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# Rescue Units Operated by Municipal Fire Departments: Their Status Under the Doctrine of Municipal Immunity

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## STUDENT COMMENTS

### RESCUE UNITS OPERATED BY MUNICIPAL FIRE DEPARTMENTS: THEIR STATUS UNDER THE DOCTRINE OF MUNICIPAL IMMUNITY

#### I. Introduction

**O**F LATE, it has become a common practice among municipalities in Ohio and some other states to operate ambulance services, resuscitator units, or rescue squads as adjuncts of the fire department.<sup>1</sup> This is sometimes done for the purpose of providing more rapid responses to calls from those injured in accidents or stricken by sudden illnesses. In other instances the municipality feels that it owes to its inhabitants an inexpensive (or free) rescue or ambulance service. It is, however, probable that the municipal authorities of at least some cities feel that the money expended for salaries of firemen would be put to better use if firemen had additional duties to perform besides the extinguishing of fires. Whatever the reason for the establishment of these kinds of services, they present serious questions with regard to the municipality's amenability to tort suits grounded upon the negligent performance of such activities.

At the outset it should be indicated that the view taken by this writer does not purport to be unbiased. Rather, it is his intent to place a few more munitions in the arsenal of those who propose that the doctrine of municipal sovereign immunity be abrogated in its entirety.

The first part of the discussion (Section II) will focus upon the background and current status of the municipal immunity doctrine, with special emphasis upon the governmental-proprietary distinction. Section III will discuss the effects and interpretations of the Uniform Traffic Act and how they relate to municipal immunity. In addition, another possible interpretation of the Act will be suggested.

#### II. History and Present Status of Sovereign Immunity Doctrine

Sovereign Immunity has been variously described as follows: "For generations . . . a major scandal"<sup>2</sup>; ". . . the most granitic and resistant to change of all the immunities"<sup>3</sup>; ". . . a proper

<sup>1</sup> See Appendix.

<sup>2</sup> 31 *American Trial Lawyer's Journal* 188 (1967).

<sup>3</sup> *Id.*

subject for discussion by students of mythology . . ."<sup>4</sup>; "one of the most discredited and yet sanctified doctrines in the great moving stream of our common law . . ."<sup>5</sup>; ". . . an anachronism without rational basis . . . (which) has existed by the force of inertia"<sup>6</sup>; "(a doctrine which) has never been in tune with American notions of responsible government."<sup>7</sup>

Although a storm of criticism has raged over the validity of this doctrine for many years, few states have completely or even substantially eliminated it. Alaska, one of the scattered jurisdictions which do not follow the doctrine, has announced that governmental immunity has *never* been a part of the law in that state; consequently a municipality in that state is liable for the torts of its employees regardless of the nature of their activities.<sup>8</sup>

Nine states which formerly recognized sovereign immunity have completely or partially disavowed the same and have held municipalities liable for the torts of their police officers.<sup>9</sup> The Ohio courts, as early as 1919 in *Fowler v. Cleveland*,<sup>10</sup> made an attempt to break away from the doctrine of municipal immunity, but there was a withdrawal from this progressive position in 1922 in the case of *Aldrich v. Youngstown*,<sup>11</sup> which overruled the *Fowler* decision.

The roots of sovereign immunity have been traced to Roman antiquity. However the most frequent form in which this doctrine finds expression is in the old English maxim, "The King can do no wrong."<sup>12</sup> The rationale and justification for the rule's acceptance in the United States is a financial, rather than a legal one. The early states simply could not afford an additional burden on their already-strained budgets. In subsequent years courts have often reiterated this reason for the rule or have stated that it is better that an individual injury be uncompensated than that the public be financially inconvenienced. The

<sup>4</sup> *Colorado Racing Commission v. Brush Racing Ass'n.*, 316 P. 2d 582 (1957).

<sup>5</sup> 32 American Trial Lawyer's Journal 286 (1968).

<sup>6</sup> *Muskopf v. Corning Hospital District*, 11 Cal. Rptr. 89, 92; 389 P. 2d 457 (1961).

<sup>7</sup> Kline, *Ohio Sovereign Immunity: Long Lives the King*, 28 Ohio St. L. J. 75, 90 (1967).

<sup>8</sup> *City of Fairbanks v. Schaible*, 375 P. 2d 201 (1962).

<sup>9</sup> Dakin, "Municipal Liability in Police Torts," 16 Clev-Mar. L. Rev. 448, 450 (1967).

<sup>10</sup> 100 Ohio St. 158, 126 N.E. 72 (1919).

<sup>11</sup> 106 Ohio St. 342, 140 N.E. 164 (1922).

<sup>12</sup> *Supra* note 7, at 75.

courts generally have considered themselves bound by *stare decisis*. However, in *Stone v. Arizona Highway Commission*<sup>13</sup> the court held that the doctrine of governmental immunity was judicially created and therefore, could be judicially abolished. Quoting Justice Holmes:

“It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>14</sup>

It would seem that when a theory supporting a rule of law (governmental immunity) cannot, in a given instance, justly be applied, then the theory should be disregarded and the rule should be considered on its merits. Modern courts should recognize that since sovereign immunity is a judge-created immunity, a product of the courts, the courts themselves have both the power and duty to modify or abrogate the doctrine if, as the evidence suggests, it no longer serves a useful function.

It is generally held that municipal corporations exercise powers and functions of two separate classes: governmental and proprietary.<sup>15</sup> In their governmental (also referred to as “public” or “corporate”) capacity, municipalities function as agents or instrumentalities of the state government.<sup>16</sup> Hence, it is from the state that municipal governments derive their governmental authority and, thus, their immunity. Where the municipal functions are of a private or proprietary nature, common law immunity has no application.<sup>17</sup> Consequently, the issue in the usual tort suit against a municipality is whether or not the officer or employee causing the injury was engaged in the exercise of a governmental function.

However, to a degree this governmental-v.-proprietary distinction has been changed by statute in Ohio. Regarding a

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<sup>13</sup> 93 Ariz. 384, 381 P. 2d 107 (1963).

<sup>14</sup> Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

<sup>15</sup> *Tolliver v. Newark*, 145 Ohio St. 517, 31 Ohio Op. 179, 62 N.E. 2d 357 (1945). See also: 38 Ohio Jur. 2d, *Municipal Corps.*, § 251, p. 645 (1959).

<sup>16</sup> *Cincinnati v. Cameron*, 33 Ohio St. 336 (1878); *Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 65 N.E. 885 (1902); *Akron v. Butler*, 108 Ohio St. 122, 140 N.E. 324 (1923); *Wooster v. Arbenz*, 116 Ohio St. 281, 156 N.E. 210 (1927).

<sup>17</sup> *Standard Fire Ins. Co. v. Fremont*, 154 Ohio St. 344, 131 N.E. 2d 221 (1955).

municipality's liability for the negligent operation of its vehicles, § 701.02 of the Ohio Rev. Code provides:

"Any municipal corporation shall be liable in damages for injury or loss to persons or property and for the death by wrongful act caused by the negligence of its officers, agents or servants while engaged in the operation of any vehicles upon the public highways of the state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent or servant is engaged upon the business of the municipal corporation."

Were this the only paragraph of this statute, the effect would be to place the State of Ohio in the forefront of those states which have substantially altered the immunity concept. However, the statute continues to say:

"The defense that the officer, agent or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:

(A) Members of the police department engaged in police duties;

(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress, or in answering any other emergency alarm."

The second paragraph of the statute makes it apparent that a municipality is not liable for the negligent actions of a fireman who caused injury while engaged in such "governmental" functions as the extinguishing of a fire, the pursuit of a fire, or the answering of an emergency alarm. The precise question to be answered, therefore, is whether a municipal corporation's fire department is engaged in a governmental function in answering a call for a resuscitator, rescue unit, or ambulance.

The final section of § 701.02 deals with the personal liability of policemen and firemen. It provides:

". . . Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a *governmental function*.

Policemen shall not be personally liable for damage for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an *emergency call*." (Emphasis added)

It should be noted that there is a different standard for policemen than for firemen. The implication of the statutory distinc-

tion—between policemen responding to an emergency call and firemen engaged in the performance of a governmental function—is clear. It is simply that not all activities of firemen are governmental, notwithstanding their public service-related purpose. The immunity enjoyed by firemen is, moreover, more restricted than that enjoyed by policemen. This latter point was noted by the Hamilton County Court of Appeals in the case of *Rankin v. Sander*.<sup>18</sup> Thus if a fireman operating an ambulance were negligently to injure someone, the issue presented would be *not* whether the defendant was responding to an emergency call as a fireman, but rather, whether he was responding to an emergency call as a fireman engaged in the performance of a governmental function. If it were found that the activity of the municipal fireman were proprietary, any claim of immunity arising under the statute<sup>19</sup> would be defeated, and the employee could be held individually liable for his negligent acts. *United States Fidelity and Guaranty Co. v. Samuels*<sup>20</sup> reaches this result and further holds that the employee may be held liable for his negligence even though the municipality is immune from liability. An objection to this result is that it compels the injured party and/or the employee to bear the cost of that which should, in fairness, be the responsibility of the governmental unit. An alternative approach would be to pay municipal employees high enough salaries to enable them to obtain protection against such suits, but the cost of this approach would undoubtedly be greater than the cost of assuming liability for valid damage claims.

The distinction between governmental and proprietary functions is not an easy one to make, and classification sometimes becomes ludicrous. In many instances the same function has been called governmental by the courts of one state and proprietary by those of another.<sup>21</sup> There is nothing inherent in particular functions by which they can be classified.<sup>22</sup> For example, in Bay City, Michigan, an employee of a telephone company was killed because of the negligence of the city's agents in maintaining electric wires. The city's electric light plant furnished *direct* current

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<sup>18</sup> 96 Ohio App. 40, 54 Ohio Op. 164, 166 (1953).

<sup>19</sup> Ohio Rev. Code § 701.02 (1965).

<sup>20</sup> 116 Ohio St. 586, 157 N.E. 325 (1927).

<sup>21</sup> Smith, *Municipal Tort Immunity*, 48 Mich. L. Rev. 41, 44 (1949); Case Note, *Municipal Corporations: Tort Liability*, 14 Corn. L.Q. 351 (1929).

<sup>22</sup> *Id.*

for lighting public streets and buildings, and sold *alternating* current for use in private homes. The court held that since the injury resulted from negligence in maintaining wires carrying alternating current, sold for profit, the city was liable. The court added, however, that if the death had been caused by negligence in maintaining wires carrying direct current, the city would not have been liable.<sup>23</sup> Thus, it appears that one can distinguish between governmental electricity and proprietary electricity. The tendency of the courts to emphasize the profit element in categorizing the activity leads to speculation as to what the result would be in a city which as a community enterprise collects certain kinds of refuse without charge, but makes a charge for the collection of other kinds. Presumably it could be argued that a distinction must be made between governmental and proprietary garbage.<sup>24</sup> The Ohio Supreme Court has acknowledged the difficulty of distinguishing between governmental and proprietary functions. In *Hyde v. City of Lakewood*<sup>25</sup> the court stated:

“Whether the performance of various activities by a municipality is governmental or proprietary frequently depends on the peculiar facts of the particular case. In one instance a municipally owned hospital may be found to be carrying on a governmental function in the manner of its operation, whereas in another instance a finding may be made that a municipally owned hospital is being operated in a proprietary capacity.”<sup>26</sup>

Needless to say, a fire department also may operate in both capacities.

The profit test is not the only one which has been used to place an activity in one category or the other. The varying tests are as diverse as the states that apply them. The test applied in *Wooster v. Arbenz*<sup>27</sup> has been generally adopted by the Ohio

<sup>23</sup> *Hodgins v. Bay City*, 156 Mich. 687, 121 N.W. 274 (1909).

<sup>24</sup> Ohio decisions reflect similar confusion. In *Hall v. City of Youngstown*, 15 Ohio St. 2d 160, 239 N.E. 2d 57 (1968), the court states: “. . . a city might be acting in a governmental capacity in providing men and equipment with which to fight fires and nevertheless be acting in a proprietary capacity in providing hydrants (from which water might be obtained to fight fires) as part of a municipal water system.”

<sup>25</sup> 2 Ohio St. 2d 155, 207 N.E. 2d 547 (1965).

<sup>26</sup> 2 Ohio St. 2d 155 (1965), at Syllabus 2.

<sup>27</sup> 116 Ohio St. 281, 156 N.E. 210 (1927).

courts as the controlling one.<sup>28</sup> Quoting from that opinion:

"First of all, let us ascertain the tests whereby these distinctions are made. In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. (Note here that the court assumes the existence of state sovereign immunity and implies that without that immunity, there can be no municipal immunity.) If on the other hand, there is *no obligation on the part of the municipality to perform them*, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments on property, or where it is *indirectly benefited* by growth and prosperity of the city and its citizens, and the city *has an election* whether to do or omit to do those acts, the function is private and proprietary."<sup>29</sup>

"Another familiar test is whether the act is done for the common good of all the people of the state or whether it relates to special corporate benefit or profit." (Emphasis added)<sup>30</sup>

In the above case the question was whether the maintenance of streets was proprietary or governmental. In finding that it was governmental (thus allowing the city to escape liability) the court stated:

<sup>28</sup> See: *Eversole v. City of Columbus*, 169 Ohio St. 205, 158 N.E. 2d 515 (1959); *Hack v. City of Salem*, 174 Ohio St. 383, 189 N.E. 2d 857 (1963); *Maloney v. City of Columbus*, 2 Ohio St. 2d 213, 208 N.E. 2d 141 (1965) (municipality held liable for negligence in maintaining a zoo— ". . . (w)e find that there is no obligation upon the defendant to maintain a zoo.") *State ex rel. Fejes v. City of Akron*, 5 Ohio St. 2d 47, 213 N.E. 2d 353 (1966); *Gabris v. Blake, City of Columbus*, 9 Ohio St. 2d 71, 223 N.E. 2d 597 (1967) (city held not liable for injuries to five year old boy caused by defective condition of one of its police vehicles); *Fankhauser v. City of Mansfield*, 19 Ohio St. 2d 102, 249 N.E. 2d 789 (1969).

<sup>29</sup> In *Hyde v. City of Lakewood*, referred to at note 25 *supra* and text accompanying same, Justice Herbert quoted this same language in his dissenting opinion. Objecting to that portion of the Court's opinion which allowed a municipal hospital to escape liability for its tortious conduct, he stated: "I can conclude only that the weight of authority and the modern view are that a hospital established under a permissive statute by a municipality is engaged in a proprietary function and is liable for its tortious conduct." In that same opinion, Herbert stated at page 160: "It is difficult to understand how a municipal hospital can claim governmental immunity when it performs no services in the exercise of state sovereignty."

<sup>30</sup> 116 Ohio St. 281, 284-285, 156 N.E. 210 (1927).

"The State of Ohio has always recognized its obligation to keep the public ways open, and has . . . enjoined by section 3714, General Code, (now § 723.01, Ohio Rev. Code) upon municipalities an obligation to keep them open, in repair, and free from nuisance."<sup>31</sup>

Has the State of Ohio always (or ever) recognized any obligation by a fire department to provide any form of ambulance service? The only section of the Code which commands a fire department created by a municipal corporation to do anything specifically is § 737.11, which provides:

"The fire department *shall* protect the lives and property of the people *in case of fire.*" (Emphasis added)

and

". . . shall perform such other duties as are provided by ordinance."

Presumably, it is this section which imposes upon the fire department of a municipality the obligations of state sovereignty which the State regards to be exercisable in the stead of the State itself. It therefore appears that the State of Ohio has *never* recognized any obligation by a fire department to provide ambulance service. It logically follows, then, that the operation of an ambulance service or resuscitator unit by a fire department is a proprietary function, for which the municipality may be held liable. This position is reinforced by the last words of Ohio Rev. Code § 737.11, quoted above (i.e. "such other duties as are provided by ordinance") and by the language of § 737.21 Ohio Rev. Code, as interpreted by the 1967 Ohio Attorney General's Opinion, number 67-078. The latter statute provides, in part:

"The legislative authority of a municipal corporation *may* establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of its citizens against damage and accidents resulting therefrom, and *for such purpose* may establish and maintain a fire department, (and) provide for the establishment and organization of fire engine and hose companies and rescue units." (Emphasis added)

A careful reading of this permissive statute (of the same type referred to by Dissenting Justice Herbert in *Hyde v. City of Lakewood*)<sup>32</sup> discloses that rescue units are to be established by

<sup>31</sup> *Supra* note 27, at 286-287.

<sup>32</sup> *Supra* note 29.

fire departments solely to protect the property and lives of citizens from damage and accidents resulting from fire. The following two questions were submitted to the Office of the Attorney General of the State of Ohio:

(1) "May a city operating under a statutory form of government create a department, other than those departments already authorized under the Revised Code of Ohio, to handle various matters such as . . . (an) ambulance service?"

(2) "To what extent and under what authority can ambulance services be provided the citizens of a municipal corporation outside fire situations?"

In response, the following answers were issued:

(1) "The officers and departments of a noncharter city operating under a general plan of municipal government are *limited* to those found in Title VII of the Revised Code. Title VII does not provide for a separate department of municipal government to handle matters such as . . . ambulance service, and *no authority* was found for a city operating under a general plan of government to create such a department."<sup>33</sup>

(2) "In section 737.21, Revised Code, the words 'resulting therefrom' clearly indicate that the function of a municipal fire department, and by implication, its emergency ambulance service, is to protect the property and lives of citizens of the municipality from damage and accidents resulting from fire. Section 737.21, Revised Code, does not, in my opinion, authorize a fire department affected by that statute, to offer ambulance service except as such service is incident to the fire-fighting functions of the department. However, section 737.11, Revised Code, provides: 'Both the police and fire departments shall perform such other duties as are provided by ordinance.' It therefore appears that the fire department could be assigned, by ordinance, the duty of furnishing emergency ambulance service unrelated to damage and accidents resulting from fire. . . . The service, provided by ordinance, would be in addition to the ambulance service relating to damage and accidents resulting from fire as authorized in section 737.21, Revised Code, . . ." <sup>34</sup>

It therefore seems that a municipality may by ordinance authorize the type of services herein discussed. If such an ordi-

<sup>33</sup> Opinions of the Attorney General, 67-078, p. 2-133.

<sup>34</sup> *Supra* note 33, p. 2-135.

nance is not passed, the validity of the service is questionable, and the activity is one step further removed from an effective claim that the service has been imposed upon the municipality as an incident of sovereignty. Thus in the absence of such an ordinance it is extremely likely that the exercise of these activities will be held to be a proprietary function. However, it is submitted that the distinction should not hinge upon the existence or non-existence of a municipal ordinance. If the service provided by the municipality is entirely voluntary, there being no mandate from the state to provide the same, it appears that the justification for immunity is lacking and that no immunity may logically be imputed from the state, notwithstanding the presence of a local ordinance.

Because of the confusion over the distinction between governmental and proprietary functions, and because of the apparent absence of any sound reason for continuing to recognize municipal immunity, some courts and many writers have recommended the abolition or restriction of governmental immunity. For example, in *B. W. King, Inc. v. West New York*<sup>35</sup> the court stated:

"In fixing municipal liability for torts there has been a more or less blind adherence to the municipal proprietary-governmental distinction, without real consideration of the reasons which gave birth to that doctrine and of whether, in the light of the general expansion of municipal activity, the doctrine has not outlived its usefulness. . . . There is a consensus that most of the reasons for immunity have expired and that municipal liability should be subject to less restrictive limits. . . . The analytical approach ought not to be one of asking why immunity should not apply in a given situation, but rather one of asking *whether there is any reason why it should apply.*" (Emphasis added)

And in a Note<sup>36</sup> on *Hall v. City of Youngstown*<sup>37</sup> the author states what is in reality the test most often employed, whether or not it is ostensibly the one used:

"Doctrines which subvert the primary municipal functions of providing public services should be discouraged. On the other hand, doctrines which force injured individuals to bear the burden of the negligence of municipalities in performing these functions should also be discouraged. Thus, in deter-

<sup>35</sup> 230 A. 2d 133, 136-137 (1967).

<sup>36</sup> Case Note, *Municipal Tort Immunity*, 37 U. Cin. L. Rev. 214, 217 (1968).

<sup>37</sup> 11 Ohio App. 2d 195, 229 N.E. 2d 660 (1967). This note discusses the Appellate Court's decision in the case. The disposition by the Supreme Court of Ohio is indicated at note 24 *supra*.

mining whether to subject a municipality to liability for its negligence, these two policy considerations must be accommodated."

In many cases there exists an additional reason for refusing immunity, namely, the presence of a liability insurance policy covering the negligence of the municipal employee. In such situations what possible justification can be advanced for allowing immunity?<sup>38</sup> The doctrine of immunity, as noted above,<sup>39</sup> was based principally on the tenuous financial structure of early governmental units. But this justification obviously cannot be used by a present-day insurance company, which is in the business of assuming the risks of liability, and which is expected by society to compensate those citizens of the community who are injured by the negligent actions of municipal employees. To allow the insurance company to escape liability (through the invocation of governmental immunity) is to allow it to receive the benefit of the premiums collected by it without taking any significant risk of ever having to make any disbursements. The enlightened view of some courts<sup>40</sup> is that governmental immunity is removed to the extent of insurance policy coverage. At least one court has stated that the procurement of liability insurance covering a particular activity is competent evidence of the proprietary character of that activity.<sup>41</sup> Such a position seems eminently reasonable.

There seems to be no valid reason why anyone should refuse to acknowledge that the cost of obtaining government services legitimately includes the cost of compensating for injuries which arise from *all* activities, whether proprietary or governmental. The expense of paying for any harm negligently caused by firemen or other municipal employees should be regarded as part of the normal and proper costs of public administration and not as a diversion of public funds. Inevitably members of the fire department will, in the course of their various functions, negligently visit harm upon some innocent member of the community. Regardless of the specific activity in which the firemen were engaged at the time, it would seem that the fairest method of deal-

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<sup>38</sup> Admittedly, if the defense of municipal immunity is disallowed, insurance companies are likely to raise their premiums, but not enough to make the cost of liability insurance prohibitive.

<sup>39</sup> *Supra* page 109.

<sup>40</sup> See cases collected at Annot. 68 A.L.R. 2d 1437 (1959).

<sup>41</sup> *Revis v. Asheville*, 207 N.C. 237, 176 S.E. 738 (1934).

ing with the problem is to have the municipality (indirectly, the entire community) assume the financial responsibility for the injury suffered by the community member. Surely the city and its total population constitute a far better loss-distributing agency than do the injured person and his family. Declared Abraham Lincoln:

“It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.”<sup>42</sup>

In summary, it is submitted that the doctrine of municipal immunity should be abrogated or restricted, and that the governmental-proprietary test, with its attendant inconsistencies, should either be eliminated or substantially modified. It should be remembered that even the total abolition of governmental immunity would not give rise to automatic liability, but simply to a right to recover when negligence is established.<sup>43</sup>

### III. Effect of the Statutes Comprising the Uniform Traffic Law

It seems appropriate at this point to consider the Ohio statutes specifically applicable to the operation of emergency vehicles, since a rescue unit, ambulance, or resuscitator unit operated by a fire department appears to fall within that classification. As one might suppose, when these statutes (composing the Uniform Traffic Act) are not complied with, the immunity which they confer is lost.

The first of these statutes to be examined is § 4511.03 Ohio Rev. Code. This act, entitled “Emergency Vehicles Entitled to Proceed Cautiously Past Red or Stop Signal,” provides:

“The driver of any emergency vehicle, when responding to an emergency call, upon approaching a red or stop signal shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.”

Cases construing this statute have held:

“. . . (A)n emergency vehicle may lawfully proceed past a red traffic signal but only if, on approaching such traffic signal, it slows down as necessary for safety to traffic and only

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<sup>42</sup> Statement by Abraham Lincoln quoted from 6 Richardson, *Messages and Papers of the Presidents* 51 (1897).

<sup>43</sup> See Case Note, *Municipal Tort Immunity*, 37 Cin. L. Rev. 214, 217 (1968).

if it proceeds cautiously past such signal with due regard for the safety of all persons using the street or highway.”<sup>44</sup>

“A driver of an emergency vehicle who proceeds through a red light at a speed of between 35 and 50 miles an hour, with his view to the left obstructed by a building, is not protected by the provisions of section 4511.03, R.C.”<sup>45</sup>

and

“Where defendant . . . drove past a stop sign without yielding the right-of-way, claiming a privilege to do so under Section 4511.03 R.C., allowing emergency vehicles to proceed through stop signals with caution, the burden is upon him to show that his vehicle qualifies as an emergency vehicle, that at the time of the accident it was equipped with a flashing red light or lights and with a siren, exhaust whistle or bell, that both lights and audible signals were working and that he was proceeding with due regard for the safety of other persons and property on the roadway.”<sup>46</sup>

The second statute to be considered is § 4511.24 Ohio Rev. Code, which provides:

“The prima facie speed limitations set forth in Section 4511.21 of the Revised Code do not apply to emergency vehicles when they are responding to emergency calls, and when the drivers thereof sound audible signals by bell, siren or exhaust whistle. This section does not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons using the street or highway.”

This enactment was discussed in *City of Worthington v. O’Dea*,<sup>47</sup> as follows:

“A police vehicle which proceeds through a major intersection in a municipality, against a flashing caution signal, at a speed of 60 to 65 miles per hour, with inadequate use of its siren, and without being appreciably braked by its operator, is not being operated ‘with due regard for the safety of all persons upon the highway.’”

The final statute to be examined is § 4511.45 Ohio Rev. Code, which establishes that emergency vehicles have the right-of-way and adds:

<sup>44</sup> *Parton v. Weilnau*, 169 Ohio St. 145, 8 Ohio Op. 2d 134 (1959) at Headnote #4.

<sup>45</sup> *State v. Leggett*, 83 Ohio L. Abs. 400, 166 N.E. 2d 772 (1959).

<sup>46</sup> *State v. Reid*, 79 Ohio L. Abs. 475, 156 N.E. 2d 510 (1958).

<sup>47</sup> 115 Ohio App. 375, 185 N.E. 2d 323 (1962) at Headnote #1.

“This section does not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons and property on the highway.”

It is generally understood by drivers that an emergency vehicle has the right-of-way, but *Parton v. Weilnau*<sup>48</sup> places a qualification on that rule, as the following statement indicates:

“Where a vehicle is not ‘proceeding in a lawful manner in approaching or crossing’ an intersection, such vehicle loses its preferential status.”<sup>49</sup>

From the foregoing statutes and cases it may be seen that so long as the driver of an emergency vehicle exercises ordinary care for the safety of others, he has a preferential status on the highway. Obviously, if this standard of care were always observed by drivers of emergency vehicles, there would be no need to rely on the doctrine of sovereign immunity. However in practice this standard is often not met, and this raises the question of whether the driver of an emergency vehicle, who is already given special statutory driving privileges, should, in addition, be permitted in some instances to invoke the defense of governmental immunity. It would seem that the only question should be whether the driver operated his particular vehicle with enough care to entitle him to the statutory preferred position on the highways. Whether or not he was engaged by the municipality in the exercise of a nebulously-defined “governmental” function should, it is submitted, be immaterial.

In *Farish v. Springfield*,<sup>50</sup> the Clark County Court of Appeals held that the statutes comprising the Uniform Traffic Act (just discussed) are not inconsistent with the “immunity statute.”<sup>51</sup> If this decision is correct, what effect did the passage of the Uniform Traffic Act have? At the time these statutes were passed, drivers of police and fire emergency vehicles already had an absolute immunity from suit for their conduct behind the wheel as long as it was found (which it usually was) that they were engaged in the performance of a governmental function. One faces the question of whether the Ohio General Assembly intended that this broad immunity be continued or whether they intended to restrict the same. If the intent was to continue the

<sup>48</sup> *Supra* note 44.

<sup>49</sup> 169 Ohio St. 145 at Headnote 3, 158 N.E. 2d 719 (1959).

<sup>50</sup> 109 Ohio App. 228, 10 Ohio Op. 2d 463 (1959).

<sup>51</sup> Ohio Rev. Code § 701.02 (1965).

old immunity, why did the legislature, knowing that most emergency vehicles are operated by employees of some governmental unit within the state, bother to impose upon them a duty of due care? If the driver, or municipality, is permitted to invoke the defense of governmental immunity, it is of no moment whether or not the vehicle was operated with due care. Logic therefore seems to dictate that the Uniform Traffic Act was intended to limit the existing immunity and to curb the unconscionable results which were being reached by the courts. If the legislature intended to exclude from the Act the drivers of fire and police department emergency vehicles, the legislators could easily have inserted an express exclusion. It is submitted that the most reasonable interpretation of the Act is that compliance with its provisions, specifically the "due care" requirement, is a condition precedent to the immunity granted by § 701.02 Ohio Rev. Code. In other words, if it is first found that the fireman or other municipal employee was proceeding with due care (as required by the provisions of the Uniform Traffic Act)<sup>52</sup> then the court should consider whether he falls within the immunity coverage of § 701.02 Ohio Revised Code. The recommended interpretation of the Act's language would not impose the same standard of "due care" upon the driver of an emergency vehicle as that which is imposed on the ordinary automobile driver. Rather, in keeping with the tenor of the statutes quoted, the standard should be the degree of care that would be exercised by the reasonably prudent ambulance (or other emergency vehicle) driver. Thus if it is found that the municipal employee was a reasonably prudent emergency driver, although his conduct would constitute negligence in the usual tort case, he would be entitled to rely upon § 701.02 Ohio Rev. Code.

#### IV. Conclusion

In conclusion, it is submitted, first, that the courts have a duty to eliminate or at least curtail the doctrine of municipal immunity. "The argument that the legislature, not the court, is the one to make this change, is answered by the fact that the principle was created by the courts as part of the common law, and if error exists or if the principle has become antiquated, it is the duty of the courts to change it."<sup>53</sup> Municipalities no longer

<sup>52</sup> ". . . with due regard for the safety of all persons using the street or highway." §§ 4511.03 and 4511.04 Ohio Rev. Code (1965).

<sup>53</sup> *Perkins v. State of Indiana*, 251 N.E. 2d 30 (1969).

confine themselves to the relatively few activities in which they engaged at the time this doctrine was first accepted in this country, and many of the new functions now performed by municipalities have no apparent relation to traditional governmental activity.

“Municipal functions have become so varied and extensive that public safety demands that municipal employees be held to the same safety standards as other citizens. Private citizens for good economic reasons insure themselves against tort liability. Why shouldn't a collection of citizens classified as a municipality do likewise?”<sup>54</sup>

Compensation for injuries which arise out of any form of municipal activity, regardless of its nature, should be regarded as simply a cost of doing business. The adoption of such a view would probably tend to increase awareness on the part of municipalities and their employees of their obligations to their cities' inhabitants.

Secondly, it seems clear that Ohio cities are not required by law to establish rescue squads, ambulance service, or resuscitator units. Thus a city operating such services, which admittedly are beneficial, should not be able to claim governmental immunity, whether or not the city has enacted an ordinance establishing the service. There is no justification in the law or in public policy for granting the municipality such immunity and letting the innocent victim go uncompensated.

Finally, it is not reasonable to suppose that the Ohio General Assembly, in passing the Uniform Traffic Act, intended to grant to (or perpetuate in) emergency vehicle drivers a license to negligently injure one group of persons while going to the aid of another. The provisions of the Act should be construed as exposing to liability any fireman (or other emergency vehicle driver) who injures another while failing to exercise due care. That the fireman was performing a governmental function at the time should be immaterial. One writer has commented: “Joan of Arc did not enthrone her king to exempt him from the dictates of justice, and the American colonists did not cast off the yoke of George III to exalt tyranny by denying reparation for harms caused by governmental maladministration.”<sup>55</sup>

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<sup>54</sup> 32 American Trial Lawyer's Journal 289 (1968).

<sup>55</sup> Roberts, *Sovereign Immunity*, 12 American Trial Lawyer's Association Newsletter 431 (1969).

## APPENDIX

The following questions were asked of ten cities in the State of Ohio. Responses were obtained from eight of those cities:

1. Does your municipality operate, in conjunction with either the fire or police department, an ambulance and/or rescue unit service?

Canton, Ohio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police
Cincinnati, Ohio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> Fire Dept.	<input checked="" type="checkbox"/> Police
Elyria, Ohio	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	<input type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police
Lima, Ohio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police
Mansfield, Ohio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police
Springfield, Ohio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police
Toledo, Ohio	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police
Zanesville, Ohio	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	<input type="checkbox"/> Fire Dept.	<input type="checkbox"/> Police

2. If so, are the functions of said service related solely to injuries, damage, or accidents resulting from fire in the case of service rendered by the fire department?

Canton	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Cincinnati	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Lima	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Mansfield	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Springfield	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Toledo	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

3. If the duties of said service are general and not limited to functions performed in connection with fire, has any ordinance been passed by the legislative body of your municipality formally establishing this service?

Canton	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Cincinnati	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Lima	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Mansfield	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Springfield	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Toledo	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

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4. If these services are general, is any charge made to the recipients thereof for them?

Canton	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Cincinnati	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Lima	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Mansfield	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Springfield	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Toledo	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

5. Is your municipality a statutory city or do you operate under a charter form of government?

Canton	<input checked="" type="checkbox"/> Statutory	<input type="checkbox"/> Charter
Cincinnati	<input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Charter
Elyria	<input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Charter
Lima	<input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Charter
Mansfield	<input checked="" type="checkbox"/> Statutory	<input type="checkbox"/> Charter
Springfield	<input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Charter
Toledo	<input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Charter
Zanesville	<input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Charter

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