TORT LIABILITY OF MUNICIPALITIES IN NEW JERSEY

In 1840, John Strader instituted an action against the Board of Chosen Freeholders of Sussex County to recover damages for injury to a team of horses ensuing from an accident arising out of the defective condition of the abutments of a county bridge. The Supreme Court of New Jersey, after a searching investigation which failed to reveal any precedent for this novel action, denied a recovery, asserting for the first time the broad principle that no civil action will lie on behalf of an individual who has sustained special damage by reason of the neglect of a municipal corporation to perform a public duty.[1]

The principal consideration which produced this result was the fear of burdensome litigation. Chief Justice Hornblower observed that:[2]

> "This would open a new field for litigation and I think it would produce an abundant crop."

Rationalization of the basis for immunity was continued in subsequent decisions. The "true principle" on which the exemption should be justified was later stated to be:[3]

> " . . . That the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a

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[1] Freeholders of Sussex v. Strader, 18 N. J. L. 108 (Sup. Ct. 1840).

[2] Freeholders of Sussex v. Strader, *supra*, note 1, at p. 121. To the same effect see Livermore v. County of Camden, 29 N. J. L. 245 (Sup. Ct. 1861), *aff.* 31 N. J. L. 507 (E. & A. 1864).

[3] Condict v. Jersey City, 46 N. J. L. 157 (E. & A. 1854), at p. 160. This same rationalization is contained in the following cases: Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 490 (Sup. Ct. 1885); Vorrath v. Hoboken, 49 N. J. L. 285, 8 Atl. 125 (Sup. Ct. 1887); Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649 (Sup. Ct. 1900); Paterson v. Erie R.R. Co., 78 N. J. L. 592, 75 Atl. 922 (E. & A. 1910); Bisbing v. Asbury Park, 80 N. J. L. 416, 78 Atl. 196 (E. & A. 1910).

duty imposed by law for the general welfare of the inhabitants and the community . . . "

The "abundant crop" of litigation nevertheless ensued, and the simple proposition of the *Strader* case became burdened with ramifications which it is the purpose of this article to investigate. Certain queries suggest themselves. Does this immunity extend to all municipal activities? If not, what is the measure of a municipality's liability in its non-exempted activities? And as to exempted activities are there any exceptions to the rule of non-liability? Does this immunity extend to all tortious conduct? And if it does not, is the responsibility of a municipality for such tortious conduct on the part of its agents determined by the ordinary standards of *respondeat superior?*

This discussion will be confined to the common law rules as developed in the decisions of the courts of New Jersey, and although references will be made to statutory changes, no effort will be made to compile a list of all statutes pertaining to this subject. It should also be stated by way of introduction that while the title of this article refers to municipal liability, the courts of this state apply the same principles in their treatment of the liability of other corporations performing public duties,[4] such as boards of chosen freeholders,[5] boards of education,[6] park commissions,[7] and boards of health.[8] The term "municipality" is accordingly used in this discussion to include such other corporations.

Governmental Functions Distinguished From Private Functions

As already pointed out,[9] the rule of municipal immunity has been justified by the courts in the later cases on the ground

[4] The distinction between the liability of municipal and quasi-municipal corporations is referred to in Spencer v. Freeholders of Hudson, 66 N. J. L. 301, 49 Atl. 483 (E. & A. 1901), but finds no further reference in any other New Jersey case.

[5] See for example Freeholders of Sussex v. Strader, *supra,* note 1; Livermore v. Freeholders of Camden, *supra,* note 2; Jernee v. Monmouth, 52 N. J. L. 553, 21 Atl. 295 (E. & A. 1890); Hart v. Freeholders of Union, 57 N. J. L. 90, 29 Atl. 490 (Sup. Ct. 1894); Spencer v. Freeholders of Hudson, *supra,* note 4.

that the municipality "derives no special benefit or advantage in its corporate capacity" from the functions there involved. It would seem to follow from this *ratio decidendi* that where the activity of the municipality does result in special benefit or advantage to it in its corporate capacity, the immunity from liability should fail. In 1900, this conclusion was definitelv stated for the first time by the Supreme Court, in *dictum*.[10] In 1910, the Court of Errors and Appeals referred to the proposition apparently with approval,[11] and in 1913, that Court actually applied the principle.[12] Is is now definitely settled that where a municipality embarks upon a venture from which it derives some special benefit or advantage in its corporate capacity, it is liable as fully and completely as any private individual similarly engaged.[13] Such functions have been described as private,[14] proprietary or business,[15] and mercantile or quasi-mercantile.[16]

Accordingly the first question to be determined in approaching a problem of municipal liability is whether the particular enterprise is governmental or private. The language of the cases laying down the test for differentiation is general, and the classification of any particular function is most readily accom-

[6] Johnson v. Board of Education, 102 N. J. L. 606, 133 Atl. 301 (E. & A. 1926).

[7] Stephens v. Commissioners, 93 N. J. L. 500, 108 Atl. 645 (E. & A. 1919).

[8] Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344 (E. & A. 1908).

[9] See cases cited, *supra,* note 3.

[10] Tomlin v. Hildreth, *supra,* note 3. There was a passing allusion to this idea in the earlier case of Pray v. Jersey City, 32 N. J. L. 394 (Sup. Ct. 1868).

[11] Bisbing v. Asbury Park, *supra,* note 3.

[12] Karpenski v. South River, 83 N. J. L. 149, 83 Atl. 639 (Sup. Ct. 1912); same case, 85 N. J. L. 208, 88 Atl. 1073 (E. & A. 1913).

[13] Karpenski v. South River, *supra,* note 12; Olesiewicz v. Camden, 1 N. J. Misc. 419 (Sup. Ct. 1923); same case, 100 N. J. L. 336, 126 Atl. 317 (E. & A. 1924); Lehigh Valley R.R. Co. v. Jersey City, 103 N. J. L. 574, 138 Atl. 467 (Sup. Ct. 1927), *aff.* 104 N. J. L. 437, 140 Atl. 920 (E. & A. 1928); Ketcham v. Newark, 3 N. J. Misc. 399, 128 Atl. 579 (Sup. Ct. 1925); Zboyan v. Newark, 104 N. J. L. 258, 140 Atl. 225 (Sup. Ct. 1928); Harper v. East Orange, 105 N. J. L. 193, 143 Atl. 435 (E. & A. 1928); Morgenweck v. Egg Harbor City, 106 N. J. L. 141, 147 Atl. 468 (E. & A. 1929); Martin v. Asbury Park, 111 N. J. L. 364, 168 Atl. 612 (E. & A. 1933); Baron v. City of Bayonne, 7 N. J. Misc. 565, 146 Atl. 665 (Sup. Ct. 1929).

[14] Tomlin v. Hildreth, *supra,* note 3; Bisbing v. Asbury Park, *supra,* note 3; Olesiewicz v. Camden, *supra,* note 13.

[15] Lehigh Valley R.R. Co. v. Jersey City, *supra,* note 13; Ketcham v. Newark, *supra,* note 13; Morgenweck v. Egg Harbor City, *supra,* note 13; Martin v. Asbury Park, *supra,* note 13.

[16] Zboyan v. Newark, *supra,* note 13.

plished by comparison with such other functions of municipalities as have already been characterized by adjudications. Activities pertaining to the following have been held to be governmental: bridges,[17] roads,[18] sidewalks,[19] operation of jails,[20] public parks and grounds,[21] education,[22] fire department,[23] police department,[24] public health,[25] sewerage system,[26] and the collection and disposition of ashes and garbage.[27] By *dictum*, the Court of Errors and Appeals has apparently approved of decisions in other jurisdictions characterizing many other activities as governmental.[28] Drainage of surface water was treated in the case of *Kehoe v. Rutherford*[29] as a governmental function, although the Court of Errors and Appeals in a *dictum* in a later decision[30] stated that the *Kehoe* case dealt with a private function. Subsequent decisions[31] of the same Court, however,

[17] Freeholders of Sussex v. Strader, *supra*, note 1; Cooley v. Freeholders of Essex, 27 N. J. L. 415 (Sup. Ct. 1859); Livermore v. County of Camden, *supra*, note 2; Callahan v. Township of Morris, 30 N. J. L. 160 (Sup. Ct. 1862); Marvin Safe Co. v. Ward, 46 N. J. L. 19 (Sup. Ct. 1884); Halm v. Hudson, 78 N. J. L. 712, 76 Atl. 1014 (E. & A. 1910).

[18] Freeholders of Sussex v. Strader, *supra*, note 1; Pray v. Jersey City, *supra*, note 10; Carter v. Rahway, 55 N. J. L. 177, 26 Atl. 96 (Sup. Ct. 1893), *aff.* 57 N. J. L. 196, 30 Atl. 863 (E. & A. 1894); Hart v. Freeholders of Union, *supra*, note 5; Buckalew v. Freeholders of Middlesex, 91 N. J. L. 517, 104 Atl. 308 (E. & A. 1918); Lydecker v. Freeholders of Passaic, 71 N. J. L. 622, 103 Atl. 251 (E. & A. 1917); Doran v. Asbury Park, 91 N. J. L. 651, 104 Atl. 130 (E. & A. 1918); Casey v. Bridgewater Twp., 107 N. J. L. 163, 151 Atl. 603 (E. & A. 1930).

[19] Dupuy v. Township of Union, 46 N. J. L. 269 (Sup. Ct. 1884).

[20] Watkins v. Freeholders of Atlantic, 73 N. J. L. 213, 62 Atl. 1134 (Sup. Ct. 1906); Liming v. Holman, 10 N. J. Misc. 582, 160 Atl. 32 (Sup. Ct. 1932).

[21] Bisbing v. Asbury Park, *supra*, note 3; Kuchler v. N. J. and N. Y. R.R. Co., 104 N. J. L. 333, 140 Atl. 329 (E. & A. 1928).

[22] Johnson v. Board of Education, *supra*, note 6.

[23] Wild v. Paterson, *supra*, note 3; Paterson v. Erie R.R. Co., *supra*, note 3; Florio v. Jersey City, 101 N. J. L. 535, 129 Atl. 470 (E. & A. 1925).

[24] Miller v. Belmar, 5 N. J. Misc. 224, 135 Atl. 795 (Sup. Ct. 1927).

[25] Valentine v. Englewood, *supra*, note 8.

[26] Jersey City v. Kiernan, 50 N. J. L. 246, 13 Atl. 170 (Sup. Ct. 1888); Waters v. Newark, 56 N. J. L. 361, 28 Atl. 717 (Sup. Ct. 1894), *aff.* 57 N. J L. 456, 35 Atl. 1131 (E. & A. 1894); Harrington v. Woodbridge, 70 N. J. L. 28, 56 Atl. 141 (Sup. Ct. 1903); Murphy v. Atlantic Highlands, 77 N. J. L. 452, 76 Atl. 1073 (Sup. Ct. 1909); Garrison v. Fort Lee, 92 N. J. L. 566, 106 Atl. 381 (E. & A. 1919); Ennever v. Bergenfield, 105 N. J. L. 419, 144 Atl. 809 (E. & A. 1929).

[27] Condict v. Jersey City, *supra*, note 3; Reilly v. New Brunswick, 92 N. J. L. 547, 108 Atl. 107 (E. & A. 1919).

[28] Condict v. Jersey City, *supra*, note 3.

[29] 74 N. J. L. 659, 65 Atl. 1046 (E. & A. 1907).

[30] Valentine v. Englewood, *supra*, note 8.

[31] Dohrmann v. Freeholders of Hudson, 84 N. J. L. 689, 87 Atl. 463 (E. &

have regarded the drainage of surface water as a governmental activity, and such it undoubtedly is.

On the other hand, a municipality has been held to be engaged in performing a private function where, as owner, it leased property adjoining a public boardwalk,[32] where it owned a public market which it leased to various tenants,[33] where it constructed and leased bathing facilities,[34] where it operated an electric lighting plant for the furnishing of light to private consumers for gain,[35] where it operated a water supply system and sold water to consumers,[36] where it was engaged in operating a sewerage plant for profit,[37] and where it owned and conducted an asphalt plant and was doing not only its own street asphalt work, but at the same time was performing work for a private corporation.[38] These decisions generally afford no light as to the specific determinant constituting special benefit or advantage to a municipality in its corporate capacity, the courts being content to say that such benefit exists or does not exist in the particular case. It seems clear, however, that the enterprise need not be actuated by a profit motive in order to render it private.[39]

A. 1913); Arnn v. Northvale, 105 N. J. L. 107, 143 Atl. 437 (E. & A. 1928).

[32] Bisbing v. Asbury Park, *supra,* note 3, where the court holds, however, that where the negligence complained of is connected with the public area and not with the leased portions there is no liability. The court says, at p. 424:

> "Where a dangerous condition exists in a public park, or way, in a portion thereof not leased, the power to rent portions only of such public lands having been conferred by statute, such condition not arising from or in consequence of the management or control of the municipality over the rented parts of the public lands, or connected therewith, the negligence of the public authorities in permitting such condition to exist, will not render such municipality liable to respond to the suit of one of the general public, injured in consequence thereof."

[33] Ketcham v. Newark, *supra,* note 13; Zboyan v. Newark, *supra,* note 13.

[34] Martin v. Asbury Park, *supra,* note 13.

[35] Karpenski v. South River, *supra,* note 12; Lehigh Valley R.R. Co. v. Jersey City, *supra,* note 13.

[36] Lehigh Valley R.R. Co. v. Jersey City, *supra,* note 13; Harper v. City of East Orange, *supra,* note 13; Baron v. City of Bayonne, *supra,* note 13.

[37] Morgenweck v. Egg Harbor City, *supra,* note 13.

[38] Olesiewicz v. Camden, *supra,* note 13.

[39] Thus, in Olesiewicz v. Camden, *supra,* note 13, the Court of Errors and Appeals said, at p. 340:

> " * * * It is not essential that the municipality carried on the private enterprise for profit in order to hold it amenable for the acts of its servants engaged to do the work; it is sufficient if it derives some special benefit or advantage * * *."

And, *a fortiori,* it is immaterial that the enterprise, if private, in fact proves

There is a suggestion in the recent case of *Olesiewicz v. Camden*[40] that even though it be engaged in the execution of a governmental function, a municipality may be deemed to be pursuing a private venture where, for the purpose of economy or better workmanship, it undertakes the performance of work which it might delegate to others by contract. There it appeared that the City of Camden owned and conducted an asphalt plant, that in connection therewith it owned and operated a steam-roller, that it did not only its own street asphalt work, but also performed general work for private persons and corporations, that at the time of the accident there involved it was doing asphalt work partly on its own account and partly for a private corporation, and that due to the negligence of an employee, the steam generated by the steam-roller suddenly became discharged, frightening a team of horses with resulting injury to the plaintiff. A judgment in favor of the plaintiff was sustained. The Court of Errors and Appeals said:[41]

> "There is, however, another urgent legal reason why the appellant municipality should respond in damages for the injury done to the plaintiff. The fact is undisputed that the appellant embarked upon a private enterprise, presumably for profit, or, if not, at least, for the sake of economy, in having the work done cheaper and better, than by letting it out on contract to a successful lowest competitive bidder, as required by statute. It is not essential that the municipality carried on the private enterprise for profit in order to hold it amenable for the acts of its servants engaged to do the work; it is sufficient if it derives some special benefit or advantage . . . "

In so far as the decision rests on the ground that the city in performing work for a private corporation was engaged in the pursuit of a private business, it is unexceptionable. The

profitless. Morgenweck v. Egg Harbor City, *supra,* note 13; Baron v. City of Bayonne, *supra,* note 13.

[40] *Supra,* note 13.

[41] *Supra,* note 13, at p. 340.

further ground which the court seems to suggest, namely, that the city's activities in paving its own street were private merely because the city, for the sake of economy or better workmanship, elected to do the work itself rather than to let it out on contract, is, however, questionable.

Since municipalities themselves frequently execute certain phases of their public duties which might be let out by contract, the question of the soundness of this rule is of great significance. Surprisingly, this language has not since been considered by the courts although at least two opportunities for its application have arisen. Thus in the case of *Lehigh Valley R. R. Co. v. Jersey City*,[42] in which the question of municipal tort liability was not involved, the Supreme Court, in distinguishing between governmental and private functions, and immediately after citing the *Olesiewicz* case, said:[43]

> *"The providing of water for extinguishing fires and electricity for lighting streets and public places are governmental functions,* while the distribution of water and furnishing of electricity to its inhabitants for a price, is the exercise of a private or proprietary function by the municipality, and is governed by the same rules as apply to private corporations." (our italics.)

Since a municipality can obtain water for extinguishing fires or electricity for lighting public places from other sources, faithful application of the *Olesiewicz* case would require the conclusion that the municipality's activities in thus supplying itself with water and elecricity are private functons. The italicized language of the *Lehigh* opinion is therefore inconsistent in principle with this aspect of the *Olesiewicz* decision, and the inconsistency is further accentuated by the fact that the Court of Errors and Appeals affirmed the *Lehigh* case in a *per curiam* opinion which adopted the reasoning of the Supreme Court.

The Court of Errors and Appeals was thereafter squarely

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[42] *Supra*, note 13.
[43] *Supra*, note 13, at p. 577.

confronted with the same problem in *Casey v. Bridgewater Township*.[44] There the defendant municipality was engaged in the building and repair of a road. In connection with this operation, it had contracted with a landowner for the right to dig and carry away gravel. In the course of the digging, which was directed by representatives of the township, a side of the gravel pit fell, inflicting injuries upon the plaintiff. In answer to the contention of the plaintiff that the defendant was engaged in a proprietary or business function, the Court said:[45]

> "He argues . . . that the municipality was acting, not in a governmental capacity, but rather in a business or proprietary function, whereby it would be liable for the injuries of the plaintiff.
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> ". . . The municipality cannot be said to have been engaged in business for profit or convenience merely because it made an agreement incidental to the performance of its public duty to build and repair its roads, no matter how advantageous the contract may have been. It did not own the pit, neither did it maintain or operate it. It bought the gravel with the right to dig and remove it in such quantities as was required for its work. It was therefore acting wholly within the scope of its functions, in the performance of a public duty."

Although the Court adverted to the *Olesiewicz* decision in connection with another phase of the case, no effort was made either to apply or to distinguish the language of that earlier opinion. Such silence seems tantamount to repudiation. The probability is that, when the Court definitely considers the problem, it will conclude that benefit or advantage incidental to the performance by a municipality itself of those aspects of its public duties which it might delegate by contract does not reach the municipality in its corporate capacity, and that, accordingly, such activities are clothed with the immunity which adheres to the performance of such duties in general.

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[44] *Supra*, note 18.
[45] *Supra*, note 18, at p. 165.

Liability for Neglect to Perform or Negligence in the Performance of Public Duties

If it is determined that a particular function is governmental, the next matter for consideration is the extent of the municipality's immunity in connection with that function. It has already been pointed out that the *Strader* case laid down the rule that a municipality is not responsible in damages for its *neglect to perform* a public duty. This rule was adopted by the Court of Errors and Appeals in *Livermore v. Freeholders of County of Camden,* where it said:[46]

> "That an action will not lie in behalf of an individual who has sustained special damage by reason of the neglect of a public corporation to perform a public duty, I consider the well settled law of this state . . . "

In 1884, the courts of this state were for the first time called upon to consider a situation where the performance of a public duty had actually been undertaken, but where the municipality had been *negligent in the performance* of that duty. It was held that the immunity extended to this situation.[47] It has since been thoroughly established that a municipality's exemption from liability applies not only to a neglect to perform a public duty, but also to its negligence in the performance of such duty.[48] And it may also be added that this is as far as the rule of immunity has been carried.[49]

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[46] *Supra,* note 2 (31 N. J. L.) at p. 508. In accord: Cooley v. Freeholders of Essex, *supra,* note 17; Pray v. Jersey City, *supra,* note 10; Marvin Safe Co. v. Ward, *supra,* note 17; Dupuy v. Township of Union, *supra,* note 19; Carter v. Rahway, *supra,* note 18.

[47] Condict v. Jersey City, *supra,* note 3.

[48] The scope of municipal immunity is expressed in this or equivalent language in the following cases: Wild v. Paterson, *supra,* note 3; Waters v. Newark, *supra,* note 26; Watkins v. Freeholders of Atlantic, *supra,* note 20; Lydecker v. Freeholders of Passaic, *supra,* note 18; Ansbro v. Wallace, 100 N. J. L. 391, 126 Atl. 426 (E. & A. 1924); Kuchler v. N. J. and N. Y. R.R. Co., *supra,* note 21; Callan v. Passaic, 104 N. J. L. 643, 141 Atl. 778 (E. & A. 1928).

[49] The text is subject to the possible qualification that even as to torts other than those of negligence or neglect to perform, municipalities may be excused from normal responsibility for wrongs of servants, though done within the scope of their employment, if such wrongs were neither directed nor specifically authorized by the municipality. See text, *infra* p. 170.

This same immunity has been expressed in some of the decisions in terms of the non-applicability of ordinary rules of *respondeat superior* to municipalities.[50] Logically, this approach to the problem is superfluous, since a principal is not subject to greater liability for acts of its agents than that which it incurs for its own like conduct. Nevertheless, due to the efforts of litigants to circumvent the rule of non-liability through the avenue of *respondeat superior,* there developed the line of cases referred to above.[51] Thus in the leading case of *Condict v. Jersey City,* the Court of Errors and Appeals said:[52]

> " . . . To maintain in its integrity the doctrine of our courts that a municipal corporation is not amenable to actions for negligence in the performance of public duties, it is necessary to maintain also that persons employed by the corporation in the execution of public duties are mere agencies or instruments by which such duties are performed, and that the doctrine of *respondeat superior* does not apply to such employments. To impose upon the corporation liability for the negligence of such employes would indirectly fix upon the corporation a liability from which it is by law, on considerations of public policy, exempted."

It is accordingly apparent that the couching of the rule in terms of agency does not affect the ultimate result where all that appears is a mere neglect to perform or mere negligence in the performance of a public duty.[53]

Applying these rules, the courts of this state have held that a municipality is not liable, in the absence of a statute impos-

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[50] Condict v. Jersey City, *supra,* note 3; Wild v. Paterson, *supra,* note 3; Paterson v. Erie R.R. Co., *supra,* note 3; Reilly v. New Brunswick, *supra,* note 27; Florio v. Jersey City, *supra,* note 23.

[51] *Supra,* note 50.

[52] *Supra,* note 3, at p. 160.

[53] But the concept of the municipal servant as a mere instrumentality does operate to lessen the scope of liability for torts of servants other than mere negligence or neglect to perform public duties, in cases where such other tortious conduct is not specifically authorized or directed by the municipality. See text, *infra,* p. 170.

ing liability,[54] where it failed to repair a bridge,[55] where it failed to provide an adequate temporary bridge during the construc-

[54] For some examples of statutory liability, see *infra,* notes 55, 58, 77, 78. See also Wells Fargo & Co. v. Jersey City, 207 Fed. 871 (D. N. J. 1913), *aff.* 219 Fed. 699 (C. C. A. 3d, 1914), holding that there can be a recovery only for injury to tangible property and not for business losses under 4 N. J. COMP. STAT. 4381, sec. 5, imposing liability upon cities or counties for destruction or injury to property resulting from mob or riot. It is also provided by statute, P.L. 1923, ch. 147, p. 316, that a surviving dependent spouse, lineal heirs or adopted children may recover damages against a county or city by reason of mob lynching.

[55] Freeholders of Sussex v. Strader, *supra,* note 1; Cooley v. Freeholders of Essex, *supra,* note 17; Livermore v. Freeholders of Camden, *supra,* note 17.

To a substantial extent the common law rule was modified by statute, (1 N. J. COMP. STAT. 304 sec. 9), which, however, was repealed, P.L. 1918, p. 694. That statute provided that an action might be maintained against a township or board of chosen freeholders of a county for damages to person or property arising from wrongful neglect to erect, rebuild, or repair a bridge.

Some of the interpretations of this Act are these. The statute covers damages to vessels resulting from defective condition of a drawbridge. Ripley v. Freeholders of Essex and Hudson, 40 N. J. L. 45 (Sup. Ct. 1878); Mattlage v. Freeholders of Hudson and Bergen, 63 N. J. L. 583, 44 Atl. 756 (E. & A. 1899). There is no liability for damages ensuing from mere omission or delay in the completion of the erection of a new bridge built to replace a defective one. Marvin Safe Co. v. Ward, *supra,* note 17. There is no liability for damages to land where because of smallness of culvert, water backs up and does damage to land. Maguth v. Freeholders of Passaic, 72 N. J. L. 226, 62 Atl. 679 (E. & A. 1905). Where reenforcements designed to protect bridge gave away and water thereby released injured plaintiff's grist and sawmill, there was denied recovery. Jernee v. Monmouth, *supra,* note 5. The statute imposes no duty to light bridges. Halm v. Freeholders of Hudson, *supra,* note 17. An action is maintainable under the Death Act for violations of this statute. Murphy v. Board of Freeholders, 57 N. J. L. 245, 31 Atl. 229 (Sup. Ct. 1894). A bridge, under the Act, includes approaches. Freeholders of Morris v. Hough, 55 N. J. L. 628, 28 Atl. 86 (E. & A. 1893); Keeler v. Freeholders of Burlington, 79 N. J. L. 436, 75 Atl. 432 (Sup. Ct. 1910); Robinson v. Freeholders of Passaic, 91 N. J. L. 154, 102 Atl. 359 (E. & A. 1917), and also railguards, Robinson v. Freeholders of Passaic, *ibid.*

Substantially the same statute was enacted, however, so far as counties are concerned, in 1 N. J. CUM. SUPP. COMP. STAT. (1911-1924) p. 765, which is as follows: "In all cases where the board of chosen freeholders of a county, or boards of chosen freeholders of two or more counties, are charegable by law with the construction, erection, rebuilding or repair of any viaduct or bridge, and the said board or boards shall wrongfully neglect to perform their duty in that behalf, by reason whereof any person or persons shall receive injury or damage in his, her or their persons or property, such person or persons may bring an action at law against said county or counties and recover judgment to the extent of all such damage sustained as aforesaid. If, however, it shall be necessary to close any viaduct or bridge and stop travel over the same on account of necessary repairs, or on account of the same being unsafe for public travel, there shall be no liability on the part of any county or counties for damages by reason of the closing of such viaduct or bridge." For some interpretations of this statute see the cases of Norton v. Bergen County, 7 N. J. Misc. 683, 147 Atl. 50 (Sup. Ct. 1929); Mullen v. Freeholders of Essex, 107 N. J. L. 301, 153 Atl. 520 (E. & A. 1931); Kacsanik v. Passaic County, 9 N. J. Misc, 783, 155 Atl. 751 (Sup. Ct. 1931).

tion of a new bridge,[56] where it failed to light a bridge,[57] where it failed to repair a road,[58] where it was charged with failure to protect travellers after it had caused a road to be oiled,[59] where its servants were negligent in digging gravel to be used in building roads,[60] where it failed to repair a sidewalk,[61] where it failed to remove a dangerous condition on public grounds,[62] where it failed to remove ice from a stairway leading to public grounds,[63] where, because of the negligent construction of a sewer, the sewage flooded and injured private lands,[64] where it negligently constructed a defective wall of a coal bin in a public school, resulting in its collapse and injury to a person,[65] where the driver of a horse and cart engaged in removal of ashes negligently inflicted an injury,[66] where its servants negligently

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[56] Marvin Safe Co. v. Ward, *supra,* note 17.

[57] Halm v. Freeholders of Hudson, *supra,* note 17.

[58] Freeholders of Sussex v. Strader, *supra,* note 1; Pray v. Jersey City, *supra,* note 10; Carter v. Newark, *supra,* note 18. Nor does the municipality assume liability by undertaking repairs which are insufficient. Buckalew v. Freeholders of Middlesex, *supra,* note 18.

This rule was modified to a limited extent by statute (4 N. J. COMP. STAT. 4451, sec. 19) to the effect:

> "That if any damage shall happen to any person or persons, his, her, or their team, carriage, or other property, by means of the insufficiency or want of repairs of any public road in any of the townships of this state, the person or persons sustaining such damage shall have the right to recover the same * * * in an action on the case * * * against such township by its corporate name * * *"

Under this Act it was held that "road" included the entire highway and not merely the center strip. Krammer v. Township of Clementon, 91 N. J. L. 69, 102 Atl. 389 (Sup. Ct. 1917), but did not include sidewalks. Dupuy v. Township of Union, *supra,* note 19. The word "township" did not include cities. Carter v. Rahway, *supra,* note 18, or boroughs, Van Valkenburgh v. Bergenfield, 83 N. J. L. 325, 85 Atl. 269 (Sup. Ct. 1912). The statute was later amended to exclude certain counties from its purview. See Krammer v. Township of Clementon, *ibid.* Thereafter the statute was repealed (P.L. 1917, p. 571, ch. 200), and no substitute enacted.

[59] Lydecker v. Freeholders of Passaic, *supra,* note 18; but see discussion of this case, *infra,* text p. 168.

[60] Casey v. Bridgewater Twp., *supra,* note 18.

[61] Dupuy v. Township of Union, *supra,* note 19; *cf.* Ansbro v. Wallace, *supra,* note 48, where the court seems to find that there was no negligence at all.

[62] Bisbing v. Asbury Park, *supra,* note 3. In this case it was not charged, nor did the court consider the possibility that the alleged actionable conduct might have constituted an active wrong rather than negligence, *i.e.,* the creation of a nuisance.

[63] Kuchler v. N. J. and N. Y. R.R. Co., *supra,* note 21.

[64] Jersey City v. Kiernan, *supra,* note 26. See discussion of this case, *infra,* text p. 156.

[65] Johnson v. Board of Education, *supra,* note 6.

[66] Condict v. Jersey City, *supra,* note 3.

started and negligently guarded a fire on dumping grounds,[67] where it failed to repair defective equipment, which resulted in injury to its employee,[68] where the driver of a fire truck negligently inflicted an injury,[69] where it failed to perform a statutory duty to provide certain comforts to a detained witness,[70] and where it failed to furnish a sufficient number of jail attendants or modern jail locks, as a result of which an escaping prisoner injured a warden.[71] As a further application of this principle it was held that the contributory negligence of the driver of a fire truck did not bar a recovery by the municipality against a negligent third party.[72]

The rule has been applied where the conduct of a municipality amounted to an error in discretion, as for example where it constructed a sewerage system which was inadequate,[73] and where it constructed a drainage system which proved insufficient in storm weather.[74] Such defaults amount either to a neglect to perform a public duty or negligence in the performance of such duties and therefore fall within the rule of immunity.

There are other situations of non-liability which are occasionally treated as falling within this principle, but which are more properly explained as cases where the conduct of the municipality was not wrongful at all. Thus no wrong is committed where a municipality alters the flow of surface water as an incident to lawful regrading of streets,[75] or where as a result of the paving of a street, the flow of surface water is augmented to the extent that the paving has eliminated seepage.[76] So, also, damage to adjoining property owners by reason of an altera-

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[67] Reilly v. New Brunswick, *supra,* note 27.
[68] Wild v. Paterson, *supra,* note 3.
[69] Florio v. Jersey City, *supra,* note 23.
[70] Watkins v. Freeholders of Atlantic, *supra,* note 20.
[71] Liming v. Holman, *supra,* note 20.
[72] Paterson v. Erie R.R. Co., *supra,* note 3.
[73] Harrington v. Woodbridge, *supra,* note 26. There is an allusion to this idea in Freeholders of Sussex v. Strader, *supra,* note 1, at p. 122.
[74] See Arnn v. Northvale, *supra,* note 31.
[75] Town of Union ads. Durkes, 38 N. J. L. 21 (Sup. Ct. 1875); Consolidated Safety Pin Co. v. Town of Montclair, 102 N. J. Eq. 128, 139 Atl. 909 (Ch. 1928), *aff.* 103 N. J. Eq. 378, 143 Atl. 916 (E. & A. 1928); *cf.* Wilson v. City of Plainfield, 4 N. J. L. J. 380 (Circ. Ct. 1881).
[76] Murray Rubber Co. v. Trenton, 103 N. J. L. 43, 135 Atl. 475 (Sup. Ct. 1926), *aff.* 105 N. J. L. 496, 144 Atl. 920 (E. & A. 1929).

tion of the grade of a street is at common law non-actionable,[77] and likewise at common law a suit will not lie for damages resulting from the vacating of a public road.[78] It has also been held that a municipality may, with legislative authorization, discharge sewage into tidal streams, and that incidental injury to tidal riparian owners is *damnum absque injuria*.[79]

Municipal Liability for Neglect to Perform or Negligence in the Performance of a Public Duty Where No Indictment Will Lie

The Supreme Court, in the *Strader* case, after reaching the conclusion that a civil action could not be maintained by an individual who sustained special damage by reason of municipal

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[77] Plum v. Morris Canal and Banking Co., 10 N. J. Eq. 256 (Ch. 1854); State, Vanatta, pros. v. Morristown, 34 N. J. L. 445 (Sup. Ct. 1871); Vorrath v. Hoboken, *supra,* note 3; Caruso v. Town of Montclair, 88 N. J. L. 405, 98 Atl. 670 (Sup. Ct. 1916); same case, 100 Atl. 339 (E. & A. 1917); *cf.* Burns Holding Corp. v. State Highway Commission, 8 N. J. Misc. 452, 150 Atl. 768 (Sup. Ct. 1930), *aff.* 108 N. J. L. 401, 154 Atl. 628 (E. & A. 1931); but as to wanton or unnecessary injuries resulting therefrom, see Plum v. Morris Canal and Banking Co., *ibid.* If the change of grade is unauthorized by the Legislature, there is liability. Caruso v. Town of Montclair, *ibid.*

By statute (4 N. J. Comp. Stat. 4461, secs. 70 and 72) it was provided that the owner of any house or building might recover damages for injuries occasioned by change of grade where the municipal charter failed to provide for assessment of damages.

This Act, however, was repealed, P. L. 1918, ch. 190, p. 652.

The only existing statute respecting liability for change of grade is 1 N. J. Cum. Supp. Comp. Stat. (1911-1924) p. 752, sec. 1137:

> "An action shall lie in behalf of any owner of any land or real estate situate along any road owned by or under the control of a board of chosen freeholders, the grade whereof shall be or shall have been altered, to recover all damages which such owner shall suffer or shall have suffered by reason of the altering of such grade; provided, that no such action shall be brought after the expiration of twelve months from the altering of any such grade."

[78] Newark v. Hatt, 77 N. J. L. 48, 71 Atl. 330 (Sup. Ct. 1908), rev'd. on other grounds, 79 N. J. L. 548, 77 Atl. 47 (E. & A. 1910); Wilmar Company v. Camden County, 107 N. J. L. 230, 155 Atl. 26 (Sup. Ct. 1930), *aff.* 108 N. J. L. 208 (E. & A. 1931). See also Burns Holding Corp. v. State Highway Commission, *supra,* note 77. Immunity from liability may be qualified by charter provision, as in Newark v. Hatt, *ibid.*

[79] Marcus Sayre Co. v. Newark, 60 N. J. Eq. 361, 45 Atl. 985 (E. & A. 1900). But as to damages not necessarily incidental to the execution of the authorized plan, see the concurring opinion of Dupue, J., in this case. As to liability to non-tidal riparian owners, see Simmons v. City of Paterson, 58 N. J. Eq. 1, 42 Atl. 749 (Ch. 1899), modified, 60 N. J. Eq. 385, 45 Atl. 995 (E. & A. 1899) and Doremus v. City of Paterson, 65 N. J. Eq. 711, 55 Atl. 304 (E. & A. 1903).

neglect to perform a public duty, added the comment that:[80]

> " . . . The only remedy in such cases has been by indictment or presentment."

With this declaration of a rule of law, gratuitously contributed by the Court, there was unwittingly laid the foundation of an anomalous exception to the rule of municipal immunity from liability.

The growth of this exception began with the case of *Jersey City v. Kiernan*.[81] There a municipality, in obedience to a public duty, constructed a sewer which, because of faulty construction and lack of repair, broke, the contents flooding the lands of the plaintiff. It appeared that only one other landowner in addition to the plaintiff suffered injury as the result of this negligence. The Supreme Court, after discussing the doctrine of the *Strader* case, said:[82]

> "It is decided that when by such official malfeasance or neglect a public nuisance has resulted, the remedial procedure is a prosecution on the part of the state. The inquiry now is, what is the legal rule when a private nuisance alone has arisen exclusively from such a source? In the principal case referred to, the neglect complained of—that is, the absence of proper care in the construction or reparation of the bridge—was a public evil affecting the body of the people; in this case the defect in the sewer is injurious, apparently, to the plaintiff and one other contiguous landowner alone. Consequently, in the case in hand, as the mischief to the community, if any, is not of a magnitude sufficient to justify an indictment, while, at the same time, it damages the property of an individual, *it is obvious that unless such a suit as the present one*

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[80] Freeholders of Sussex v. Strader, *supra,* note 1, at p. 116. The same observation is made in the cases of Callahan v. Township of Morris, *supra,* note 17; Pray v. Jersey City, *supra,* note 10; Marvin Safe Co. v. Ward, *supra,* note 17.

[81] *Supra,* note 26.

[82] *Supra,* note 26, at p. 250.

will lie, the wrong cannot be redressed by any method known to the law.

"After careful consideration, my conclusion is that the general rule established by the line of cases referred to is not applicable to the facts present in this instance, *and that whenever an indictment will not lie for such neglect as is here complained of, attended with such consequences as have here ensued, the person thus specially injured may, in order to right the wrong, resort to an action.* The injury is altogether private in its character and is capable of being continued indefinitely, so that under some circumstances the land might, in substance, be applied to the public use without compensation . . . " (our italics.)

The Court then cited cases from other jurisdictions which it deemed supported the conclusion that "in case of neglect in the construction or reparation of a public sewer, and a consequent damage to private property, an action is sustainable in the name of the person thus injured against the municipal corporation . . . " Having apparently reached that result, the Court suddenly, and without explanation, reversed itself in part and said:[83]

"The conclusion to which this court has finally come is this: That the defendant is not responsible for the consequences of a break in the sewer in question, *per se,* even though it be the result of the carelessness of its own agents, for the public is not responsible for such misfeasances of its officers; but when such break has occurred, occasioning a private nuisance exclusively, and the public authorities have been notified of the accident, we think that then they owe a duty to the individual to put the sewer in a proper condition, and that for the non-performance of such duty that an action will lie."

In short, therefore, after painstakingly reaching the conclusion

[83] *Supra,* note 26, at p. 251.

that a civil action will lie where an indictment will not, the Court proceeded to limit this conclusion to the consequences of the neglect or negligence of the municipality itself, as distinguished from those ensuing from such defaults on the part of its agents. But why should there be this limitation? If the wrong committed by the agent is not remediable by indictment against the municipality, a denial of a civil action against it results in the eventuality of a wrong without a remedy, the very situation which this case seeks to avoid.[84] Moreover, if a municipality is not responsible for the conduct of its employees in creating a harmful condition, it is difficult to understand how it can be charged with the duty of removing the condition. Nevertheless the Court held that the municipality, although immune from responsibility for such damages as flowed from the break itself, was liable for damages suffered after notice to it and the expiration of a reasonable opportunity to abate the nuisance thereby created.[85]

The broad principle that a civil action will lie for the neglect or negligence of a municipality where an indictment will not, took firm root. A few years later, the same Court, in the case of *Waters v. Newark,*[86] had before it a similar situation, with the exception that the damage was not confined to the lands of the plaintiff but extended as well to a public highway. The Court, relying on the *Kiernan* case, stated:

> "It follows that, in any given case of special damage, the question as to the right of civil action is narrowed down to the inquiry whether such damage is or is not part of a public wrong for which an indictment will lie."

Finding that a public indictment would lie, the Court denied recovery.

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[84] In holding that the municipality was not liable for damages resulting from the negligence of its servants, the court apparently had in mind the case of Condict v. Jersey City, *supra,* note 3. Since in that case, however, the defendant would not have been liable if it had itself been guilty of the negligence, that case was not mandatory authority for the conclusion of the Kiernan Court.

[85] The strict holding of the court, as stated in the text, was approved in Murphy v. Atlantic Highlands, *supra,* note 26.

[86] *Supra,* note 26, at p. 363.

There then followed a series of *dicta* recognizing liability to indictment as a prerequisite to municipal tort immunity, and restating the rule as follows:[87]

> "It has been uniformly held by our courts that, in the absence of statutory provisions, a municipal corporation charged with the performance of a public duty is not liable to an individual for neglect to perform or negligence in the performance of such duty, *whereby a public wrong has been done for which an indictment will lie,* although such individual has suffered special damage thereby . . . " (our italics.)

If this test of liability were faithfully applied, it is apparent that the immunity of a municipality would be greatly circumscribed, for there are many instances of neglect and negligence that would not support an indictment. The indictment against a municipality to which the *Strader* case alluded was essentially civil in nature, and had as its principal object, an abatement of the dangerous condition, rather than the punishment of the corporation. According to the early authorities dealing with this common law proceeding against municipalities, the remedy of indictment was confined to cases of public nuisances, and although in some instances a conviction carried with it a fine, the principal consequence of a conviction

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[87] Hart v. Freeholders of Union, *supra,* note 5, at p. 92. The rule is stated in this or equivalent language in the following cases: Kehoe v. Rutherford, *supra,* note 29; Dohrmann v. Freeholders of Hudson, *supra,* note 31; Caruso v. Town of Montclair, *supra,* note 77; Lydecker v. Freeholders of Passaic, *supra,* note 18; Doran v. Asbury Park, *supra,* note 18; Garrison v. Fort Lee, *supra,* note 26; Olesiewicz v. Camden, *supra,* note 13; Casey v. Bridgewater Twp., *supra,* note 18; Buffington v. County of Atlantic, 11 N. J. Misc. 443, 167 Atl. 527 (Sup. Ct. 1933); *cf.* Watkins v. Freeholders of Atlantic, *supra,* note 20; Buckalew v. Freeholders of Middlesex, *supra,* note 18. The scope of the situation within which an indictment will not lie, and consequently, within which a civil action will lie for the recovery of damages suffered by an individual has been variously described as, where a "private nuisance" is created, Jersey City v. Kiernan, *supra,* note 26; Hart v. Freeholders of Union, *supra,* note 5; Casey v. Bridgewater Twp., *supra,* note 18; and where there is an "infliction of a private injury to the property of an individual," Waters v. Newark, *supra,* note 26, and Caruso v. Town of Montclair, *supra,* note 77. These broad statements purported only to describe the exception laid down by the Kiernan case to the general rule of immunity, but not to extend the scope of that exception.

was an order that the nuisance be abated.[88] This being so, it is clear that the remedy of indictment could not be invoked where the neglect or negligence of a municipality resulted in a casual wrong, unassociated with a continuing condition.

There has been a tremendous expansion of governmental activities since the days of Blackstone, giving rise to types of municipal defaults in public duties which were unheard of when the common law indictment was developed. There have been no square decisions in this state touching the applicability of this remedy to wrongs incidental to the performance of these new functions. There have, however, been several *dicta* bearing on this point, which *dicta* have been occasioned by efforts of plaintiffs to invoke the rule of the *Kiernan* case. Thus in

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[88] The measure of modern municipal criminal liability of municipalities is apparently nowhere considered and laid down in this state. An estimate of such liability, however, becomes necessary in view of the rule of the Kiernan case to the effect that, subject to the qualifications of the rule discussed in the text, *supra,* p. 157, the measure of such criminal liability is the corresponding measure of civil immunity for negligence in the performance of and neglect to perform public duties. The subject is considered in BLACKSTONE'S COMMENTARIES (6th ed. 1774) in Book IV, Public Wrongs, ch. 13, p. 166, where he lists cases of indictable nuisances. Those of his cases where the defendant would most likely have been a municipality are specified as follows:

> "1. Annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass; either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, *may be indicted, distreined to repair and amend them, and in some cases fined.*" (our italics).

CHITTY ON CRIMINAL LAW (3rd Am. Ed. 1836), following the general plan of Blackstone's discussion of crimes under his heading, Public Wrongs, lists the following cases of indictments for public wrongs: 1. For not repairing highways. 2. For not repairing bridges. 3. For nuisances to highways by actual obstruction. 4. For obstructions to watercourses.

A modern consideration of the problem concludes not only that the nuisance cases mark the genesis of municipal criminal liability, and that the proceeding by indictment is civil in nature, but that these cases also mark the limits of such liability, (1933) 33 COLUMBIA L. REV. 747, 748.

That the conviction upon an indictment against a municipality carried with it an order for the abatement of the wrong is clear from the italicized excerpt from Blackstone, *ibid,* and is also supported by what little authority bearing upon the point is present in this state. Thus in Freeholders of Bergen v. State, 42 N. J. L. 263 (Sup. Ct. 1880), it is stated at p. 274: " * * * where a defendant is convicted for maintaining a nuisance which is continuous, the usual course is to order it to be abated, and if the defendant neglect or refuse to obey, to direct an abatement by the sheriff. 2 WHARTON, CRIM. LAW, sec. 2377; Barclay v. Commonwealth, 1 CASEY 503." So also in State v. Hudson County, 30 N. J. L. 137 (Sup. Ct. 1862), the court says, at p. 143: " * * * As Chief Justice Holt said in the case of *Regina v. The Inhabitants of the County of*

Watkins v. Freeholders of Atlantic,[89] the Supreme Court, in denying the right of a detained witness to recover against a board of freeholders for its failure to provide him with provisions and lodging in accordance with a statutory duty, stated that for this neglect an indictment was the proper remedy. So also in *Johnson v. Board of Education*[90] the Court of Errors and Appeals asserted that an indictment would lie against a board of education for negligence in the construction of the wall of a coal bin in a public school, so that one injured by the collapse of the wall could not succeed in a civil action. It is difficult to understand how the common law indictment, carrying with it, as it does, an order to abate, could be invoked upon the facts of the *Watkins* case since the wrong to the plaintiff was thoroughly completed and there was no semblance of a continuing condition requiring abatement. Nor in the *Johnson* case would a common law indictment lie after the collapse of the wall, for with that occurrence the injurious condition terminated, and the need for the remedy of abatement expired.

As to the propriety of an indictment in the situation there involved, the Court in the *Johnson* case said:[91]

> "The misfeasance for which an indictment lies in cases of this class is, fundamentally, not so much the accident itself as the general negligence out of which grew the accident. So, in the case at bar, if the board negligently built a defective wall, liable to break and do injury, it was indictable for that, whether the wall broke or not, or whether someone was injured or not; whereas, the accident to plaintiff was only a special injury arising out of the act of public negligence in building a bad wall whereby any member of the public might be injured."

But this view is essentially inconsistent with the view taken by

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Wilts, 6 *Mod.* 307, 'If the order to repair be not obeyed, an attachment may issue against the inhabitants of the whole county, and catch as many as one can of them' * * *."

[89] *Supra*, note 20.

[90] *Supra*, note 6.

[91] *Supra*, note 6, at p. 611.

the Court in the *Kiernan* case as to when an indictment will lie, for the latter decision regarded the resulting damage as the vital factor rather than the nature of the wrongful act. If the Court in the *Kiernan* case had used the reasoning of the *Johnson* case, it could not have concluded[92] that a municipality would be civilly liable for its negligence in constructing a sewer for that too must be regarded as an act of public negligence whereby any member of the public might have been injured, although in fact, as in the *Johnson* case, it proved injurious to an isolated member of the public. In straining to avoid an application of the *Kiernan* rule the *Watkins* and *Johnson* cases seem to have formulated the proposition that an indictment will lie for the breach of any public duty, even though the breach is unconnected with a public nuisance. As noted above, the common law stopped short of that proposition. But whether this conclusion of the *Watkins* and *Johnson* cases is historically sound or not, it substantially nullifies the sweeping rule of the *Kiernan* decision by so radically expanding the class of cases in which an indictment will lie as practically to include within its scope every situation of municipal neglect or negligence in the performance of public duties.

The concept that municipal liability depends upon whether an indictment will lie has apparently never been considered outside of this jurisdiction. Although not a cogent argument against the rule, this fact arouses suspicion that it may be unsound.

As already pointed out, the *Kiernan* rule had its genesis in the notion that there should be a remedy for every wrong,[93] and apparently also in the belief that the *Strader* case denied the right of the individual to recover damages because an indictment would there serve as a sufficient remedy. But the Court in the *Strader* case obviously did not regard the fact that an indictment would lie as the reason for municipal immunity. The basis of the decision was plainly a broad policy demanding

[92] This conclusion was only *dictum*, since the Court, as noted above, found that the municipality was not chargeable with the negligence of its employees and, not being independently negligent, was not liable.

[93] The same thought is expressed in the cases of Waters v. Newark, 15 N. J. L. J. 17 (Circ. Ct. 1881); Hart v. Freeholders of Union, *supra*, note 26.

the protection of public funds from burdensome litigation. Nor is the test laid down in the *Kiernan* case any more compatible with the further expression of the justification for immunity expounded in cases subsequent to the *Strader* case, namely, that the municipality in pursuing its governmental functions derives no special benefit or advantage to itself in its corporate capacity, since the existence or non-existence of the remedy of indictment is obviously immaterial to the existence or extent of such corporate benefit or advantage. And an indictment does not provide, so far as the damnified individual is concerned, anything that can be regarded as a genuine remedy of the wrong he has suffered.

The actual result of the *Kiernan* case, however, the imposition of liability for damages accuring after notice to the municipality and after the expiration of a reasonable opportunity to remedy the wrong, may well be justified on the ground that there the neglect or negligence resulted in a condition which, if not abated, would amount to a taking of property without compensation. Language articulating this thought appears in the *Kiernan* decision itself,[94] and the limitation of liability to such damages as accrued after notice and opportunity to abate, is consistent with this rationale.

As a matter of fact, notwithstanding the constant reiteration of the statement that a civil action may be maintained where an indictment does not lie, only one case in addition to the *Kiernan* case actually allowed a recovery on that theory. That was the case of *Murphy v. Atlantic Highlands,*[95] and there, as in the *Kiernan* case, the result may be explained on the ground that the failure to abate the nuisance after notice and opportunity amounted to a taking of the plaintiff's property without compensation.

The *Kiernan* case has been one of the principal causes of confusion in the field of municipal tort liability. The test which it purports to lay down rests upon neither precedent nor principle, and certainly has been evaded if not actually repudiated by the later decisions. The *Kiernan* case did engraft upon the

[94] See last sentence of quotation appearing *supra,* text, p. 157.
[95] *Supra,* note 26. See, however, *infra,* note 103.

rule of municipal immunity from liability for neglect to perform or negligence in performance of public duties, the limitation that the municipality is liable where it fails, after notice and opportunity, to abate a condition which, if continued, will amount to a taking of property without compensation. To this extent only should the case be followed.[96]

Municipal Liability for "Active Wrongdoing"

It has already been pointed out that a municipality is exempt from liability for damages resulting from its neglect to perform or its negligence in the performance of a public duty, and that this immunity has been curtailed to an uncertain degree by the *Kiernan* case. We now turn to a consideration of municipal liability for torts other than a mere neglect to perform or mere negligence in the performance of a public duty.

It was stated early in the development of the law in this field that there would be liability for "wanton or unnecessary damage" inflicted by a municipality in the course of the performance of its public functions.[97] Shortly thereafter a city was held liable for trespass to land, without any consideration of the possibility of immunity.[98] In 1875, the Supreme Court held that although a municipality was free from liability in cases of neglect to perform a public duty, it was liable for "some positive act, wrongful in itself, and detrimental to the plaintiff".[99] This rule was definitely established, after an elaborate consideration of the problem, in the case of *Hart v. Freeholders of Union,* where the Supreme Court concluded that:[100]

[96] The Court of Chancery of this State has alluded to the conception that property should not be taken without compensation, in several cases which granted equitable relief from tortious municipal conduct. Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61 (Ch. 1890), *aff.* 48 N. J. Eq. 645, 25 Atl. 20 (E. & A. 1891); Sparks Manufacturing Co. v. Town of Newton, 57 N. J. Eq. 367, 41 Atl. 385 (Ch. 1899), rev'd on other grounds, 60 N. J. Eq. 399, 45 Atl. 596 (E. & A. 1900); Simmons v. City of Paterson, *supra,* note 79.

If this principle be sound, however, compensation should be available for the injured property owner regardless of whether an indictment lie, and a recovery have been allowed in the case of Waters v. Newark, *supra,* note 26. But that case did not consider the principle.

[97] Plum v. Morris Canal and Banking Co., *supra,* note 77.

[98] Quinn v. City of Paterson, 27 N. J. L. 35 (Sup. Ct. 1858).

[99] Town of Union ads. Durkes, *supra,* note 75.

[100] *Supra,* note 5, at p. 93. Substantially the same language appears in Kehoe v. Rutherford, *supra,* note 29; Bailey v. Osborn, 80 N. J. L. 333, 78 Atl.

> " . . . We have not been pointed to any precedent extending exemption from liability to cases of active wrongdoing, nor are such precedents to be discovered. There is no reason arising out of public policy why municipal corporations should be shielded from liability when a public injury is inflicted by their wrongful acts, as distinguished from mere negligence. The grounds on which the exemption has been rested in the one class of cases are inapplicable to the other case."

The expression, "active wrongdoing," which is so frequently used to describe conduct for which a municipality must respond in damages here had its origin. It was also definitely decided in this case that the rule of the *Kiernan* decision, which deals solely with cases of neglect to perform or negligence in the performance of public duties, has no application here, and therefore it is immaterial whether an indictment will or will not lie for such conduct.[101]

Concretely, the application of the rule that a municipality is liable for active wrongdoing has resulted in liability where it committed a trespass to land,[102] where by unlawfully excavating in a public highway, it inflicted injury to improvements to land,[103] where by artificial means it diverted surface water from the course which it would otherwise have taken, and discharged it in a body upon private property,[104] where by reason of certain

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9 (E. & A. 1910); Dohrmann v. Freeholders of Hudson, *supra,* note 31; Lydecker v. Freeholders of Passaic, *supra,* note 18; Doran v. Asbury Park, *supra,* note 18; Garrison v. Fort Lee, *supra,* note 26; Ennever v. Bergenfield, *supra,* note 26; Buffington v. County of Atlantic, *supra,* note 87.

[101] *Supra,* note 5, at p. 93.

[102] Quinn v. City of Paterson, *supra,* note 98; Bailey v. Osborn, *supra,* note 100.

[103] Caruso v. Town of Montclair, *supra,* note 77. The decision of the court, while based upon the Kiernan case, is properly justified as a situation of active wrongdoing.

[104] Soule v. Passaic, 47 N. J. Eq. 28, 20 Atl. 346 (Ch. 1890); Miller v. Morristown, *supra,* note 96; Field v. West Orange, 36 N. J. Eq. 118 (Ch. 1882), *aff.* 37 N. J. Eq. 600 (E. & A. 1883); Fuller v. Belleville, 67 N. J. Eq. 468, 58 Atl. 176 (Ch. 1904); Kehoe v. Rutherford, *supra,* note 29; Dohrmann v. Freeholders of Hudson, *supra,* note 21; Joralemon v. Belleville, 90 N. J. L. 206, 101 Atl. 244 (E. & A. 1917); Bloom v. City of Orange, 91 N. J. L. 376, 103 Atl. 395 (Sup. Ct. 1819); Cassini v. City of Orange, 107 N. J. Eq. 128, 155 Atl. 871 (Ch. 1930).

public improvements it caused lake water to be diverted and to flow upon private property,[105] where it conducted water from natural watercourses to a public highway and thereby caused its discharge upon private property,[106] where its sewerage system was so designed and constructed that its contents emptied into and polluted a private fish pond,[107] where the same conduct resulted in pollution of a stream flowing through private lands,[108] where it discharged sewage into a stream with resulting injury to non-tidal riparian owners,[109] where, as an upper riparian owner, it made an unreasonable appropriation of water to the injury of lower riparian owners.[110] In a *dictum* it has been stated that where a municipality makes connections to a sewer which its capacity will not permit, and sewage thereby flows upon private property, the municipality will be liable.[111]

It has also been held that a municipality is liable where by demurring to a complaint it admitted that it had authorized an assault, battery, and false imprisonment,[112] where it created a nuisance by excavating in a public highway,[113] where it created a nuisance by so constructing a road that a tree was included within the portion of the road designed for travel,[114] and where it created a nuisance by building a stairway of improper structural design.[115] In *dictum* the Court of Errors and Appeals has also said that a municipality will be liable, on the theory of

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[105] Doran v. Asbury Park, *supra,* note 18.
[106] Town of Union ads. Durkes, *supra,* note 75.
[107] Garrison v. Fort Lee, *supra,* note 26.
[108] Ennever v. Bergenfield, *supra,* note 26.
[109] Simmons v. City of Paterson, *supra,* note 79; Doremus v. City of Paterson, *supra,* note 79; *cf.* liability to tidal riparian owners, *supra,* note 79.
[110] Sparks Manufacturing Co. v. Town of Trenton, *supra,* note 96.
[111] Harrington v. Woodbridge, *supra,* note 26. On the basis of this rule, there should have been liability in Waters v. City of Newark, *supra,* note 26, but no contention was there urged that the conduct of the defendant amounted to "active wrongdoing".
[112] Wallace v. Newark, 69 N. J. L. 495, 55 Atl. 1078 (Sup. Ct. 1903).
[113] Hart v. Freeholders of Union, *supra,* note 5. This principle was not considered by the court in the cases of Bisbing v. Asbury Park, *supra,* note 3, and Van Valkenburgh v. Bergenfield, *supra,* note 58, although the facts in these cases might have warranted its application.
[114] Buffington v. County of Atlantic, *supra,* note 87. A fact situation to which this rule might have been applied appears in Pray v. Jersey City, *supra,* note 10, which case was decided, however, before the development of the concept of active wrongdoing and therefore was disposed of by a general application of the Strader rule.
[115] Martin v. Asbury Park, *supra,* note 13.

nuisance, where it fails to light a safety isle.[116]

It is readily discernible from these authorities that the courts use the expression "active wrongdoing" in contradistinction to neglect to perform or negligence in the performance of public duties. There are two decisions, however, which seem to conceive of active wrongdoing as constituting as well a limitation upon municipal immunity from liability for mere negligence.

The first of the two cases is that of *Olesiewicz v. Camden.*[117] In that case, as already pointed out,[118] the municipality was engaged not only in doing its own street asphalt work, but at the same time was performing similar work on behalf of a private corporation. It appeared that due to the neglect of an employee the steam generated by the steam-roller was suddenly discharged, frightening a team of horses with resulting injury to the plaintiff. The Court properly held that the municipality was engaged in a private function and therefore liable. But the Court, in language which is much confused, seems also to have held that, even if the function of the municipality be regarded as governmental, it must respond in damages because of active wrongdoing. Just what constituted active wrongdoing is not stated. The facts seem plainly to bring the case within the rule that a municipality is not liable for negligence in the performance of governmental duties, and also within the corollary to this rule, that a municipality is not liable for the neglect or negligence of its employees. In this respect, the decision is clearly without foundation and indistinguishably in conflict with both earlier and later cases exempting municipalities from liability.

The other case which appears to regard active wrongdoing as a limitation on municipal immunity from liability for negligence, is the case of *Florio v. Jersey City.*[119] There the driver

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[116] Cochran v. Public Service Electric Company, 97 N. J. L. 480, 117 Atl. 620 (E. & A. 1922). This *dictum* appears to be questioned in Lorentz v. Public Service Ry. Co., 103 N. J. L. 104, at p. 108, 134 Atl. 818 (E. & A. 1922), although the Cochran case was cited with apparent approval in the earlier case of Florio v. Jersey City, *supra,* note 23.

[117] *Supra,* note 13.

[118] See discussion, *supra,* text, p. 147.

[119] *Supra,* note 23.

of a fire engine, by negligent operation, injured property of the plaintiff. Following the earlier cases in this state, the Court of Errors and Appeals held that the municipality was not amenable to action. The Court, by way of *obiter dictum,* however, does say that a municipality is liable for its "negligent acts of misfeasance". The Court fails to refer to any decisions in this jurisdiction wherein such conduct resulted in the imposition of liability, and none can be found. The history of the development of the doctrine of municipal liability for so-called "active wrongdoing" and the actual application of that doctrine, demonstrate as above noted, that the term active wrongdoing is used solely in contradistinction to neglect and negligence, and negative the conclusion that this rule in any way encroaches upon municipal immunity from liability for mere negligent conduct.

The confusion perhaps arises from cases which deal with municipal liability for nuisances. A nuisance is something more than mere negligence and differs from it. Where a municipality *creates* a nuisance, as where it digs a hole in a public highway, or where it so constructs a highway as to include a tree within the portion of the roadway designed for travel, it is liable for ensuing damages, even though certain omissions, such as failure to light or to warn, which standing alone would amount to mere negligence, also enter into the situation. Where, however, the nuisance results solely from negligence or nonfeasance, as for instance, where a road falls into disrepair, the municipality is free from liability. In the latter situation, since the wrong has its origin solely in neglect or nonfeasance, the rule of the *Strader* case controls.

This distinction is well illustrated by the case of *Lydecker v. Freeholders of Passaic.*[120] The defendant had caused a public highway to be spread with oil, and by reason of the slippery surface thereby created the plaintiff was thrown from his bicycle and injured. The complaint charged that the defendant "well knowing the dangerous condition which would be produced thereby, negligently failed to remove the oil; to close the highway against public traffic; to warn persons using the same of

[120] *Supra,* note 18.

its dangerous condition, or to make the road safe after the dangerous condition became apparent." With respect to these allegations the court observed:[121]

> " . . . Thus it charged the negligent non-performance by a municipality of a public duty which resulted in an alleged public nuisance, and the proofs applicable to this branch of the case did not extend beyond the averments in the complaint.
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> "There is no statute making the county liable for such negligence, and the common law rule of liability is confined to active wrongdoing . . . "

The Court then proceeded to distinguish the case of *Hart v. Freeholders* where the defendant had dug a hole in a public highway, and pointed out that there the first count charging only negligence had been held to be insufficient, and that the plaintiff succeeded solely on the second count charging the wrongful creation of a nuisance.[122]

> "The second count was sustained upon the ground that it charged that the nuisance resulted from active wrongdoing."

The Court then concluded that:[123]

> "In the present case, all that the complaint avers is that the county negligently omitted to remove the oil from the highway; failed to close it from use by the public; failed to warn persons not to use it, and failed to make it safe after the spreading of the oil rendered its use dangerous. All of which are acts of omission and not of active wrongdoing.
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> "If the complaint had charged, and the proof sustained, the committing of an active wrong and not the

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[121] *Supra,* note 18, at p. 628.
[122] *Supra,* note 18, at p. 628.
[123] *Supra,* note 18, at p. 629.

> negligent omission to perform a public duty, a different question would be presented."

Although the creation of a nuisance is a misfeasance, it cannot properly be described as a "negligent act of misfeasance". Where all that appears is negligence, the municipality is exempt from liabiliity whether such negligence is in the nature of nonfeasance or misfeasance. Whether the Court in the *Florio* case intended to establish a contrary rule is a matter for conjecture. The distinction between negligent acts of nonfeasance and negligent acts of misfeasance is patently a difficult one to apply, and if adopted by the courts, promises great contrariety of results. On the other hand the distinction established by the decisions, between mere neglect or negligence on the one hand, and other tortious conduct on the other, is fairly susceptible of accurate and consistent application. It is doubtful that the Court in the *Florio* case intended in a mere *dictum* to go beyond the rule thus established.

In the cases cited above imposing liability for active wrongdoing the wrongful conduct was directly attributable to the municipality itself, although the actual operations were effected through employees. A further question accordingly suggests itself. Is a municipal corporation liable for such wrongful conduct where it is committed by its servants without authorization or direction by the municipality, but where the conduct is within the scope of the employment and in furtherance thereof? If ordinary principles of agency prevail, there should be liability. It has already been pointed out that after the adoption of the rule of municipal immunity from liability for neglect and negligence in connection with governmental functions, an attempt was made to evade that exemption where the neglect and negligence was on the part of a servant on the theory of *respondeat superior* and that the courts refused to permit this evasion. It would have been sufficient to have held that since the principal was not liable when it acted itself in that manner, it could not be liable for the same conduct on the part of its employees. The Court however went further and said in sweeping terms that:[124]

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[124] Condict v. Jersey City, *supra*, note 3, at p. 161.

> " . . . persons employed by the corporation in the execution of public duties are mere agencies or instruments by which such duties are performed, and that the doctrine of *respondeat superior* does not apply to such employments . . . "

Although there is little authority on the point, the courts consistently apply this same principle to all unauthorized tortious conduct of employees, even though such conduct on the part of the municipality itself would entail liability. Thus it has been held that a municipality is not responsible for an unauthorized trespass committed by a sewer commissioner,[125] or for the unauthorized seizure of personal property by a tax collector,[126] or for an assault, battery, and false imprisonment committed by a servant,[127] unless authorized by the municipality.[128] This rule is stated by the Court of Errors and Appeals by way of *dictum* in *Florio v. Jersey City*:[129]

> "The active wrongdoing must be chargeable to the municipality in order to render it liable, *e.g.*, where a municipality directs its employe to dig a hole in a public highway and leave it unguarded, or participates in some other act of misfeasance of its employe through which a person suffers injury . . . "

There have been a few other cases reaching the conclusion of non-liability in colorable situations but upon other grounds. Thus it is held that although the power of appointment of members of a board of health is vested in the municipality, the board is in no sense an agent of the municipality, and hence the latter is not liable for its conduct.[130] So also it has been held that a municipality is not responsible for the conduct of its clerk in preparing and issuing tax searches since the clerk's

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[125] Jersey City v. Keirnan, *supra*, note 26.
[126] Howard v. Waters, 73 Atl. 50 (Sup. Ct. 1909).
[127] Tomlin v. Hildreth, *supra*, note 3 Apparently this is the basis of the case of Miller v. Belmar, *supra*, note 24.
[128] Wallace v. Newark, *supra*, note 112; *cf.* Tomlin v. Hildreth, *supra*, note 3.
[129] *Supra*, note 23, at p. 537.
[130] Valentine v. Englewood, *supra*, note 8.

duty in this regard is imposed upon him by the legislature as the municipal clerk, and not as an agent of the municipality.[131] In short, therefore, in these cases there is no agency at all.

If the operations of a municipality are *ultra vires,* then, of course, no matter what the nature of its wrongful conduct in connection with those operations, it is not liable.[132]

SUMMARY

By the way of summary, it may be stated that the following basic principles have been established by the courts of this state:

1. Where a municipality pursues a private function, its liability is coextensive with that of a private person similarly engaged.

2. If the function is governmental, a municipality is not liable for either its neglect to perform or its negligence in the performance of such duty, and the same rule applies where the default is on the part of its employees.

(a) The cases have suggested a dubious limitation on this immunity to the effect that liability will be imposed if an indictment will not lie for the wrong. Actually this limitation has resulted in liability only where the wrong resulted in a condition which, if continued, would constitute a taking of property without compensation, and then, only for such damages as accrue after notice to the municipality and a reasonable opportunity to abate the condition.

3. If, in connection with the performance of a governmental function, a municipality commits a tort other than mere neglect or negligence, then, whether or not an indictment will lie, it is liable. This liability is subject to two limitations:

(a) If a nuisance results solely from neglect or negligence, there is no liability; and

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[131] Muller v. Bayonne, 45 N. J. Eq. 237, 19 Atl. 614 (E. & A. 1888).

[132] Wheeler v. Essex Public Road Board, 39 N. J. L. 291 (E. & A. 1877); Spencer v. Freeholders of Hudson, *supra,* note 4.

Compare Clark v. Atlantic City, 180 Fed. 598 (D. N. J. 1910) holding that a municipality is not liable for damage arising from prosecution under void ordinances. This case, incidentally, applies the rule that the question of municipal tort liability in the federal courts is one of local law.

(b) A municipality is not liable for such torts when committed by its employees, unless their commission is authorized or directed by the municipality itself.

4. For torts connected with operations which are *ultra vires,* a municipality is immune from liability.

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