 18 McQUILLIN, *MUNICIPAL CORPORATIONS* § 53.01 (3d ed. 1950); Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1925); Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937). For a recent case applying the classification test, see *City and County of Denver v. Austria*, 318 P.2d 1101 (Colo. 1957) where

illogical,<sup>4</sup> has been accepted with occasional minor refinement in many

the erection of a fence across the steps of a municipal building while removing Christmas decorations was said to be proprietary.

While the bifurcation of the municipal entity springs from the *Bailey* case, the principle of the immunity of the sovereign adhering to a lesser unit of the governmental structure finds its immediate judicial origin in *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (1788), an early English case decided on rather questionable grounds. In that case an unincorporated county was held immune from responsibility for an injury arising out of a defective bridge because it had no corporate funds or the means of obtaining them, and it seemed impracticable to permit judgment to be satisfied out of the assets of a few individuals.

The idea of governmental immunity in this country appears to have been worked out first in New England, where the Massachusetts court, in *Mower v. Leicester*, 9 Mass. 247 (1812), rendered judgment for the defendant county on the ground that it was a quasi-corporation created by the legislature for purposes of public policy, and that as an agent of the state, it was immune. This was done with reliance upon the *Russell* case, although practically no reason for immunity can be found to exist in the *Mower* case, since the county involved was incorporated, had a corporate fund, and was charged by statute with the duty of keeping highways in repair. This inadequately reasoned decision, based upon a case which is contradictory rather than supportive, has been followed generally in the United States, and the view expressed has, with a few exceptions, become the common law. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 41 (1924).

It is interesting to note that in Maryland the court readily perceived the distinction between the county in the *Russell* case and an incorporated Maryland county having a corporate fund. *Anne Arundel County v. Dudkett*, 20 Md. 468 (1864).

<sup>4</sup>The literature abounds in criticism of the classification approach. See generally, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); Ropes, *Torts' Doctrine of Municipal Immunity—A Myth*, 8 MIAMI L.Q. 555 (1954). An extensive note in 17 U. PITT. L. REV. 674 (1956) contains an excellent analysis of the law in Pennsylvania and is especially critical of the governmental-proprietary distinction. See also, Price and Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953).

The difficulty in attempting to categorize the functions of a municipality as governmental or proprietary is that there is no universally applicable test or comprehensive definition available. *City of Tampa v. Easton*, 145 Fla. 188, 198 So. 753 (1940). Indeed, it has been said that it is an absurdity to attempt to distinguish between governmental or public and corporate or private functions for the purpose of determining tort liability. For a collection of cases classifying various functions, see Note, 34 HARV. L. REV. 66 (1920). See also, Barnett, *Public Agencies and Private Agencies*, 18 AM. POL. SCI. REV. 34 (1924).

Recognizing the difficulty of making any rational classification, at least one court has rejected the distinction altogether, holding that all functions of municipal corporations are of a public or governmental nature, the exercise of which does not result in tort liability. *Abernathy v. City of Columbia*, 213 S.C. 68, 48 S.E.2d 585 (1948); *Sheriff v. City of Easley*, 178 S.C. 504, 183 S.E. 311 (1936).

On the other hand, Florida had once adopted the view that the old concepts embodied in the immunity rule were not applicable to modern cities operating under the commission or city manager forms of government, but that the activities of such cities

other jurisdictions.<sup>5</sup> That this limited liability has its roots in the doctrine of sovereign immunity seems abundantly certain,<sup>6</sup> and while a few states have not expressly applied the *Bailey* rationale to questions of municipal liability,<sup>7</sup> the great majority have adopted some mode of accomplishing the same result.<sup>8</sup> These latter tests, like the former, however, suffer from a common inherent deficiency—the lack of a

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were more in the nature of a business than a government, and such functions were treated as proprietary, in the exercise of which municipalities are liable for the negligence of their officers and agents. *Kaufman v. Tallahassee*, 84 Fla. 634, 94 So. 697 (1922).

<sup>5</sup> Cases cited note 3 *supra*. See also, Miller, *Recent Substantive Developments Affecting Municipal Tort Liability*, 21 U. CINN. L. REV. 31 (1952).

<sup>6</sup> See *City of Harlan v. Peaveley*, 224 Ky. 338, 6 S.W.2d 270 (1928); *Barnett v. State*, 220 N.Y. 423, 116 N.E. 99 (1920). This position has been extensively criticized. See Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924), where it is pointed out that in spite of the fact that the conditions giving rise to absolutism abroad, and since abandoned there, have not and do not exist in this country, it has still been difficult to secure a legislative reconsideration of the propriety and justification of the immunity rule.

Even historically, this doctrine has little foundation. That this maxim was misunderstood even by Blackstone and Coke is indicated in the excellent monograph of EHRlich, *PROCEEDINGS AGAINST THE CROWN* (1921). It merely meant that the king was not privileged to do wrong. If his acts were against the law they were wrongs. The doctrine of acquired or vested rights had been firmly established in medieval law, and was kept alive by the jurists of the natural law school. The king and his officials were subject to these rights and the individual was deemed as privileged in the enjoyment of his rights against the king as against any other person. The infallible and non-responsible king was a conception of post-thirteenth century England and was historically unjustified. Borchard, *supra*, at 41. See also, Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925). Cf. *Feather v. Regina*, 6 Best. & S. 257 (1865).

The doctrine of sovereign immunity is fully discussed in Gardner, Geller, McGrory, and Shaffer, *An Inquiry Into the Principles of Municipal Responsibility in General Assumpsit and Tort*, 8 VAND. L. REV. 753 (1955).

<sup>7</sup> See note 4 *supra*.

<sup>8</sup> Other tests include: (1) Classification of duties and powers as mandatory or permissive, imposing liability if the injury results from the exercise of the permissive powers, and not otherwise. *Martinson v. Alpena*, 328 Mich. 595, 44 N.W.2d 148 (1950); *Storti v. Fayal*, 194 Minn. 628, 261 N.W. 463 (1935); *Burns v. Jackson*, 140 Miss. 656, 105 So. 861 (1925); *But cf. Day v. Berlin*, 157 F.2d 323 (1st Cir. 1946). (2) Classification of municipal functions as discretionary or ministerial, imposing liability only in the latter category. *Harris v. District of Columbia*, 256 U.S. 650 (1921); *Johnston v. Atlanta*, 71 Ga. App. 552, 31 S.E.2d 417 (1944). (3) Classification of activity as either nonfeasance or misfeasance, imposing liability for misfeasance only. *Van Zandt v. Bergen County*, 79 F.2d 506 (3d Cir. 1935); *Adams v. Toledo*, 163 Ore. 185, 96 P.2d 1078 (1939). (4) Classification as an act as *intra vires* or *ultra vires*, granting immunity if *ultra vires*. *Palm Beach v. Vlahos*, 152 Fla. 159, 15 So.2d 848 (1944); *Chicago v. Williams*, 182 Ill. 135, 55 N.E. 123 (1899). *Contra*, *Whitacre v. Charlotte*, 216 N.C. 687, 6 S.E.2d 558 (1940). Cf., *Cardiff Light and Water Co. v. Taylor*, 73 Colo. 566, 216 Pac. 711 (1923).

definitive standard of application, which leaves the courts free to achieve a desired result in a given case by a simple classification technique.<sup>9</sup>

But quite apart from this technical infirmity, there is the more fundamental question of why a municipality should thus be immunized from tort liability.<sup>10</sup> The proprietary-governmental distinction merely states a result, rather than affords a reason; for if the doctrine of sovereign immunity, in fact, constitutes an impediment to suit, it would logically apply equally to all municipal functions.<sup>11</sup>

In order to avoid this impasse, therefore, some courts have developed a more sophisticated rationalization: that it is better for individuals to suffer occasional injury in certain areas of governmental activity than for the public to bear the cost of a major liability and possible discontinuation of an essential service.<sup>12</sup> This position, however, is not attuned to the recent social trend toward apportioning loss, especially to those who can spread or insure against it.<sup>13</sup> Moreover, al-

<sup>9</sup> See note 4 *supra*. Hazard v. Duff, 287 Ky. 427, 154 S.W.2d 28 (1941); Montgomery v. Quinn, 246 Ala. 154, 19 So.2d 529 (1944).

<sup>10</sup> It is frequently said that the reason for exempting a municipality from liability for injuries inflicted in the performance of its governmental functions is one of public policy, to protect public funds from being directed from governmental purposes: Taylor v. Westerfield, 233 Ky. 619, 26 S.W.2d 557 (1930).

Almost without exception the literature denies the soundness of any basis for refusing liability. See Gardner, Geller, McGrory, and Shaffer, *An Inquiry Into the Principles of Municipal Responsibility in General Assumpsit and Tort*, 8 VAND. L. REV. 753 (1955); Warp, *The Law and Administration of Municipal Tort Liability*, 28 VA. L. REV. 360 (1924); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Lloyd, *Municipal Tort Liability in New York*, 23 N.Y.U.L.Q. REV. 278 (1948); Note, 100 U. PA. L. REV. 92 (1951); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949).

<sup>11</sup> This conclusion appears inescapable, although not advanced by the proponents of the immunity doctrine, since it would result in even more obvious inequities than the classification approach. See generally the law review treatment *supra* note 10.

<sup>12</sup> This argument was presented in the case of Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788). For an excellent dissenting opinion, see Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919). See also, Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921), which is especially critical both of the interpretations of the Russell case and the reasons assigned in support of its purported holding. The plaintiff's unavailing plea in the Russell case has been cited as an admirable present-day position. Note, 17 U. PITT. L. REV. 674 (1956).

<sup>13</sup> A familiar instance of this is the state workmen's compensation acts. N.C. GEN. STAT. §§ 97-1—122 (1950).

A general trend toward increased liability may be noticed in the Federal Tort Claims Act of 1946, 62 STAT. 869, 28 U.S.C. §§ 1291, 1346(b), 1402, 1504, 2110, 2401-2, 2411-12, 2671-80 (1952). See Comment, 56 YALE L.J. 534 (1947).

For what is perhaps the best summation of the law in each of the forty-eight states

though some courts have suggested that a doctrine of absolute municipal liability would tend to cripple certain municipal operations,<sup>14</sup> it is at least arguable that such a doctrine might rather tend to insure a more circumspect performance of duties and an increased selectivity and training of municipal employees.<sup>15</sup>

Still other courts have suggested that since municipal employees are not agents of the municipality, the doctrine of respondeat superior does not apply;<sup>16</sup> and others urge that the absence of pecuniary profit or benefit to the municipality should, in any event, relieve it from liability.<sup>17</sup> Neither of these reasons, however, is fundamentally sound, as the fact of agency is not to be determined from the character of the

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see Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363, 1367-1407 (1954).

The problem posed by insurance has several interesting facets. In *Bailey v. City of Knoxville*, 113 F. Supp. 3 (D.C. Tenn. 1953) where a statute barred suits arising from the operation of an airport, classifying that function as governmental, and the city carried liability insurance, the court held that the immunity was waived. See Notes, 52 MICH. L. REV. 457 (1954); 24 TENN. L. REV. 272 (1956). See also, *Taylor v. Knox County Bd. of Education*, 292 Ky. 767, 167 S.W.2d 700 (1942). *But cf. Pohland v. City of Sheboygan*, 251 Wis. 20, 27 N.W.2d 736 (1947). In *Osbach v. Lyndhurst Township*, 7 N.J. 371, 81 A.2d 721 (1951), where the municipality was required by statute to have insurance, it was held that the failure of the municipality to insure resulted in non-liability on the basis of a resurrection of the common law immunity. See Note, 23 MISS. L.J. 300 (1952). For a summation of this problem see, Comment, 54 MICH. L. REV. 404 (1956) which concludes, "In general, the carrying of liability insurance is not a waiver of immunity from suit or from tort liability. This result is historically supportable. However, it often results in a finding that an insurer is not liable on a policy because the insured cannot be sued. This defeats the purpose of the policy, and to allow the immune entity to recover the premiums is no answer to the increasing problems of municipal torts. But a trend toward increasing municipal liability is discernible and ought to be given judicial impetus. By scrapping the protection-of-public funds basis of the immunity where insurance makes this basis no longer sound, or by removing immunity to suits in statutes giving permission to insure, the public desire for the fair compensation of all injured parties could be given a realistic, economical, and just fulfillment." 54 MICH. L. REV. at 412.

<sup>14</sup> *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1 (1947); *Coolidge v. Brookline*, 114 Mass. 592 (1874). See *Dodderidge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 336, 337 (1925).

<sup>15</sup> *City of Miami v. Bethel*, 65 So.2d 34 (Fla. 1953). See *Ropes, Torts' Doctrine of Municipal Immunity—A Myth*, 8 MIAMI L.Q. 555 (1954) which emphasizes the possibility of better supervision as a result of the imposition of liability.

<sup>16</sup> *Lawton v. Harkins*, 34 Okla. 545, 126 Pac. 727 (1912); *Burill v. Augusta*, 78 Me. 118, 3 Atl. 177 (1886); *Wilcoy v. Chicago*, 107 Ill. 334 (1883). See Note, 34 HARV. L. REV. 66 (1920).

<sup>17</sup> *Orlando v. Brockton*, 295 Mass. 205, 3 N.E.2d 794 (1936); *Hill v. Boston*, 122 Mass. 344 (1877).

service rendered, and tort liability is never properly predicated upon a benefit derived by the tortfeasor.<sup>18</sup>

Some of the difficulties posed by this categorization of municipal functions are illustrated by the situation which has developed in Florida. There, the courts had long adhered to a governmental-corporate distinction in assessing municipal tort liability.<sup>19</sup> In recent years, however, concern over the injustices inherent in such a rule evoked a series of subterfuges to avoid its application.<sup>20</sup> The resulting confusion led the Supreme Court of Florida, in the recent case of *Hargrove v. Town of Cocoa Beach*,<sup>21</sup> finally to adopt the rule that "when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress [against the municipality] for the wrong done."<sup>22</sup> Thus, the widow of a prisoner who died of asphyxiation in the city jail could maintain an action for the wrongful death of her husband, caused by the negligence of the jailer. The Florida Court, in taking this step, expressly flouted its own contrary precedent,<sup>23</sup> refusing to be "blindly loyal to the doctrine of stare decisis,"<sup>24</sup> recognizing that "the law is not static"<sup>25</sup> and stating:

The great body of our laws is the product of progressive thinking which attunes traditional concepts to the needs and demands of changing times. The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization. . . . To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.<sup>26</sup>

<sup>18</sup> *Martin v. Temperly*, [1843] 4 Q.B. 298. See Note, 34 HARV. L. REV. 66 (1920).

<sup>19</sup> For an excellent summary of the Florida cases with respect to this situation see Price and Smith, *Municipal Tort Liability: a Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953).

<sup>20</sup> *Ibid.*

<sup>21</sup> 96 So.2d 130 (Fla. 1957).

<sup>22</sup> 96 So.2d at 133.

<sup>23</sup> *Brownlee v. City of Orlando*, 157 Fla. 524, 6 So.2d 504 (1946); *Kennedy v. City of Daytona Beach*, 132 Fla. 675, 182 So. 228 (1938); *Janes v. City of Tampa*, 52 Fla. 292, 42 So. 729 (1907):

<sup>24</sup> 96 So.2d at 133.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

Any present attempt to evaluate the effect of the *Hargrove* decision on the existing municipal tort liability concepts in other jurisdictions would be premature.

Although some jurisdictions have already modified municipal immunity by statute,<sup>27</sup> there has been a widespread judicial reluctance to review exemption from tort liability,<sup>28</sup> apparently reflecting an attitude that it is not properly within the province of the courts to tamper with such purportedly long-standing common-law limitations.<sup>29</sup> Accordingly, many courts would view the action of the Florida Supreme Court as inexcusable judicial legislation and would, if faced with the same situation, tend rather to rely on legislative wisdom, albeit manifested by inaction rather than by positive affirmation of the immunity rule. Since, however, the rule of municipal immunity is really of relatively recent judicial origin and is founded upon principles of dubious validity,<sup>30</sup> this self-restraint seems less than laudable, especially in light of

<sup>27</sup> CAL. VEHICLE CODE §§ 400, 401; MICH. COMP. LAWS § 691.141 (1948). WIS. STAT. c. 77 (1929). See *Shumacker v. Milwaukee*, 209 Wis. 43, 243 N.W. 756 (1932). See also, Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 444 (1941); MacDonald, *The Administration of a Tort Liability Law in New York*, 9 LAW AND CONTEMP. PROB. 262 (1942); Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort*, 9 LAW AND CONTEMP. PROB. 282 (1942). Occasionally there have been legislative restrictions of the common law liability for torts arising out of proprietary enterprises. See 2 TEX. REV. CIV. STAT. ANN., art. 1175, sub. 6 (1925-38).

On the other hand, there has been direct statutory opposition to liability for municipal activities classified as governmental. See *Bryan v. City of Chicago*, 371 Ill. 64, 20 N.E.2d 37 (1939). See also, Note, 25 SO. CALIF. L. REV. 489 (1952) criticizing the court's narrow interpretation of a restrictive statute.

<sup>28</sup> *Warden v. City of Grafton*, 99 W. Va. 249, 128 S.E. 375 (1925); *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922); *Fowler v. Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919); *Jones v. Sioux City*, 185 Iowa 1178, 170 N.W. 445 (1919). See also, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932).

<sup>29</sup> *Ramirez v. Cheyenne*, 34 Wyo. 67, 241 Pac. 710 (1925); *Scebillia v. Philadelphia*, 279 Pa. 549, 120 Atl. 273 (1924). See also, Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 47 (1949); Lloyd, *Municipal Tort Liability in New York: A Legislative Challenge*, 23 N.Y.U.L.Q. REV. 278 (1948); Note, 31 B.U.L. REV. 386 (1951) commenting on the reluctance of the Massachusetts courts to change the common law immunity; Note, 28 TEMP. L.Q. 283 (1954), urging the necessity of a definitive law by the legislature; Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910, 941, 944 (1936), calling for legislative action, expressing the conclusion that the courts cannot do the job.

<sup>30</sup> Notes 3 and 6 *supra*. In the *Hargrove* case the Court stated: "We can see no necessity for insisting on legislative action in a matter which the courts themselves originated." 96 So.2d at 132.

the realities of modern community life and the possibility of serious injustice that may be done to the injured individual.<sup>31</sup> This, it is submitted, far outweighs the conjectural additional financial burdens on small communities that might eventuate.<sup>32</sup>

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<sup>31</sup> Green, *Freedom of Litigation—Municipal Liability for Torts*, 38 ILL. L. REV. 355, 379 (1943).

<sup>32</sup> See Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW AND CONTEMP. PROB. 363, 367 (1942) where it is concluded that: "It would seem that there is little cause for fear that an extension of liability to the performance of so-called governmental functions would bankrupt the small municipalities as a group. . . . It would seem that the method of meeting the situation lies, not in granting immunity to small municipalities, but in devising some form of state or cooperative insurance, perhaps made compulsory by statute."