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Municipal Corporations -- Tort Liability -- Notice of Injury Requirements

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court, the decision must be binding on other state courts and also must be printed in available form.

With these factors as a guide a decision of the Superior Court of North Carolina, for example, apparently would not be binding on a federal court in the determination of the law of the state in the absence of a decision on the point by the Supreme Court of North Carolina, but mere evidence of the law of the state. The status of the Superior Court of North Carolina is very similar to that of the Court of Common Pleas of South Carolina. It is denominated a court of record, but its decisions are recorded only in the local courthouse of the county and are not reprinted or digested in any way which would make them accessible to the bar or other inferior courts. Further, a decision by one Superior Court in North Carolina is not binding on another Superior Court in this state. The court does not have statewide jurisdiction within the meaning set forth in the United States Supreme Court opinions in that, while it does have jurisdiction over all the citizens of North Carolina, it has jurisdiction to try only such cases that are triable within the county in which the court is located.[25]

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Municipal Corporations—Tort Liability—Notice of Injury Requirements

More than half of the states have statutes of general application requiring that notice of tort claims against municipalities be given within certain fixed time limits to designated city officials.[1] The requirement is also frequently found in municipal charters, but no notice is necessary in the absence of legal provision so requiring.[2]

North Carolina has a statute[3] requiring that a prior demand be made upon the proper municipal authorities before suing a city, county, town, or other municipal corporation, but it expressly applies only to debts or demands arising out of contract where the damages are liquidated. Another statute[4] requires that claims against counties, cities, and towns

[25] N. C. GEN STAT. §§1-76 to 1-82 (1943).

[1] Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 700, 701 (1942). For a list of states see Sahm, *Tort Notice of Claim to Municipalities*, 46 DICK. L. REV. 1 n. 2 (1941).

[2] 6 MCQUILLIN, MUNICIPAL CORPORATIONS §2888 (2d ed. 1937); WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS §665 (1920).

[3] N. C. GEN. STAT. §153-64 (1943). Judicial decisions restricted the operation of this statute to contract actions long before it was expressly limited in this regard. *E.g.*, Sugg v. Greenville, 169 N. C. 606, 86 S. E. 695 (1915); Neal v. Marion, 126 N. C. 412, 35 S. E. 812 (1900); Sheldon v. Asheville, 119 N. C. 606, 25 S. E. 781 (1896); Frisby v. Marshall, 119 N. C. 570, 26 S. E. 251 (1896); Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §389 (1929).

[4] N. C. GEN. STAT. §1-53 (1947 Supp.): "All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county

be presented to designated officials within two years after maturity or be forever barred, but this statute has never been construed as applicable to tort actions.[5] Both of these statutes will bar an action to which they are applicable unless the requirements they impose are met.[6]

Unless authorized by statute or charter, a municipality has no power to require notice of claims before suits thereon shall be brought against it,[7] and even where a city has home rule powers the decisions have been against the existence of a power to establish a notice requirement by local action.[8] Several North Carolina cities and towns have notice of injury provisions in their charters.[9] Some have prior presentment

commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon; provided, however, that the provisions of this paragraph shall not apply to claims based upon bonds, notes, and interest coupons, except claims based upon bonds, notes, and interest coupons . . . which mature after March first, one thousand nine hundred forty-five. . . ."

[5] This latter statute was enacted in 1875, the act being entitled "An Act to Ascertain the Indebtedness of the Different Counties, Cities and Towns of this State, and to prescribe a Statute of Limitations." N. C. Pub. Laws 1874-5, c. 243. It became N. C. CODE §756 (1883), and the statute on "prior presentation of debts and demands" (construed not to apply to tort actions at an early date, see note 3 *supra*) immediately followed as N. C. CODE §757 (1883), both appearing with statutes concerning county revenue. Sec. 4 provided that it should not apply to any county whose debts were already audited and ascertained. The first case construing this statute set out its object as being "to enable the municipal bodies mentioned to make a record of their valid outstanding obligations, and to separate them from the spurious and illegal." Wharton v. Commissioners, 82 N. C. 12 (1880). It seems clear that the statute was passed to meet an emergency in the financial affairs of municipal bodies brought about by the Civil War. Royster v. Commissioners, 98 N. C. 148, 153, 3 S. E. 739, 741 (1887) (dissenting opinion). In the N. C. REVISAL (1905), the statute on "prior demand before suit" remained in the chapter on county government (present G.S. §153-64). The statute on "presentation within two years or action will be barred" was moved to the chapter on statutes of limitation, where it is located today (G.S. §1-53). While the former was many times construed to apply only to contract actions, the latter was not construed as to this point. The court has cited G.S. §1-53 when dealing with nuisance cases, but the bare citation without comment plus the possibility of a contract theory of the action do not make very strong authority for the proposition that this statute applies to tort as well as contract actions. Moore v. Charlotte, 204 N. C. 37, 39, 167 S. E. 380, 381 (1933); Lightner v. Raleigh, 206 N. C. 496, 503, 174 S. E. 272, 276 (1934); Ivester v. Winston-Salem, 215 N. C. 1, 7, 1 S. E. 2d 88, 91 (1939). In *Moore v. Charlotte, supra,* the tort theory was held barred by the city charter provision as to notice of injury. This would have been unnecessary had the statute under discussion barred the tort action. The origin of G.S. §1-53, its early association with G.S. §153-64, the fact that both use language more properly concerned with contract such as "claim," "maturity," and "holders," the original proviso that it should not apply to any county whose debts were already audited and ascertained, the original title of the act, its object being described by the Court in terms of "valid and outstanding obligations" and "valid debts" all indicate a confinement of this statute to contract claims. Such a construction would be in accord with the majority view concerning such statutes. 6 MCQUILLIN, *op. cit. supra* note 2, §§2629, 2890. See IV DILLON, MUNICIPAL CORPORATIONS §1613 (5th ed. 1911).

[6] MACINTOSH, *op. cit. supra* note 3, §§187, 384, and 389.

[7] 6 MCQUILLIN, *op. cit. supra* note 2, §2629.

[8] Note 170 A. L. R. 237 (1947); 20 NAT. MUNIC. REV. 608, 726 (1931).

[9] *E.g.,* N. C. Pub. Loc. Laws 1939, c. 366, §59 (Charlotte): "No action for damages against said city of any character whatever, to either person or property, shall

of claim provisions which would seem to be merely local versions of N. C. GEN. STAT. §153-64 (1943), though they are not expressly limited to contract claims.[10] Notice of injury, whether required by statute or charter, should be sharply distinguished from the prior notice of defects which must be proved in order to sustain municipal liability for injury resulting from defective condition of streets and sidewalks.[11]

Some notice of injury charter provisions are expressly limited to torts, but the typical provision is not expressly so limited. Yet the language is such as to logically restrict its operation to the field of tort, though there is some support for a different view.[12] On the assumption that the notice provision only applied to tort, the plaintiff in *Stephens Co. v. Charlotte*,[13] who had failed to give notice in time, amended his

be instituted against said city, unless within ninety (90) days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the city council of said city of such injury in writing, stating in such notice the date and place of happening or infliction of such injury, the manner of such infliction, the character of the injury and the amount of damages claimed therefor, but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of happening or infliction of such injury or in any manner interfere with its running." The following charter provisions are substantially the same as that of Charlotte: N. C. Priv. Laws 1913, c. 59, art. XXII, §2 (Raleigh); N. C. Priv. Laws 1901, c. 100, §103 (Asheville); N. C. Priv. Laws 1935, c. 122, §2 (Statesville); N. C. Priv. Laws 1929, c. 196, §69 (Thomasville); N. C. Priv. Laws 1931, c. 34, §2 (Black Mountain); N. C. Priv. Laws 1929, c. 204 (Rocky Mount, also provides that action barred if not brought within one year); N. C. Priv. Laws 1927, c. 26, §2 (Morganton); N. C. Priv. Laws Ex. Sess. 1924, c. 8, §3 (Landis). The following are provisions for a notice period of six months, but otherwise similar to the quoted provision: N. C. Priv. Laws 1923, c. 37, §82A (Greensboro); N. C. Priv. Laws 1931, c. 171, §2 (High Point, which also provides that no action shall be brought within 30 days after notice).

N. C. Priv. Laws 1927, c. 232, §115 (Winston-Salem): "All claims or demands against the city of Winston-Salem arising in tort shall be presented to the board of aldermen of said city or to the mayor, in writing, signed by the claimant, his attorney, or agent, within 90 days after said claim or demand is due or the cause of action accrues; that no suit or action shall be brought thereon within 10 days or after the expiration of 12 months from the time said claim is so presented, and unless the claim is so presented within 90 days after the cause of action accrued, and unless suit is brought within 12 months thereafter, an action thereon shall be barred." The following charter requirements are substantially the same as the Winston-Salem provision: N. C. Pub. Loc. Laws 1939, c. 466, §141½ (Elizabeth City); N. C. Priv. Laws 1935, c. 105 (Burlington); N. C. Priv. Laws 1933, c. 18 (Gastonia). Two recent notice provisions may herald a longer period for filing notice in future legislation on this subject: N. C. Pub. Loc. Laws 1941, c. 476 (Wilmington, 365 days period and applies only to personal injuries); N. C. Pub. Loc. Laws 1941, c. 253 (Marion, 180 days period with notice to be given by guardian or next friend if infant or insane).

[10] *E.g.*, N. C. Priv. Laws 1913, c. 59, art. XXII, §1 (Raleigh); N. C. Priv. Laws 1901, c. 100, §102 (Asheville); N. C. Priv. Laws 1921, c. 142, §48½ (Durham); N. C. Priv. Laws 1931, c. 34, §1 (Black Mountain); N. C. Priv. Laws 1923, c. 37, §81 (Greensboro); N. C. Priv. Laws 1927, c. 26, §1 (Morganton); N. C. Priv. Laws Ex. Sess. 1924, c. 8, §2 (Landis).

[11] MACINTOSH, *op. cit. supra* note 3, §390; 6 MCQUILLIN, *op. cit. supra* note 2, §2887; Sahm, *supra* note 1, at 9.

[12] *See* Perry v. High Point, 218 N. C. 714, 718, 12 S. E. 2d 275, 278 (1940) (by implication); MACINTOSH, *op. cit. supra* note 3, §389.

[13] 201 N. C. 258, 159 S. E. 414 (1931).

complaint for the taking of his water lines by the city to allege that the city took and used his lines and thus became indebted to the plaintiff "by virtue of an implied promise or agreement on its part to pay the plaintiff." The court did not indicate that the change in theory of recovery made the difference, but held that the notice provision does not cover a claim for compensation arising out of the physical appropriation of property for public use. The rule now seems established that where property is taken by eminent domain powers, a suit for compensation is not subject to a notice of injury charter provision.[14] Where the action is based on a permanent trespass or nuisance the notice requirement must be met,[15] but the requirement has only limited operation if the trespass or nuisance is continuing or recurring.[16] In this latter situation, even if notice was given, damages suffered prior to the beginning of the notice of injury period were once held not recoverable.[17] But this position was abandoned in favor of the view that the notice requirement was designed to affect the claimant's right to maintain his action only in reference to the time during which it should be commenced, so if notice is given only the damages barred by the statute of limitations are irrecoverable.[18] Provisions requiring prior presentment of claims are frequently found in charters also having notice of injury provisions,[19] thus supporting the conclusion that prior presentment of claim requirements apply only to claims based on contract. Since N. C. GEN STAT. §153-64 (1943) is in practically identical language and was so construed[20] prior to the insertion of an express limitation to contract actions, there seems to be no field in which these charter provisions can be given effect that is not already covered by this statute.

Notice of injury provisions are universally upheld as valid and constitutional as long as the period for giving it is not so short as to deprive the party injured of a substantial remedy.[21] The North Carolina Su-

[14] Charlotte Consolidated Const. Co. v. Charlotte, 208 N. C. 309, 180 S. E. 573 (1935); *cf.* Ivester v. Winston-Salem, 215 N. C. 1, 1 S. E. 2d 88 (1939) (a nuisance case which amounts to a taking). *But cf.* Briggs v. Asheville, 198 N. C. 271, 151 S. E. 199 (1930).

[15] Wallace v. Asheville, 208 N. C. 74, 179 S. E. 18 (1935); Peacock v. Greensboro, 196 N. C. 412, 146 S. E. 3 (1928); Dayton v. Asheville, 185 N. C. 12, 115 S. E. 827 (1923).

[16] Ivester v. Winston-Salem, 215 N. C. 1, 1 S. E. 2d 88 (1939); Lightner v. Raleigh, 206 N. C. 496, 174 S. E. 272 (1934). This result is reached because such continuing and recurring injuries give rise to new causes of action all along. No matter when notice was given, if the nuisance was still causing injury then the notice would necessarily be within the time allowed for giving notice.

[17] Smith v. Winston-Salem, 189 N. C. 178, 126 S. E. 514 (1925).

[18] Ivester v. Winston-Salem, 215 N. C. 1, 1 S. E. 2d 88 (1939); Lightner v. Raleigh, 206 N. C. 496, 174 S. E. 272 (1934); see Chief Justice Hoke dissenting in Smith v. Winston-Salem, 189 N. C. 178, 126 S. E. 514 (1925).

[19] See notes 9 and 10 *supra.* [20] See note 3 *supra.*

[21] 6 MCQUILLIN, MUNICIPAL CORPORATIONS §2888; WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS §668.

preme Court has described a ninety days' notice requirement as reasonable, with no necessity for showing the plaintiff to have actually known of it in order for his failure to give notice to defeat his action.[22]

Typically, the notice provision requires the notice to be in writing, stating the date, place, manner of infliction of the injury, the character of the injury, and the amount of damages claimed.[23] Substantial compliance is sufficient where there is nothing to mislead the defendant as to the basis of the action, and a notice containing date, place, and amount of damages claimed has been held sufficient where the city had ample knowledge of the cause of the injury.[24] The notice need not be drawn with the technical nicety of pleading,[25] and the action need not be brought during the notice period,[26] though North Carolina has not decided whether the complaint will suffice for the notice in this event.[27] Sufficiency of the notice is a question of law,[28] but proof of notice is for the jury where the evidence is conflicting.[29]

The notice must be served on the officials designated in the charter, usually the governing body. A claim addressed to and served on the city manager was held not to be presented to the "lawful municipal authorities,"[30] though a charter requiring notice to be served on the city council was held to have been complied with where the notice was addressed to that body but was served on the city manager, the rule being stated that when the governing body specified is not in session notice directed to them and delivered to the officer having care and custody of the records and files is a sufficient compliance.[31] Personal knowledge of the injury by the city officials is not sufficient, nor can the body designated waive notice or by words or conduct estop the municipality from taking advantage of failure to give notice.[32] The person injured must give the notice or it must be given for him, and one not named as claimant in the notice cannot sustain the action.[33]

[22] Hartsell v. Asheville, 164 N. C. 193, 80 S. E. 226 (1913), *reh. allowed on other grounds*, 166 N. C. 633, 82 S. E. 946 (1914).

[23] See note 9 *supra*.

[24] Peacock v. Greensboro, 196 N. C. 412, 146 S. E. 3 (1928); Graham v. Charlotte, 186 N. C. 649, 120 S. E. 466 (1923).

[25] See note 24 *supra*.

[26] Webster v. Charlotte, 222 N. C. 321, 22 S. E. 2d 900 (1942).

[27] For criticism of this practice in other jurisdictions see Sahm, *supra* note 1, at 4. In states where the notice is held to be a condition precedent to the right to bring an action, it has generally been held that the filing of the suit is not a substitute for the notice. Note, 101 A.L.R. 726 (1936).

[28] 6 McQUILLIN, MUNICIPAL CORPORATIONS §2895.

[29] Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738 (1904).

[30] Nevins v. Lexington, 212 N. C. 616, 194 S. E. 293 (1937).

[31] Perry v. High Point, 218 N. C. 714, 12 S. E. 2d 275 (1940).

[32] Pender v. Salisbury, 160 N. C. 363, 76 S. E. 228 (1912). Notes, 82 A.L.R. 749 (1933); 153 A.L.R. 329 (1944); 31 MINN. L. REV. 751 (1947).

[33] Virginia Trust Co. v. Asheville, 207 N. C. 162, 176 S. E. 257 (1934) (damage to land, notice being given by owner of equity of redemption but suit being brought by trustee in deed of trust); Note, 63 A.L.R. 1080 (1929).

A failure to give notice within the time fixed by charter does not defeat the cause of action where the plaintiff is mentally or physically unable to present it during that period by reason of the injury and did present it within a reasonable time after he was able to do so, but the injured person is not excused if he is able to give notice through others or is not disabled during the entire period.[34] North Carolina has not considered whether infancy or insanity would excuse, but the weight of authority seems to be that it would not unless statute or charter provided otherwise.[35]

The majority rule is that compliance with notice statutes and charter provisions is a condition precedent to the institution of an action against a municipal corporation, and that compliance must not only be proved but a failure to allege that notice was given as required will render the complaint demurrable.[36] Until recently, only one state has consistently held to the contrary view that failure to give notice is a matter of defense and not a condition precedent.[37]

In a recent case,[38] the plaintiff brought an action against a city for damages suffered as a result of a fall allegedly caused by a hole

[34] Foster v. Charlotte, 206 N. C. 528, 74 S. E. 412 (1934). Hartsell v. Asheville, 164 N. C. 193, 80 S. E. 226 (1913), *reh. allowed*, 166 N. C. 633, 82 S. E. 946 (1914); Terrell v. Washington, 158 N. C. 282, 73 S. E. 888 (1912); *see* Webster v. Charlotte, 222 N. C. 321, 22 S. E. 2d 900 (1942).

[35] Notes, 109 A.L.R. 975 (1937), 59 A.L.R. 411 (1929), 31 A.L.R. 619 (1924); 6 McQUILLIN, MUNICIPAL CORPORATIONS §2893; Peterson, *supra* note 1, at 715; Notes, 17 CORNELL L. Q. 867 (1932), 36 MICH. L. REV. 502 (1938). Terrell v. Washington, 158 N. C. 282, 73 S. E. 888 (1912) is frequently cited by writers for the proposition that general legal incapacity will excuse, but no such question was before the court and though some of the statements in that opinion are broad, they support the proposition as dicta, if at all.

[36] *E.g.*, Barnett v. Elizabeth City, 222 N. C. 760, 24 S. E. 2d 264 (1943); Webster v. Charlotte, 222 N. C. 321, 22 S. E. 2d 900 (1942); Virginia Trust Co. v. Asheville, 207 N. C. 162, 175 S. E. 257 (1934); Foster v. Charlotte, 206 N. C. 528, 174 S. E. 412 (1934); Hartsell v. Asheville, 164 N. C. 193, 80 S. E. 226 (1913), *reh. allowed on other grounds*, 166 N. C. 633, 82 S. E. 946 (1914); Pender v. Salisbury, 160 N. C. 363, 76 S. E. 228 (1912); Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738 (1904); Maise v. Gadsden, 232 Ala. 82, 166 So. 795 (1936); Marino v. East Haven, 120 Conn. 577, 182 Atl. 225 (1935); Russell v. Wilmington, 35 Del. 193, 162 Atl. 71 (1932); Williams v. Jacksonville, 118 Fla. 671, 160 So. 15 (1935), Cuvelier v. Dumont, 221 Iowa 667, 266 N. W. 517 (1936); Deschant v. Hays, 112 Kan. 729, 212 Pac. 682 (1923); Galloway v. Winchester, 299 Ky. 87, 184 S. W. 2d 890 (1944); Huntington v. Calais, 105 Me. 144, 73 Atl. 829 (1909); O'Connell v. Cambridge, 258 Mass. 203, 154 N. E. 760 (1927); Gable v. Detroit, 226 Mich. 261, 197 N. W. 369 (1924); Johnson v. Chisholm, 222 Minn. 179, 24 N. W. 2d 232 (1946); Harms v. Beatrice, 142 Neb. 219, 5 N. W. 2d 287 (1942); Sweeney v. New York, 225 N. Y. 271, 122 N. E. 243 (1919), *reversing* 173 App. Div. 984, 159 N. Y. Supp. 1145 (2d Dep't 1916) (memorandum decision); Lane v. Cray, 50 R. I. 486, 149 Atl. 593 (1930); Knoxville v. Felding, 153 Tenn. 586, 285 S. W. 47 (1926); Waco v. Watkins, 292 S. W. 583 (Tex. Civ. App. 1927); Duschaine v. Everett, 5 Wash. 2d 181, 105 P. 2d 18 (1940); Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654 (1905).

[37] Cole v. St. Joseph, 50 S. W. 2d 623 (Mo. 1932); Brown v. Kirksville, 294 S. W. 436 (Mo. App. 1928); Branchetti v. Luce, 222 Mo. App. 282, 2 S. W. 2d 129 (1928); Beane v. St. Joseph, 211 Mo. App. 200, 240 S. W. 840 (1922); Adelman v. Altman, 209 Mo. App. 583, 240 S. W. 272 (1922).

[38] South Norfolk v. Dail, 47 S. E. 2d 405 (Va. 1948).

in the sidewalk of one of the streets of the city. Plaintiff recovered below, and on appeal the defendant city contended for the first time that the lower court had no jurisdiction to try the case inasmuch as the plaintiff had failed to allege that notice of injury was given as required by statute and charter. Recognizing that the law of Virginia had been that a failure to allege notice was fatal to an action, the Virginia Court overruled their previous decisions and held that such a notice requirement is not a condition precedent to the right to institute an action and, therefore, the defendant had raised the question too late. In the words of he court, "after mature consideration we have reached the conclusion that this holding is harsh and unreasonable, and should be modified. . . . The failure to make the allegation of notice should be taken advantage of by the city as a matter of defense to the action." It follows that failure to plead the defense resulted in waiver of it, since the matter was not put in issue. The present North Carolina rule is thus sharply opposed to the law as announced by the Virginia Court.

Several reasons have been advanced to justify the notice of injury requirement: (1) to prevent fraud by giving municipal authorities an early opportunity to investigate such claims while the evidence is fresh,[39] (2) to enable the city to determine whether or not it should admit liability and undertake to settle the claim without suit[40] and, (3) to enable authorities to allow for such claims when preparing fiscal estimates for the future.[41] These are very fine objectives as far as a defendant city is concerned, but it should be readily apparent that any defendant operating through agents and employees over a considerable area would similarly applaud such a beneficent gesture in its behalf. To really justify prior notice, it is necessary to find something in a municipality's situation as to tort liability that differentiates it from the status of corporate defendants generally.

Considering prior notice as one manifestation of a municipal tort immunity that has its roots in the immunity enjoyed by the state in such matters, it is significant that "the king can do no wrong" concept is the subject of sharp attack.[42] The enactment of the Federal Tort

[39] Foster v. Charlotte, 206 U. C. 528, 174 S. E. 412 (1934); Hartsell v. Asheville, 164 N. C. 193, 80 S. E. 226 (1913); Pender v. Salisbury, 160 N. C. 363, 76 S. E. 228 (1912).

[40] Perry v. High Point, 218 N. C. 714, 12 S. E. 2d 275 (1940); Virginia Trust Co. v. Asheville, 207 N. C. 162, 176 S. E. 257 (1934); Peacock v. Greensboro, 196 N. C. 412, 146 S. E. 3 (1928).

[41] Note, 24 VA. L. REV. 86 (1937).

[42] 6 MCQUILLIN, MUNICIPAL CORPORATIONS, §§2792, 2793, 2794. PROSSER, LAW OF TORTS §108 (1941) (see list of materials on this point in footnote 30); Borchard, *Government Liability in Tort,* 34 YALE L. J. 1, 129, 229 (1924-1925); Borchard, *Government Liability in Tort,* 36 YALE L. J. 1, 757, 1039 (1926-1927); Borchard, *Governmental Responsibility in Tort,* 28 COL. L. REV. 577 (1928); Borchard, *Theories of Governmental Responsibility in Tort,* 28 COL. L. REV. 734 (1928); Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform,* 20

Claims Act (which has no mandatory notice provision) is some of the fruit of this spirited planting.[43] As far as proprietary functions are concerned, it has been generally understood for some time that a municipal corporation is subject to the liabilities of the private law,[44] but as to governmental functions the courts are now embarrassed and at times humiliated by doctrines of immunity that cannot be defended.[45] Confusion as to the distinction between proprietary and governmental functions resulting in about as many functions being in the shadowland between, as definitely in one or the other, is hastening the eventual demise of municipal tort immunity.

Granting the difficulty of justifying the notice requirement on the basis of the decaying concept of general municipal tort immunity, can it be justified otherwise? Some who have attacked the basic principle with vigor foresee a more pressing need for notice with the coming of full municipal responsibility.[46] The argument advanced, however, is the old chant of fraud and imposition which was a major prop of the doctrine of municipal immunity and one of the first to be attacked. There is no justification that will bear close scrutiny, mainly because there is nothing to distinguish municipal corporations from corporate bodies generally except their public character, and it is this public character which has been exploded insofar as municipal liability for tort is concerned.

Having a notice requirement, however, is it necessary to convert it into "a trap and pitfall for the ignorant and unskillful"?[47] On appeal, Virginia would have allowed the failure to plead notice to have been interposed for the first time by the defendant city before the principal case on grounds that it was a jurisdictional essential, and North Carolina would reach the same logical result, for failure to allege notice

A. B. A. J. 747 (1934) (valuable list of materials on p. 748, n. 1); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Green, *Municipal Liability for Tort*, 38 ILL. L. REV. 355 (1944); Hobbs, *The Tort Liability of Municipalities*, 27 VA. L. REV. 126 (1940); Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 854, 874-879 (1942); *Symposium on Municipal Tort Liability*, 5 LEGAL NOTES ON LOC. GOV. 351 (1940); Warp, *Can the "King" Do No Wrong*, 31 NAT. MUNIC. REV. 311 (1942); Warp, *The Law and Administration of Municipal Tort Liability*, 28 VA. L. REV. 360 (1942); Notes, 14 N. C. L. REV. 388 (1936), 22 N. Y. U. L. Q. REV. 509 (1947), 16 ST. JOHN'S L. REV. 256 (1942), 5 U. OF DET. L. J. 83 (1942), 24 VA. L. REV. 86 (1937); Comments, 42 YALE L. J. 241 (1932).

[43] 60 STAT. 842 (1946), 28 U. S. C. §§921 *et seq.* (1946). See Baer, *Suing Uncle Sam in Tort*, 26 N. C. L. REV. 119 (1948).

[44] 6 MCQUILLIN, MUNICIPAL CORPORATIONS §§2771, 2792.

[45] Green, *supra* note 42, at 381.

[46] Borchard, *State and Municipal Liability*, 20 A. B. A. J. 747, 793 (1934) (Sec. 5 of Borchard's proposed statute is a 30-day notice requirement); Sahm, *Tort Notice of Claim to Municipalities*, 46 DICK L. REV. 1 (1941); Symposium, 5 LEGAL NOTES ON LOC. GOV. 351, 382 (1940).

[47] WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS §64 (1920).

in this state is a failure to state a cause of action.[48] The legislative handicap of having to give notice is enough to inflict upon a plaintiff, but to judicially handicap by placing the burden of pleading notice on him is to slap his cheek the second time. It would seem that the municipality which has been given such a fine legal weapon should be required to utilize it, pleading failure to give notice within the period specified as with other statutes of limitation. This would be in accord with modern pleading tendencies to remove pitfalls in the way of honest claimants.

If notice requirements are to be retained, there is need for a notice statute of general application, for all municipalities should be accorded the protection afforded by prior notice if it is a justified municipal safeguard. It would be to the interest of the bench, bar, and the public generally to be rid of the galaxy of varying requirements now found in our charters in favor of a requirement which would not make the charter of the particular city where the injury occurs such an important consideration. Such a step would remove much of the difficulty in construction and serve to inform the public generally of the uniform hurdle that all must face in suing a municipality in North Carolina. The following statute is proposed:

> **It shall be a good defense to an action brought against a city or town for injury to person or property sustained by reason of the negligence of the city or town, that a written statement of the time and place where the injury was received, the nature of the injury, and the amount of damages claimed was not filed with the city or town attorney or the mayor within 90 days after the injury occurred: Provided, where the person injured is an infant or non compos mentis such statement may be filed within 180 days: Provided, further, that where the action is for wrongful death the statement may be filed within 180 days of the date of death. All charter provisions for notice of injury or presentation of tort claims to the city or town applicable to tort injuries are hereby repealed.**

LEONARD STEWART POWERS.

Negligence—Contributory Negligence—Outrunning Headlights as—

The evidence of the plaintiff tended to show that he was driving 40 to 45 miles per hour along a highway on a clear night, and that he had just rounded a long curve and traveled over the crest of a small hill when his automobile collided with an unlighted truck which was

[48] MACINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §389 (1929).