Liability of the Municipal Corporation for the Negligent Acts of the Independent Street Contractor

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THE LIABILITY OF THE MUNICIPAL CORPORATION FOR THE NEGLIGENT ACTS OF THE INDEPENDENT STREET CONTRACTOR

I. INTRODUCTION

A. GOVERNMENTAL LIABILITY IN TORT

1. IN GENERAL

The existence of governmental liability in tort has often been denied,¹ and still is today; but this view, whether based on the theory that the king can do no wrong, that “there can be no legal right as against the authority that makes the law on which the right depends,” ² or on some other supposedly self-evident truth, has not passed unchallenged.³ The challenge has come either in the form of new theories to oppose the old, or in statutes.

2. MUNICIPAL LIABILITY

a. The Scope of Inquiry. The scope of our inquiries is limited to a single branch of the government—the municipal corporation. Here in particular, where the contacts between the citizen and the government are the closest and most frequent, we find a fertile field for the development of counter-theories⁴ to contend with the older one of governmental non-liability. Among those imposing some liability on the government is the one suggesting that municipal acts

¹ See note 34 HAR. L. REV. 66.
² Borchard, Governmental Responsibility in Tort, V, 36 YALE L. J. 757, and the opinion of Mr. Justice Holmes there cited.
³ Judge Cardozo has suggested our portion of the problem as a suitable subject for action by a proposed Ministry of Justice. 35 HAR. L. REV. 113, 120. See also Borchard, op. cit. supra note 2, at 758.
⁴ 34 HAR. L. REV. 67. The reasons there outlined as being those advanced by the courts for the city’s non-liability may, it seems, be put either in the negative or the affirmative, i.e., the city is not liable, since it received no pecuniary benefit; the city is liable since it received such a benefit. Quaere, whether the latter is not the original form. See also 29 YALE L. J. 911; 37 Id. 389; 26 MICH. L. REV. 222.
may be either “governmental” or “ministerial” and that, as regards the latter, the municipality is to be treated as any private corporation or individual.

b. Distinctions between Governmental and Ministerial Functions. Judge Cardozo has written that the indistinct line of demarcation between the two sorts of functions “has at best a dubious correspondence with any dividing line of justice. In many jurisdictions, however . . . it is supported by precedent so inveterate that the chance of abandonment is small.”

In determining on which side of the line a given case shall fall, courts use various tests. But in some situations the result of the classification is unconvincing.

“Usually the element of emolument is used as a peg to hang the term ‘ministerial’ on. Functions from which incidental and ever so slight remuneration reaches the municipal coffers have attendant municipal immunity . . . . But where emolument cannot be found, term juggling seems to be the modus operandi, and all that can be done with safety is to determine each case as it arises.”

Nevertheless, tradition has consecrated the view that there are times when the municipality can in no wise be held liable in tort. One case, while upsetting temporarily the
accepted view that the city is not liable for the negligence of members of the fire department, recognized that there could never be liability for failure of the police to enforce the laws.

c. Liability for the Condition of the Streets. As Professor Borchard has pointed out, "no function of a municipal corporation is more 'governmental' in character than the care of the highways, streets and bridges." The fact that most courts impose liability for defective streets is but further evidence of the fundamental unsoundness of the classification of functions as governmental or ministerial.

In view of the theoretical difficulties involved in applying the concepts of governmental and ministerial functions so as to produce wise solutions of the many problems it is perhaps not surprising to find that the sources of municipal liability for the condition of the street are not always of the clearest. In general, of course, the source of liability may be either in a statute or in the common law.

In some dozen of the American jurisdictions there is no liability on the part of the municipal corporation for injuries resulting from defective streets, unless the liability is imposed by statute. Such statutes vary widely in their terms and are usually to be strictly construed, giving a right of action only for direct injuries to persons using the highway as travellers. In Connecticut, for example, certain conditions must concur and no negligence of a third party can in any way contribute to the result if the city is to be held. On

538 (1898), and was itself overruled in Aldrich v. Youngstown, 106 Oh. St 34 (1922).

11 "In theory, therefore, the city should be immune from responsibility for negligence in such matters; and such was the common law. Precisely the opposite result, however, constitutes the weight of judicial authority in this country even in the absence of statute, on the commonly advanced ground that the duty of taking care of the public highways is ministerial in character. The conclusion deserves approval, though not necessarily the ground on which it is based." 34 YALE L. J. 1, 63.

12 WHITE, op. cit. supra note 9, §§ 199-204.

13 Frechette v. City of New Haven, 104 Conn. 83 (1926); Dyer v. Danbury 85 Conn. 128, 81 Atl. 958 (1911); Gustafson v. City of Meriden, 103 Conn. 596 (1925). The city is not liable for failure to remove an obstruction constituting a "public nuisance." Hewiston v. City of New Haven, 37 Conn. 475 (1871). See Comment 37 YALE L. J. 389.
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the other hand, under the Maine statute the municipality is called much more strictly to account. The cause of the defective condition is immaterial, and liability results even though it was created by an independent contractor.

In by far the greater number of states, however, the city’s liability for the defective condition of the streets has not been the creation of an express statute. But even in the absence of such a statute, it is not uncommon to impose what is sometimes called a “statutory” liability. In one sense it is statutory, since it is inferred from the terms of the municipal charter granting control of the streets to the city, which may open or close them to traffic, police them, repair them, and raise taxes for this purpose.

B. THE DOCTRINE OF RESPONDEAT SUPERIOR

1. IN GENERAL

Municipal corporations can act only through their servants, agents, or contractors. In respect to them, as well as to other aggregate corporations, the early view was that they could not be liable in tort. Later, when this liability came to be recognized, it was supported either on the ground that an employer should be responsible for the torts committed by his employes in the course of their employment, or on

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14 ME. REV. STAT. (1903) c. 23, § 76; Tripp v. Lyman, 37 Me. 251 (1854).
15 Butler v. Bangor, 67 Me. 385 (1877).
16 The defective condition is sometimes classified as a nuisance. Nevertheless, consistent results do not follow from the use of this concept. In Connecticut, for example, the duty to remove a nuisance upon the highway, endangering public travel, being a public “governmental” duty, does not make the city liable for its failure to perform it. Hewiston v. City of New Haven, op. cit. supra note 13. Contra: Vogel v. The Mayor, etc., 92 N. Y. 10 (1883). In Wyoming a city is under no obligation to abate nuisances. Kent v. Cheyenne, 2 Wyo. 6 (1877). Cf. Woodman v. Metr. R. Co., 149 Mass. 335 (1889).
17 City of Omaha v. Olmstead, 5 Neb. 446 (1877); Goodrich v. City of University Place, 80 Neb. 774, 115 N. W. 538 (1908); Updike v. City of Omaha, 87 Neb. 228, 127 N. W. 229 (1910).
18 Lowry v. City of Delphi, 55 Ind. 250 (1876); Centerville v. Woods, 57 Ind. 192 (1877); Logansport v. Dick, infra note 94; Blake v. St. Louis, 40 Mo. 569 (1867); Allentown v. Kramer, 73 Pa. 406, (1873); Todd v. City of Troy, 61 N. Y. 506 (1875).
19 BLACKSTONES COMMENTARIES, Book 1, 476, 477. But see WILLISTON, BUSINESS CORPORATIONS, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 216.
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the completely different ground that there are certain conditions which the municipality is under a positive duty to keep safe for the public. The former view has become crystallized in the rule of respondeat superior.

We are not concerned with the history of this doctrine, though it is undoubtedly old, and may even date from ancient times. More important would be an accurate identification of its underlying reasonableness, if that is possible. Mr. Justice Holmes has indicated the uncertainty, concluding that "all the proposed tests go to show that the distinction (between responsibility and non-responsibility) rests on the remoteness of personal connection between the parties."

2. THE EARLY CASES OF INDEPENDENT CONTRACTORS

"... The general proposition, that a person shall be answerable for an injury, which arises in carrying into execution that, which he has employed another to do, is perhaps too large and loose; but, in the case of Littledale v. Lord Lonsdale, 2 H. Bl. 267-299, and in Bush v. Steinman, 1 Bos. & Pull. 404, the principle was carried to a great extent.... In Bush v. Steinman the decision was this; A., having a house by the roadside, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned; it was held that A. was answerable for the damage sustained." 22

The famous case of Bush v. Steinman was decided before the courts had recognized a distinction between the status of an agent and that of a contractor. 23 We are not interested in whether the case was properly decided, but it is interesting to note that each of the three concurring judges gave rather different grounds for his opinion that the owner of the property, who was also the employer, was liable for the negligence

21 Namely: Choice, Control, A Round Sum Paid, Power to Discharge, Notoriously Distinct Calling. HOLMES, op. cit. supra note 20, at 405-406.
22 STORY, AGENCY (2nd ed. 1844) 577, note.
23 In speaking of the Littledale case, EYRE, C. J., said: "Whether he work it (the colliery) by agents, by servants, or by contractors, still it was his work ...."
of the servant of a sub-contractor. Eyre, C. J., indicates that liability is based on ownership and quotes the maxim *sic utere tuo ut alienum non laedas* on the benefit received from the work, on the relationship of master and servant between the primary employer and the sub-contractor's servant, and on nuisance. Later, when the doctrine of the independent contractor had begun to be hinted at, *Bush v. Steinman* was generally thought of as a case involving servants who had employed sub-servants.  

The independent contractor doctrine appeared in a distinct, though still primitive form, a little more than a century ago. In a case which Story said exhausted all the prior learning on the subject, *Laugher v. Pointer*, the holding, or the implication, of *Bush v. Steinman*, was put on a much narrower ground: that "where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants." In *Laugher v. Pointer* it was held that the owner of a carriage was not liable for the negligence of the driver of the horses, the driver having been provided by the owner of the horses which the defendant had hired. It was said that the driver was the servant of the owner of the horses, and

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24 2 Kent's Commentaries (3rd ed. 1836) 260. The last edition of Kent's Commentaries, the 6th, which contained alterations and additions to be made by the author himself, re-iterates this view. Nevertheless, under the influence of Burgess v. Gray, 1 C. B. 578 (1845), and the discussion in Laugher v. Pointer, infra note 26, the author indicates that liability in these cases of fixed property is supportable on the ground that "the possessor of fixed property must be responsible for the acts of those whom he employs."


26 5 B. & C. 547 (1826).

27 Littledale, J., in Laugher v. Pointer, at 559 et seq. He cites also Sly v. Edgley, 6 Esp. 6, along with Bush v. Steinman. It is not clear whether the rule of *respondeat superior* is thought to be inapplicable to these cases where the owner of fixed property was the employer, but that absolute liability attaches, or whether *respondeat superior* is peculiarly applicable in these cases. In a way this is rather fundamental from the point of view of theory. The same problem comes up in connection with the exceptions to the independent contractor doctrine—are they to be based on *respondeat superior*, on absolute liability, or some on one and some on another?
further, that he could not be the servant of the traveler also, for "the law does not recognize a several liability in two principals who are unconnected." 

_Laugher v. Pointer_ was followed in _Quarman v. Burnett_ where the facts were similar, but where the personal connection between the carriage owner and the driver was considerably closer._29_ We see, therefore, that the courts felt that there was a fundamental difference between the employer-owner of realty (Bush v. Steinman) and the employer-owner of personality (the Laugher and Quarman cases). In the first situation the employer was liable, even though the negligence complained of were that of a servant of a sub-contractor, either on the ground of _respondeat superior_, or for some other reason, possibly the mere ownership of realty.

Near the middle of the 19th century the independent contractor doctrine began to assume a more definite form. It was felt that the result making the employer-owner of real property liable for the contractor’s negligence, while letting off the employer-owner of personality, was illogical. If the view of the _Laugher_ case was correct, _Bush v. Steinman_ could not be.30 The owner of real estate should not be placed in a peculiarly responsible position with respect to the negligence of independent contractors and their servants.31 Nevertheless, something of the idea still remained, though obscurely, for when the city employed independent contractors to construct sewers in the street, the same Michigan court, less than a decade after the _De Forrest_ case, affirmed the liability of the city for the negligence of such an agent.32

28 6 M. & W. 507 (1840).
29 Laugher v. Pointer was decided by a divided court. By 1826, as Wigmore points out (in his _Responsibility for Tortious Acts, 3 Select Essays in Anglo-American Legal History_ 534), liability for the agent’s torts was tested by phrases “course of employment,” or “scope of authority.” This is somewhat complicated by the necessity of defining who is an “agent” or “servant.” The Laugher and Quarman cases might very well have gone the other way.
30 DeForrest v. Wright, 2 Mich. 368 (1852).
31 Milligan v. Wedge, 12 A. & E. 737 (1840). Lord Denman, C. J., doubted “whether the distinction as to the law in the cases of fixed property and moveable property can be relied on.” Reedie v. N. W. R. Co., 4 Ex. 244 (1849), overruled Bush v. Steinman and the distinction between real and personal property except on the possible ground of nuisance.
32 City of Detroit v. Corey, 9 Mich. 165 (1861). Bush v. Steinman was
3. THE INDEPENDENT CONTRACTOR DOCTRINE

EXCEPTIONS TO THE GENERAL RULE

Meechem, in his treatise on Agency, after stating the general rule regarding the employer’s immunity from liability for the acts of the independent contractor,\(^3\) indicates various exceptions. The following classification of them suggests itself:\(^4\)  

1. If the thing to be done is unlawful, if it is a nuisance \(\textit{per se}\), if it cannot be done without doing damage to third persons, the employer (or master) who causes it to be done is liable;\(^3\)  
2. If the act to be done is by its nature likely to do damage to third persons unless precautions are taken, the employer (or master) is liable if the precautions are not taken and the damage occurs;\(^3\)  
3. One who, for his own purposes, brings on his land and keeps there, anything likely to do mischief if it escapes, keeps it at his peril, and is liable for the damage which is the natural consequence of its escape;\(^7\)  
4. If the law imposes the

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overruled in Massachusetts in 1855 in Hillard v. Richardson, 3 Gray 349. In the 50’s the difficulty in the independent contractor cases seems to have been primarily in defining the master and servant relationship, 2 Kent’s Commentaries (10th ed. 1860) 306. Compare the series of cases in New York culminating in Stores v. Utica, 17 N. Y. 104 (1858). See also Randerson v. Murray, 8 A. & E. 109 (1838).

\(^3\) “If . . . . the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or his servants in the performance of the work.” Meechem, Agency (1899) 595.

\(^4\) Not in Meechem’s exact terms, but based on his discussion. \textit{Op. cit. supra} note 33, at 596 \textit{et seq.}

\(^5\) Distinguish from case (2).

\(^6\) Water Co. v. Ware, 16 Wall. 166 (U. S. 1872), is perhaps the most famous discussion of this phase of the subject.

In each of the classes of exceptions, one should ask whether the employer’s liability is based on the principle of \textit{respondeat superior}, which is the expression of a certain policy of the law, or on some other and different policy, as, for example, absolute liability in certain cases, \textit{i. e.}, the escape of fire which one had kindled on one’s own land, at common law.

\(^7\) (3) and (4) seem to be fundamentally different from (1) and (2) in that they can be satisfactorily explained even though we ignore, or do not know of, the existence of the agent. In them we look only to the result. On
performance of a duty on the employer, he is responsible for its non-performance by the contractor.\footnote{38}

Mr. Justice Holmes has said that common sense is opposed to the idea of making one man liable for the torts of another, unless the first induced the doing of the act of which wrong was the immediate consequence.\footnote{39} The first of the two exceptions to the independent contractor doctrine, as we have indicated them, seems to be in accord with the test of common sense, and with the idea that it is the "superior" who should be answerable for having willed and caused the injurious act to be done. In our study of the liability of the municipal corporation for the negligent acts of the independent street contractor, we shall see cases which come within these classes. Our main interest, however, will be centered on the cases falling within class (4)—where the law imposes the performance of a duty on a person, he cannot escape liability for non-performance by delegating it to another. In such a case, it seems inexact to say that liability is predicated on the rules of agency, or the particular doctrine of respondeat superior.\footnote{40} 

4. Certain Cases of Non-Delegable Duties

a. Of the Landlord Who Has Agreed to Repair. Salmond's analysis of the situations in which the employer of an independent contractor may be liable, is somewhat
different than that we have indicated above. We shall adopt it later in a modified form in discussing the liability of the municipal corporation for the negligent acts of the independent street contractor. For the present, however, it suffices to call attention to his concluding statement on the subject:

"It would seem clear, therefore, that the vicarious responsibility of the employers of independent contractors is not the outcome of any far-reaching general principle, but represents merely a number of more or less arbitrary exceptions based on special considerations of public policy." 42

In particular, as he points out, the proposition that the employer is liable for a breach of a duty imposed by law, even though the duty was merely to use due care and was performed when a competent independent contractor was employed, is questionable, from the point of view of the logical development of the independent contractor doctrine. However, it seems to me, that, as a pragmatic device which the law has adopted to place responsibility on the shoulders best able to bear it in certain cases, the rule is sound. It becomes a part of the broad policy which imposes absolute liability in certain cases, without regard to the employer's negligence. 43

In illustration it is worth while to take the case of the liability of the landlord to the tenant, when the landlord has agreed to repair. 44

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41 It includes cases where the employer was negligent in selecting the contractor—a situation which is almost implicit but which perhaps needs to be kept in mind. It also distinguishes absolute liability (negligence is immaterial), absolute liability of a sort (employment permitted only on terms of vicarious liability), and liability for breach of delegated duties. SALMOND, THE LAW OF TORTS (5th ed. 1920) 119 et seq.

42 SALMOND, op. cit. supra note 41, at 125.

43 The concept of "absolute liability" seems to be confused by Salmond. Is it (1) the existence of negligence which is immaterial, or (2) the fact that whose negligence it is, that is immaterial? If we say the latter, and it appears to be the only tenable 'ew, the scope of the employer's absolute liability is much broader, including particularly the non-delegable duties.

Quaere, Whether "absolute liability" is not a misnomer, anyway? It is never imposed when the damage was caused by an act of God, except in some cases of nuisances. See SALMOND, op. cit. supra note 41, at 239.

44 In the absence of fraud and of an agreement, the lessor is not liable to
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If the landlord has agreed to repair, and has done nothing in regard to the work, the weight of authority seems to be that an injured tenant cannot predicate an action in tort upon the failure to make repairs, though the failure constitutes a breach of the contract and caused the injuries.

Whether or not the landlord was under an obligation to make repairs, if he in fact makes them negligently, he will be liable for the injuries resulting from the defective condition. For positive acts of negligent misfeasance, he is liable. This is clear if he does the acts causing the defective condition himself or through his servants. But if the landlord employs an independent contractor to do the work instead of doing it himself, and the work is negligently done, upon what principle can the landlord be held liable? Can we say that there is an "absolute liability," a liability without fault on the part of the person liable, in the sense we suggested above, and is this idea to be identified with that

the lessee, or others lawfully on the premises, for their condition, or that they are tenantable. Jaffe v. Harteau, 56 N. Y. 398 (1874); Silverman v. Isaacs, 183 App. Div. 542 (1918).

46 In New York it is settled that an agreement to repair by the landlord may not be made the basis of an action for personal injuries, so long as nothing has been done under the agreement. Miller v. Rinaldo, 21 Misc. 470 (1897); Schick v. Fleischauer, 26 Hun. 210 (1898); Kushes v. Ginsburg, 99 App. Div. 417 (1904).

47 There is great confusion in the different jurisdictions. In Connecticut the landlord is liable to the tenant or to those in privity with him for injuries to property or person because of the breach of a covenant to repair. Stevens v. Yale, 101 Conn. 683 (1925) (with a discussion of the situation in various states at 689 et seq.). Recovery allowed ex contractu, as being within the contemplation of the parties, in Hart v. Coleman, 201 Ala. 345, 78 So. 201 (1918). An action lies for the landlord's negligent failure to make such repairs as were agreed on, if injury results from the failure. Robinson v. Heil, 128 Md. 645, 98 Atl. 195 (1916).


49 Smith v. Tucker, 151 Tenn. 347, 270 S. W. 66 (1925); Murrell v. Crawford, 102 Kan. 118, 169 Pac. 561 (1918); Salmond, op. cit. supra note 41, at 424; Clark, op. cit. supra note 37, at 159.

40 We are using absolute liability in the sense which makes the test of its existence the fact that negligence, whether on the part of the servant or the master, the contractor or the employer, is immaterial. In such a case, we may say that the employer has a non-delegable duty; likewise that the performance of such a duty is imposed by law. This seems to the author a scientific classification, but as it is not entirely convenient it will not be rigorously adhered to.
of non-delegable acts? The answer is not a perfectly easy one. It has already been suggested that the exceptions to the general rule of the independent contractor are quite arbitrary. If we classify them, it is for necessity or convenience, rather than because the classification is inherent in the law. However, if we start by admitting that as soon as the landlord has begun repairs, or caused them to be begun, it is up to him to prevent their resulting in a defective condition, we have laid the basis for an absolute liability and created a non-delegable duty—the duty to see that the repairs are properly prosecuted. If there is negligence, it is immaterial whose negligence it is—the landlord will nevertheless be liable for defective conditions brought about by repairs which he caused to be started. If there is a duty to act, the law imposes a corresponding duty not to act negligently which attaches to the person having the primary duty. He may employ an independent contractor, but he still has to perform both duties and is liable for their non-performance. Thus, as it seems to the writer, what are known as non-delegable duties are composed of two elements, but which go together—the duty to do the act, and the duty to refrain from doing it negligently. If there is failure in regard to either, the person under the primary duty becomes absolutely liable. In the case of a gratuitous undertaking by the landlord to repair, the primary duty attaches during the prosecution of the work, along with the other duty to prevent its resulting in defective conditions.

In Vollrath v. Stevens the landlord undertook to repair, in the absence of a covenant requiring him to do so. He employed an independent contractor to do the work. The court said:

50 Thus answering the objection that the non-delegable duty may consist merely in choosing a competent contractor. *Salmond, op. cit. supra* note 41, at 123. Such a duty is not a non-delegable duty. If the employer had been unable to find a contractor and had had to use a servant, the result would have been the same, even though the servant were highly competent.


52 199 Mo. App. 5, 202 S. W. 283 (1918).
“If the lessor undertakes to have repairs made when he has not covenanted to do so, a duty is cast upon him to see that the repairs are made so as not to injure the tenant, and the rule of independent contractor has no application.” (Italics are the writer’s.)

Likewise, in Rosenberg v. Zeitchik the court said that

“it was the duty of the landlord to make repairs, and the fact that he made a contract with some one to do the work does not relieve him from liability for negligence to his tenant. It cannot well be claimed that the leaving unguarded for several minutes . . . of a furnace, with a dipper of molten lead on top, was not a negligent act.”

The tenant was allowed to recover for the injuries to his infant child.

We may, perhaps, conclude that the landlord is liable for repairs negligently made, that is, he is liable absolutely in the sense that it does not matter whose negligence (his own, his servant’s or his contractor’s) was in question.55 But if the landlord’s contractor is not making repairs in the tenant’s particular portion of the building, as regards that tenant, he is not making repairs at all, and the ordinary rules of the employer’s non-liability must be applied.56

55 Contra: Ebblin v. Millers Exrs., 78 Ky. 371 (1880). The opinion goes on the ground that the landlord is not liable unless he was negligent in employing the contractor. The case is perfectly logical unless we are prepared to admit that there is a non-delegable duty to prosecute repairs, once they are undertaken, in a non-negligent manner; or, in other words, that there is an absolute liability for repairing negligently, whether the negligence be that of the landlord, his servants, or his contractor. The landlord is not liable for “collateral negligence”—a term hard to define, but none the less useful. In O’Connor v. Schneple, 12 Misc. Rep. 356, 33 N. Y. S. 562 (1895), the contractor was fixing a chimney and knocked soot into the stove in the tenant’s apartment. His son received a severe fright, inhaled the soot, and later died. Held, the landlord was not liable. The court said, “The doing of the repairs, if they were not negligently made, could not have involved any liability upon the landlord for the soot.”
56 It is thought that this view of absolute liability is thoroughly supported by the decisions. It can, of course, be argued that it is not absolute, because if there had been no negligence at all there would have been no liability. It might just as well be argued that it is not absolute because there is no liability if the plaintiff was guilty of contributory negligence. It is not denied, be it noted, that there is another sort of absolute liability—liability without fault anywhere, or on the part of anyone. This is rare in tort, however common it may be in criminal law.

56 Fitzgerald v. Timoney, 13 Misc. Rep. 327, 34 N. Y. S. 460 (1895). The court calls the workman a “servant.” While working in the apartment above
b. Of the Landowner to Business Guests When He Has Retained Control of the Premises. It is generally held that the landowner (or landlord) is liable for defects in those portions of the premises over which he has retained control. This liability extends to injuries to tenants, their families, and persons using the common portions of the building or land to visit the tenants. The implied invitation to use the premises is the basis of the owner’s liability.

The owner’s duty in such a case is said to be “to use reasonable care to keep the premises in repair and suitable condition for the use of the tenants.”

Though the tenant and his guests are not strictly “business guests” of the landlord or owner, perhaps; the duty owed by the owner is the same as in the case of customers in a store, etc.

If the owner charges an independent contractor with the duty of putting the premises in condition, is his liability affected? The case is particularly important as presenting

the plaintiff’s, laying the floor, his foot slipped, causing the plaster below to fall, and injuring the plaintiff. Held, the landlord was not liable.

Dillehay v. Minor. 188 Iowa 37 (1920); Idell v. Michell, 5 App. Div. 268 (1896); Peil v. Rheinard, 127 N. Y. 381 (1890); McNab v. Wallin, 133 Minn. 370, 158 N. W. 623 (1916); Roman v. King, 289 Mo. 641, 233 S. W. 161, 25 A. L. R. 1263 (1921). This rule applies not only to halls, steps, etc., but to a defective dumb waiter, Blake v. Fox, 17 N. Y. S. 508 (1892); and to defective plumbing, whereby boiling water was run into the toilet tank, Wardman v. Hanlon, 280 Fed. 988 (1922). Cf. Kinnier v. J. R. M. Adams, Inc., 142 Md. 305. 129 Atl. 838 (1923).

Notice of the defect must be given to the landlord. Henkel v. Marr, 31 Hun. 28 (1883).


Clark, op. cit. supra note 37, at 151-52, 159.

Consider several cases: (1) The contractor is in charge of the premises when an injury occurs because of a condition existing before his coming and independent of his work. The owner’s liability is not affected. (2) The contractor is in charge and creates a condition, in the performance of his work, which causes the injury. (3) The contractor is in charge and creates a condition, independent of his work, which causes the injury. In (2) the owner should be held to have anticipated the condition and assumed its danger. In (3) is not the situation like that where a defective condition is created by accident or by a stranger? The owner should be liable if he has had notice, etc. If he is liable, it is still a case of absolute liability under our definition; he controlled the property, and is implied to have invited guests to use it. It does not matter whether the contractor was negligent in creating the condition or the owner in not having notice or not acting after notice.
a close analogy to that of the liability of the municipal corporation for the defective conditions of the street, created by an independent contractor.

In *Sciolaro v. Asch* the owner of the building employed a firm of independent contractors to furnish elevator service. The plaintiff, who was employed by tenants, was injured while leaving the elevator, through the negligence of the operator. It was held that the owner was liable. The court said that

"as to all persons having business in the building the law imposed on the owner the duty of seeing that the premises were in reasonably safe condition for access and ingress . . . . This was a personal duty which the appellant could not delegate . . . The master, the innkeeper, and the landlord assume certain duties that can only be delegated subject to the legal responsibility which inheres in the primary obligation." 62

*Curtis v. Kiley* takes us one step nearer the cases of the city's liability for the conditions created by the independent street contractor. A person coming to see the tenant fell into a hole opened by the owner's independent contractor. It was held that the owner was liable, since he employed the contractor to do work which was likely to render the premises more dangerous and since he had control of the premises, and because he could not "continue to hold out the invitation without being bound to exercise due care."

c. *The Basis of Liability.* The foregoing discussion of certain cases of non-delegable duties has not been offered either as a new classification of tortious responsibility or

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61 198 N. Y. 77 (1910).
62 *Accord:* Besner v. Central Trust Co. of New York, 230 N. Y. 357 (1921). The decision was based on two grounds: (1) the owner's non-delegable duty, so that he was always liable for negligence in the operation of the elevator; (2) the operation of the elevator made the decedent's employment inherently dangerous.
64 8 CAL. L. REV. 192, contrasting the twofold Norman classification of acts of misadventure and willful acts with the threefold modern classification of willful acts, acts done at peril, and acts negligently done, which is said to have resulted more or less indirectly from Rylands v. Fletcher, *supra* note 37.
as an exposition of new theory, but merely in an effort to define what we mean by non-delegable duty and by absolute liability. For purposes of the discussion to follow we state our conclusions as below. However little novel they may be, it is well to keep them in mind in considering a subject where the concepts are so intangible.

I Tortious liability may be classified as:
(a) liability with fault; (b) liability without fault.

II The fault in each case is always strictly the fault of the person sought to be charged.

III Whenever an employer is liable for the acts of a competent independent contractor, we have a case of liability without fault ("absolute liability").

IV If, in the case last mentioned, the employer was negligent in selecting a contractor (or in over-seeing his work, if he was charged with that duty) we would have an additional reason for imposing liability; but, the liability is, primarily, liability without fault.

V The idea of a non-delegable duty a primary duty and co-extensive secondary duty to perform the first without fault. That is, it is proper to say that the duty to use due care in the selection of an independent contractor is co-extensive with a duty to select the contractor; but it is not co-extensive with doing, as a primary duty, certain work, for which we choose to hire an independent contractor rather than a servant.

Let it be said that these somewhat dogmatic statements are not intended to contradict others who have used the terms in a different sense, but to indicate the sense which is given them in this paper.

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66 On the above section, see: Bohlen, Landlord and Tenant, 35 Har. L. Rev. 633, 646; supra note 23.
II. The Municipal Corporation and the Independent Contractor

We have already seen that the municipal corporation is almost universally held to be liable for the defective condition of the streets. We now pass to a consideration of the bases and extent of that liability when the condition causing the injury was brought about by an independent contractor. The whole question may be profitably examined in the light of Dean Thayer's remarks, given below:

The doctrine "by which the defendant who has employed an independent contractor may be liable for the consequences of the contractor's negligence, though himself free from fault in selecting the contractor or in any particular, is sometimes misleadingly stated as though respondeat superior were somehow involved. To say that the contractor is treated as the owner's servant is merely to misstate the situation; it is negatived by the very proposition that he is an independent contractor. The true statement of the case is that the law charged the defendant with a non-delegable duty. Though it be only a duty of care, it is a duty to see that care be used, whatever the agency which he employs to do the work. Sometimes this result flows naturally from the circumstances creating the duty, as where it is attached to some right or privilege the giver of which looked to the defendant's personal responsibility."

The clearest exposition of the idea that exceptions to the general rule of the employer's non-liability for the acts of the independent contractor are not based on the theory of respondeat superior, so far as the writer is aware, is found in an opinion by Judge Burch, of Kansas.

"It has not been established that the construction company was free from fault (in not lighting the excavation) and the cause now stands in the same situation as if separate suits had been brought and the one against the construction company had not yet been tried. Besides this, the case is not one in which it is charged that a servant committed a tortious act for which his master is liable, on the principle of respondeat superior. In such cases primary liability to answer for the act rests on the servant. The master is liable only because he

67 Supra notes 11-18.
68 THAYER, op. cit. supra note 65, at 808.
must respond for the acts of the servant, and if the servant be adjudged free from fault there is nothing for which the master should respond . . .

"The city owed the plaintiff an original, independent and primary duty to keep its streets in reasonably safe condition for use." 69

"Notice" as an Element of a Non-Delegable Duty. It may be urged, and quite properly, that where it is required that the city should have notice of the defective condition of the street before it can be held liable therefor, it cannot be said that the city's liability for defective streets is absolute. But if we say, on the other hand, that the city's primary duty is to use reasonable care to see that the streets are reasonably safe for the public use, its co-extensive counterpart is that there shall be no negligent failure on the part of the city or any one under it to use such reasonable care—that there is a duty to use such reasonable care, and liability for failure is absolute. This does not preclude the requirement of notice as an element of the non-delegable duty to use reasonable care to see that the streets are reasonably safe. 70


Dean Thayer and Judge Burch are certainly correct in saying that respondeat superior is not in question in all of those exceptions to the independent contractor doctrine in which there is absolute liability—a primary and a non-delegable duty. In them the employer does not answer for the contractor's wrong—there may have been none in the Coffeyville case—but for his own failure in regard to the non-delegable duty. An example of the misuse of the term respondeat superior is found in Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33 (1889). But where the exception to the general rule is based on the inherently dangerous nature of the act to be done, quaere, Whether respondeat superior is not applicable? Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46 (1904). In accord with the views of Judge Burch, see Savannah v. Waldner, 49 Ga. 316 (1873).

In Karpinski v. South River, 85 N. J. L. 208 (1913), it was held that the independent contractor of a municipal corporation furnishing electric light to private consumers under a franchise is the agent of the corporation when he negligently strings electric wires on the public street causing injury.

70 Courts may say: (1) In certain cases notice is not required, or that it is implied, or that the city is bound to take notice of the character of work which is, by its nature, dangerous to the public. Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33 (1889); Birmingham v. McCravy, 84 Ala. 477, 4 So. 634 (1888).

Or, it may be said: (2) The city is not liable unless it has reasonable notice. It is obvious that then the question of what is notice may decide the case, and may be used by the courts in interpreting their views of public policy in particular situations. If the defect in question is created by an agent of the city, the city has notice, Tewksbury v. Lincoln, 84 Neb. 571, 121 N. W. 994
A. THE DIFFERENT BASES OF MUNICIPAL LIABILITY

If a municipal corporation is under a non-delegable duty to keep its streets reasonably safe, and they are not kept reasonably safe, and an accident results, we need not look far afield for the source of the municipality's liability. It results from the failure to keep the streets in a specified condition described as being one of reasonable safety—by the use of reasonable care. What is reasonable safety is a variable standard, as well as what is reasonable care, but these are standards at least, and serve a purpose. Some courts have gone so far as to hold that the negligent driving of fire engines breached the duty to keep the streets safe for travelers, and this would seem to be correct if we can say that reasonable care on the part of the municipal authorities, regarding the streets, was wanting in these cases.

Though the essential basis of the city's liability is the non-delegable duty which we have been at such pains to delimit, it will be necessary to examine it in connection with other possible bases of municipal liability, namely, the negligence of the city, its absolute liability for the work performed, and a third class in which the city may not have been negligent and where it is not absolutely liable for the work performed.

(1909); or by a licensee, Davis v. Omaha, 47 Neb. 836, 66 N. W. 859 (1896) (dictum); or, in some cases, by an independent contractor, who is assimilated to an agent for the purpose, Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833 (1892).

Cf. Bailey v. Winston, 157 N. C. 252, 72 S. E. 966 (1911). The better view seems to be that of Hugo v. Nance, 39 Okla. 640, 135 Pac. 346 (1913) (the case of an excavation made by an independent contractor across the sidewalk), where the court held that the city was not bound to take notice of the character of the work done on its streets, whether safe or dangerous.

 Cf. Wihte, op. cit. supra note 9, §66; Martin v. Board of Fire Commissioners, 132 La. 188, 61 So. 197 (1913); Creps v. City of Columbia, 104 S. C. 371, 89 S. E. 316 (1916). It seems questionable, however, whether moving objects should come within the rule, unless it is apparent that they render the street unsafe.

Cf. Whitte, op. cit. supra note 9, §§567, 370: "An illegal use of the highway by men, animals, vehicles, etc., while moving and actually being moved by human will and direction . . . will not render the town liable for damages occasioned by horses taking fright . . . . It would be quite different for towns, whatever powers they possessed, or however diligent they might be, to guard against annoyances of so shifting and temporary a nature."
1. Negligence of the City

It seems obvious that an employer may be liable if he “fails to use due care to employ a reasonably competent contractor.” In such a case he is liable because he was negligent. If he had not been negligent, though the contractor had been, according to the general rule the employer would not be liable. But our question is a different one: Where the employer is negligent in selecting a contractor in the performance of a non-delegable duty, and injury results from the contractor’s negligent acts, on what ground shall the liability be placed?

It is a general rule that the employer is liable for the contractor’s negligence resulting in a failure to perform a non-delegable duty. Such a duty may be imposed by common-law or by statute.

If the employer is bound to do a certain act, and not to do it negligently, that is, he has a non-delegable duty, is his selection of an incompetent independent contractor material? Doubtless it may be an additional reason for imposing liability, as in cases where there is no non-delegable duty, but would not the result be the same in spite of negligence in selecting the contractor?

72 Berg v. Parsons, 84 Hun. 60 (1895); Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32 (1893); Conners v. Hennessey, 112 Mass. 96 (1873).
73 Carr v. Stevens, 295 Fed. 701 (1924); Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052 (1893).
74 Where a contractor fails to perform a non-delegable duty, the employer is liable whether or not the contractor was negligent. Roger v. Coffeyville, supra note 69.

The Coffeyville case is a more accurate statement—the contractor’s negligence is immaterial; the employer is not liable for his negligence, but for results of it; he would be liable if the same results had been produced without the contractor’s negligence.
76 Bower v. Peate, 1 Q. B. D. 321 (1876); Toledo Brewing Co. v. Bosch, 41 C. C. A. 482, 101 Fed. 530 (1900); Covington, etc., Bridge Co. v. Steinbrook, 61 Oh. St. 215, 55 N. E. 618 (1899).
MUNICIPAL LIABILITY: NEGLIGENCE

In Goodwin v. Mason 78 the wall of the defendant’s building, constructed by an independent contractor, collapsed, killing the plaintiff’s intestate. It was held that the defendants had an absolute duty to exercise ordinary care and skill in the construction of the building.

"The duty thus resting upon the defendants was one which they could not fulfill by the employment of a competent mason. . . . As far as it went, it was an absolute duty, and nothing short of an actual performance of it . . . would excuse them.'

"Due care in the selection of a contractor" would not constitute a defense and was not relevant to any issue in the case. Defendants' duty was absolute and, regardless of care they may have displayed in selecting a superintendent to construct the building or their confidence in his skill or ability, they were responsible for the exercise of ordinary care and skill in the actual work. 79

The negligence of the municipal corporation in supervising the work of the independent contractor raises a somewhat different question. In the first place, supervision of the work to the extent of taking notice of its character, whether safe or dangerous, would seem to be required from the mere fact that the city is under a non-delegable duty as regards the reasonably safe condition of the streets. 79 And if the city actually undertakes to control and direct the work of the contractor, 80 he ceases to be a contractor and becomes a servant or agent, with the resulting application of the doctrine of respondeat superior. 81

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78 173 Iowa 546, 155 N. W. 966 (1916).
79 Hugo v. Nance, supra note 70.
80 General supervision as to results does not constitute such control as to render the contractor a servant. Hawke v. Brown, supra note 77. Control of the contractor was held to create the relationship of master and servant in Brooks v. Somerville, 106 Mass. 271 (1871). The town's obligation to care for the streets seems to have been an important element in determining whether control existed. The test is not the exercising of control, but the right to exercise it. Linnehan v. Rollins, 137 Mass. 123 (1884).
81 Tuscon v. Dunseath, 15 Ariz. 355 (1914); Chicago v. Murdock, supra note 69; Thillman v. Baltimore, 111 Md. 131, 73 Atl. 722 (1909); Hugo v.
Thus it seems reasonable to conclude that in cases where the city is under a non-delegable duty to keep the streets in safe condition for travel, its negligence in selecting the contractor, as well as negligence in supervision, either because supervision must be construed as notice of the defect or because it created the relationship of master and servant, is merely a concurring basis of municipal liability, and, for that reason, is immaterial.

This conclusion is not one of merely technical importance, for it raises the question of fundamental policy. It is probably well to say that the employer should be liable when he is negligent in selecting a contractor or in supervising his servants. The reason is, in either case, that care in work which he causes to be started for his own purposes is reasonably within his control. In one case, he negligently selected a poor instrument when he should have selected a good one; in the other the personal connection is so close that it is reasonable that the superior should respond. But the policy of requiring the city to keep safe its streets is even stronger, and should be kept clearly before the courts as the one to put decisions on. Safety on the streets is for the benefit of the public and the public, through the city, should be required to take all reasonable steps to insure safety. Injuries for failure to do so ought, it would seem, to be compensated for through the public treasury. In other words, the city, as employer of independent street contractors, occupies a peculiarly important place in the scheme of the independent contractor doctrine, and for that reason its liabilities should be clearly seen to follow from its anomalous status. In more general terms, whenever an employer is liable because of failure to discharge a non-delegable duty, liability should be predicated by the courts on that failure rather than on a possible other ground.

2. Absolute Liability For The Work Performed

Absolute liability as we have discussed it so far, has had reference to liability growing out of failure to keep the streets in a safe condition. There is also a sort of absolute liability which is imposed because of the character of the work which the employer directs to be done. For example, "E" contracts with "C" for certain work which "C" is to perform. "E" is under no duty to do the work in the first place and we have no question of non-delegable duty in the sense we have used that term. But the law may say that "E" will be liable for injuries resulting from the work, either (1) because of methods to be used in its prosecution, or (2) because of the character of the completed work. As an example of the first class we have certain cases of blasting; of the second, nuisance. We may say, then, that the city is liable absolutely in certain cases not only because of its non-delegable duty in regard to the streets, but also because the character of the work performed by the independent contractor imposed absolute liability.

Liability for Blasting. Our discussion has throughout been directed primarily toward those cases where persons on the street have been injured. It is submitted that there is a fundamental difference between such cases and those where injury occurs to persons or property on adjacent land. In the latter class of cases, the liability of the city would seem to be the same as that of adjacent landowners to each other. The city's control of the streets, and its liability for injuries based on that control, should probably not be given an exceptional status as regards persons or property not on the streets. If this is so, the doctrine of Pack v. The Mayor, etc. of New York \(^82\) is of little authority in itself for holding the city not liable when the injury occurs on the street, from acts committed on the street. In the Pack case, blasting by the servants of an independent contractor resulted in injuries from stones falling on plaintiff's house. Moreover, all the reasoning of the case is drawn from the assumption that

\(^82\) 8 N. Y. 222 (1853).
“the immediate employer of the agent or servant through whose negligence an injury occurs, is alone responsible for the negligence of such agent or servant.” Since the principle of respondeat superior was narrowly limited to cases of the “immediate employer,” it was felt that in no other case could vicarious liability attach. A year later, in Kelly v. The Mayor, etc. of New York 83 the court did not seem to feel that any different principle was involved when blasting on one road caused injury to a traveller on another. The employer, the city, was not liable simply because the doctrine of respondeat superior was inapplicable. The result of these two cases was the formulation of a definite rule, hard to support where the injury occurs on the street, that the city is not liable for injuries caused by blasting on the street by its independent contractors. In Herrington v. Lansingburg 84 the Pack and Kelly cases were considered sufficient authority for holding that when the sewer contractors fired a blast and frightened the plaintiff’s team, tied to a post in a village street, with the result that the plaintiff was injured while trying to control them, the village was not liable. It was admitted by all concerned that if the injury had been caused by falling rocks, no liability would have resulted. Yet such a result is entirely out of line with the view, already accepted in New York shortly after the Pack and Kelly cases, 85 that the city, having control of the streets, must be deemed negligent in not protecting the public from dangers created by its independent contractors.

Injuries caused by high explosives are peculiar in that the act causing injury may occur in one place, whereas the resulting injury may occur either in the same place or at one at a considerable distance and under entirely different control. Moreover, when the injury is to adjacent property, it may be the result of what is technically a trespass by the

83 11 N. Y. 432 (1854).
84 110 N. Y. 145, 17 N. E. 728 (1888).
85 Storrs v. The City of Utica, supra note 32. The injury there resulted from the city’s failure to protect an open excavation created by an independent contractor. It was thought material that the injury “resulted from the work itself, however skillfully performed.”
falling rocks, or it may be caused by vibrations in the earth. We need to consider only two of these cases: (1) the blast is not fired on the highway, but the injury occurs there; (2) the blast is fired on the highway, and the injury occurs there also. If there is absolute liability in the first instance for the work performed, it would seem that there should be in the second also; but this, in the latter case, would be independent of the absolute liability imposed on the city for its failure to control and keep safe the streets. (We are not considering the question of nuisance for the moment.)

The complete extent of the acceptance of the rule of Rylands v. Fletcher 86 may be uncertain in this country, yet where the work may be said to be inherently dangerous, or that it will be apt to do damage unless guarded against, the owner of the land is generally said to be liable if he failed to take due care to prevent harm. 87 Whether blasting is of such a character as to impose liability will depend on the circumstances. 88 Consequential damage which could not be

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The error which, as it seems to the writer, resulted in the decision in the Herrington case, was emphasis on the fact that the contractor controlled the work, but a failure to consider the fact that the village was charged with control of the street. Earle, J., said: "If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work and the manner of performance. They could choose their own time for firing the blasts and select their own agent and instrumental- ity. They could make the charges of powder large or small, and they could in some degree smother the blasts so as to prevent falling rocks, and much of the noise of the explosion . . . If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractor should have given notice; but the duty to give it did not devolve upon the village." (Italics are the author's.) It seems that the duty of the village to keep its streets safe is overlooked, as we suggested above.

86 Supra note 37.
87 Wetherbee v. Partridge, 175 Mass. 185, 55 N. E. 894 (1900). The control contemplated blasting. It was clear that the performance of the contract would do the damage complained of unless guarded against. Holmes, C. J., said, relying on Woodman v. Metr. R. Co., supra note 75, that in some such cases it would be a matter for the jury as to whether the danger was so great as to make the defendant liable. That is, the employer would be liable for the results of blasting by the independent contractor, and at his peril, if the danger were imminent enough. See, also, Houssonne v. Vancouver Powder Co., 23 West. L. Rep. 167 (Brit. Col. Ct. App. 1913), discussed in Comment'26 Har. L. Rev. 650; Hay v. Cahoes Co., 2 N. Y. 159 (1849).
88 Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957 (1898). No liability where the work is lawful and necessary for the use and improvement of real property,
clearly foreseen will not, at least in many cases, render the owner of the land liable. But it has been held that the use of high explosives in a populous neighborhood or near a public highway is so fraught with danger that the person using the same is liable for injury without proof of negligence. Thus it has been held that both the city and the independent contractor are liable when the latter, while constructing a sewer in a proper manner, damaged the plaintiff’s house through vibrations caused by blasting, the work being intrinsically dangerous.

If we can reasonably accept the doctrine that a man may not use his own property so that injury occurs to persons nearby, or to adjacent property—and in spite of the difficulty in reconciling the blasting cases, so much seems of fairly universal acceptance, except where the injury is “consequential”—there would seem to be particularly good reasons for applying it to cases of injury occurring on the highways, from blasts on adjacent property.

If a private employer engages a contractor to do work in the prosecution of which high explosives will be used, injuries caused to persons using the public highways will render the employer liable. It is not entirely clear whether

if there is no statute and the work does not constitute a public nuisance. The case gives no proper consideration to the dangerous character of the work and is put primarily on the narrow ground of the non-applicability of the doctrine of respondeat superior. Cf. Hay v. Cahoes Co., supra note 87. The dangerous character of explosions of dynamite has been said to be a matter for judicial notice. Chicago v. Murdock, supra note 69. In cases of consequential damage, where the injury to buildings was caused by vibrations, it has been thought to be against public policy to allow a recovery, “since public policy is promoted by improvement of property.” Booth v. Rome, etc., R. Co., 140 N. Y. 267, 55 N. E. 592 (1893). Blasting by an independent contractor, when not clearly authorized or necessary, is a “collateral” act, and for damage caused thereby the employer will not be liable. McNamee v. Hunt, 30 C. C. A. 653, 87 Fed. 298 (1898).


Taylor v. Walsh, 193 Mo. App. 516, 186 S. W. 527 (1916). The work of blasting to construct a sewer, being intrinsically dangerous, the city is liable for all damage resulting therefrom, however carefully or skillfully the work is done. City of Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17 (1877).

Stone v. Cheshire R. Corporation, 19 N. H. 427 (1849). An independent contractor, in pursuance of the contract with the railroad corporation, was blast-
such liability depends on the inherently dangerous character of the work or follows from the principle that one in possession of fixed property must use it, and see that it is used only, so that other persons are not injured. In either case, the liability is an absolute liability, in the sense that if there is negligence, the employer is not protected by the fact that the negligence was that of the contractor. Whether or not the work was inherently dangerous is simply a question of fact.

It may be said, therefore, in view of the above discussion, that in the first case which we proposed to consider—where the blast is not fired on the street, but the injury occurs there—that the employer, owning or controlling the land where the blast was fired, is liable absolutely for the results of the work performed by the independent contractor. The fact that it was the contractor's negligence which failed to prevent the harmful results is immaterial. If the employer were the city, acting in a ministerial capacity, would it not be held liable equally with private employers? If it were held liable in such a case, it is independent of the control of the streets, but follows from the same facts which impose liability on private employers. Coming to the second case which we propose to examine—where the blast is fired on the street and the injury occurs there also, it seems that all the reasons urged above for imposing liability exist—the city owning or being in control of the street where the blast is

ing rocks; plaintiff, on the highway, was injured by stones. Held, relying on Bush v. Steinman and Quarman v. Burnett, that the plaintiff could recover. Accord: Carson v. Blodgett Construction Co., supra note 89; Sullivan v. Dunham, supra note 89.

92 Analogous cases: U. S. v. Standard Oil Co. of N. J., 258 Fed. 697 (1920), aff'd, 264 Fed. 66, 12 A. L. R. 1404 (a contractor, with knowledge of the employer, permitted the dangerous practice of throwing hot ashes into oil-covered waters, whereby barges were destroyed; this method of disposal was cheaper and the work was being done on a cost basis); Gorham v. Gross, 125 Mass. 232 (1878) (fall of a party wall, built by defendant's independent contractors; case follows Rylands v. Fletcher, and distinguishes Hilliard v. Richardson, 69 Mass. 349 (1855), on the ground that in the latter case the acts causing the injury in the highway were collateral, which seems to be a repudiation of Bush v. Steinman); Hudgins v. Hann, 153 C. C. A. 313, 240 Fed. 387 (Ala. 1917), (owner of a building is liable for injuries to persons or property rightfully near it, if they could have been prevented by ordinary care, and the owner's liability cannot be avoided by entrusting the care of the building to another).
fired, its dangerousness being obvious unless the street is closed to traffic. Yet, as we saw in the Herrington case, relying on the non-applicability of respondeat superior, the court neglected this phase of the question, and tacitly admitted that rocks thrown by a blast set off in the street by an independent contractor, causing injury in the street, would not make the city liable.

It must not be forgotten, however, that the Herrington case was not one of injury by falling rocks, but because of the noise created by the blast. The analogy with falling rocks is pure dictum. The difference between the two situations may consist in the fact that noise is less likely to result in harm than is a shower of rocks. The latter may be inherently dangerous whereas the accompanying sounds may not be. Thus it has been held that a railroad company is not liable for the operation of a steam engine near the highway, by an independent contractor, though a traveller was injured through the fright of his horse. 93

In the City of Logansport v. Dick 94 we have a state of facts satisfying the conditions we outlined above: Independent contractors under the city, blasting in the street, injure a person using the street as a traveller. The city was held liable, on the ground that it had failed to keep its streets in safe condition for use in the usual manner. Howk, J., said:

"... But it seems to us, that, in view of the exclusive power conferred, and of the correlative duty necessarily imposed, upon the appellant over the streets, alleys and highways within its corporate limits, in and by the legislation of this State, providing for the incorporation of cities, the appellant could not and ought not be allowed to avoid the imperative duty, which it owed to the public, to keep its streets, alleys and highways in a safe condition for use in the usual manner by travellers, nor to escape responsibility for its neglect or failure to perform such duty, upon the plea that it had entered into

93 Wabash, etc., R. Co. v. Farver, 111 Ind. 195 (1887). Cf. Water Co. v. Ware, supra note 36.
94 70 Ind. 65, 36 Am. Rep. 166 (1880).
a contract with another person for the performance of the work, which rendered such use of the street, alley or highway unsafe or dangerous to the travelling public." 95

The court, in basing the city's liability on the ground of its failure to keep the streets safe, said nothing about liability, independent of the control of the streets, arising from the inherently dangerous nature of the acts to be performed. Yet it is submitted that this additional ground for imposing absolute liability also existed. This view finds strong support in the reasoning of Water Co. v. Ware, 96 where the independent contractor was responsible for frightening the plaintiff's horse with the noise of an engine and drill, and the contractee, who was also a contractor, but directly under the city, was held liable. 97 Mr. Justice Clifford said:

"... Where the obstruction or defect which caused the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employed the contractor and authorized him to do those acts is equally liable to the injured party." 98

In regard to the blasting cases, we may, perhaps, conclude:

1. It is impossible to reconcile them; 99
2. If rocks are

95 Supra note 94, at 80.
96 Supra note 36.
97 Quaere, Whether the result would not have been the same in the absence of the agreement on the part of the Water Company "to be responsible for all damage which may occur."
98 Supra note 36, at 576.
99 Edmundson v. Pittsburg, etc., R. Co., 111 Pa. 316 (1885) (company held not liable for blasting by its independent contractor, where the plaintiff's buildings were damaged; court relied on Painter v. The Mayor, etc., of Pittsburg, 46 Pa. 213 (1863), and Wray v. Evans, 80 Pa. 102 (1875)—cases based on the argument that respondeat superior applied only to the immediate employer, and that the inapplicability of this doctrine protected the employer of an independent contractor whose servants were negligent. Cf. Louisville & Nashville R. Co. v. Bonhayo, 94 Ky. 67, 21 S. W. 526 (1893) (if a landowner has caused injury to a neighbor's lands or buildings by his negligence in blasting, he is liable).

The city is not liable for the injury of an employee of the contractor while driving near old, unexploded blasts. Salmon v. Kansas City, 241 Mo. 42, 145 S. W. 16 (1912). Accord: Staldter v. Huntington, 153 Ind. 354, 55 N. E. 88 (1899) (plaintiff, working in sewer trench, was not using the street as a traveller).

Cf. Lowry v. Carbon County, 64 Utah 555 (1924) (county, though a municipal corporation, is a political subdivision of the state, created for governmental purposes, and is not liable for a death caused by rocks from blasting).
thrown onto a public highway from without, by the acts of an independent contractor, and blasting was within the contemplation of the contract, the employer will be held, probably because the work was inherently dangerous; 3. If the city, acting in a ministerial capacity, were such an employer, it should, logically, be held liable; 4. The same reasoning would justify imposing liability on the city when blasting is done by its independent contractors on the public street, and injury occurs on the street; 5. In this last case, there is an additional, and controlling reason for holding the city, i.e., it is liable for its failure to keep the streets safe (note that the necessity for notice is obviated by the fact that the blasting was within the contemplation of the contract); 6. Where there is blasting on a public street, with resulting damage to persons or property not on the street, the question is a very different one, and the fact that the city as such is the employer, and has control of the streets as such, is not material.

In (5) above we said that there was the additional and controlling reason for holding the city, that it was charged with keeping the streets safe. Such liability is clear and easy to establish. We do not have to go into questions of what is inherently dangerous. As was done in Logansport v. Dick,\textsuperscript{100} it seems desirable to keep this liability clearly in view.\textsuperscript{101}

\textsuperscript{100} Supra note 94.
\textsuperscript{101} Blumb v. Kansas City, 84 Mo. 112 (1884), is directly contra to Logansport v. Dick, on the ground that blasting is not a nuisance \textit{per se}, and that injuries from falling stones are not like injuries from defects in the streets. One may reply, as we have indicated, that the city's liability is based on control, which should be extended to necessary superintendence of known blasting operations in the street. In Gerber v. Kansas City, 304 Mo. 157 (1924), a distinction is made. An independent contractor had left a dynamite cap in a pile of dirt at the edge of the walk. Some time later a little boy picked it up and was injured. The city was held liable for not keeping the streets safe for the use of the public, but expressly not liable for the negligence of the construction company, which (the use of the explosives not being unlawful) was "collateral" to the performance of the contract. Cf. Sroka v. Halliday, 39 R. I. 119, 97 Atl. 965 (1916), where, after an exhibition of fireworks, a child was injured, a week later, by picking up an unexploded bomb. It was held that the employer of the independent contractor in charge of the exhibition was liable on the ground that the contract called for the doing of things which were, by their nature, liable to injure others unless precautions were taken.
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Nuisance. Many of the blasting cases might very well be considered under the head of nuisance. In this section we wish only to indicate what has already been said—that though there may be absolute liability for the work performed, because it is inherently dangerous or because it is a nuisance, in all cases where such a nuisance has been created in the highway by independent contractors under the city, the latter should be held liable primarily for its failure to keep the highway safe. Nevertheless, the liability in both cases is absolute. Salmond says:

"Moreover, the rule of absolute liability for nuisance established by Rylands v. Fletcher applies to the escape of things from the highway, no less than to their escape from the defendant's own land. He who brings any dangerous thing upon the highway, or, interferes with any dangerous thing already there, with the result that it does damage on adjoining property, is absolutely liable without proof of negligence."

And a municipal corporation has been held liable, apart from any proof of negligence, for the escape of inflammable gas from the roadway. Moreover, the employer of the independent contractor is liable in such a case though the accident was due solely to the negligence of the independent contractor.

Our problem, however, is not covered by the situations just mentioned. Suppose, in the Hardaker case, the gas had exploded in the street at the time of the passage of a car. Would liability then have been imposed on the council on the

102 In Connecticut the duty to remove a nuisance upon the public highway is a "public governmental duty," and the city is not liable for its failure to perform it. Hewison v. City of New Haven, 37 Conn. 475 (1871). In Wyoming a city is under no duty to abate nuisances, and is not liable for such defects in the streets as constitute nuisances. Kent v. Cheyenne, 2 Wyo. 6 (1877).

103 SALMOND, op. cit. supra note 41, at 245.

104 SALMOND, op. cit. supra note 41, at 246; Midwood v. Mayor of Manchester (1902) 2 K. B. 597.

105 "In Hardaker v. Idle Council District (1896) 1 Q. B. 335, the defendant council employed an independent contractor to make a sewer in the highway, and by his negligence a gas-pipe was left insufficiently supported in an excavation made by him, with the result that it was fractured, and the escaping gas found its way into the plaintiff's house and there exploded. The council was held liable although the accident was due solely to the negligence of an independent contractor." SALMOND, op. cit. supra note 104.
ground of nuisance? Salmond again comes to our aid and cites, though with apparent disapproval, the case of *Charing, etc., Co. v. Hydraulic Power Co.*,\(^{107}\) indicating that it would. In the *Charing case, the Court of Appeal*

"professing to follow *Midwood v. Mayor of Manchester*, went considerably further by holding that the rule in *Rylands v. Fletcher* was applicable as between two companies using a highway as licensees under statutory authority for the transmission of water and electricity respectively; and the water company was held liable for the damage done to the electric cables of the other company by the escape of water from a broken main. . . ."\(^{107}\)

It may well be argued that if the water mains had belonged to the municipal corporation, the corporation would be liable, exactly as the private company. Or if dynamite, stored in the street, should explode, and injure either abutting property or passers-by, the city should be held liable, though there was no negligence or though it were the negligence of the independent contractor in charge. Here again, though the city's liability could be said to result from the nuisance, in the case of the passers-by, it would seem better to urge as a primary reason for imposing liability on the city, its failure to keep the streets safe.\(^{108}\)

\(^{106}\) (1914) 3 K. B. 772.

\(^{107}\) *Salmond, op. cit. supra* note 104.

\(^{108}\) The statements in the cases as regards the application of the concept, or concepts, of nuisance are so confusing as to be of little help in analyzing the cases. Nuisance is frequently suggested as a concurring reason for the imposition of liability. One of the most inexplicable cases is *Smyth v. City of New York*, 203 N. Y. 106 (1911), where the property of an abutting owner was damaged by the explosion of dynamite, stored in the street in charge of a sub-contractor, under the general supervision of the Department of Combustibles of the Fire Department. The city was held not liable (1) Under *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91 (1901), which was a case of consequential damage to abutting property by the sinkage of land in front of it; (2) Under other cases supposed to hold that the city was not liable for the "default" of the fire department. The dissenting opinion by Haight, J., would have held the city on the ground that it had permitted, with notice, a dangerous nuisance. *Accord*: *Holman v. Clark*, 272 Mo. 266, 196 S. W. 868 (1917) (it may be inferred from the case that damages would have been allowed if the injury had been to a person using the street as a way).

So *Logansport v. Dick* may be put on the ground that the city is under an affirmative duty of superintending all independent street contractors to the end that their work shall not result in nuisances dangerous to the public. This seems to the writer an unnecessary confusion of two distinct bases of liability. *Cf. White, op. cit. supra* note 9, § 132.
Indeed, the whole question of nuisance is made difficult by the intangibility of the term. To say that there is liability in a given case because the obstruction is a nuisance, or because the blasting of rocks is a nuisance, is little better than saying that there is liability because there is an obstruction, or because rocks were blasted. Salmond has pointed out the misuse of nuisance as a generic term in a broad sense. Its limits are often very uncertain.

But to come back to the main problem, what is the situation where an independent street contractor has done acts amounting to a nuisance, and resulting in an injury to persons on the streets? Is there an absolute liability imposed on the city as employer of a contractor guilty of creating a nuisance, or simply as being in control of the land where a nuisance was created, without respect to the relationship of contractor-employer? If the latter, it is clear that we are not concerned with the doctrine of respondeat superior, and that the basis for absolute liability is similar to, but not the same as, the absolute liability of the city based on its control of the streets.

"As a matter of strict logic a particular thing cannot be both a trespass and a nuisance... Courts have been inclined to denominate as a nuisance all injuries to property which do not amount to a trespass and contain no element of negligence or other culpability. It would seem to be more conducive to clear thinking, however, to recognize definitely an indeterminate class of cases where the defendant is liable at peril, but where the situation is not such as would justify the court in giving an injunction; for example, explosives kept on land may not be dangerous enough to warrant an injunction but dangerous enough to impose liability at peril for damage done if they should explode." Clare, op. cit. supra note 37, at 119.

White has said: "A public street when opened for travel should be free, safe, and convenient; and any unlawful substantial interference with these qualities for an unreasonable time creates a public nuisance." White, op. cit. supra note 9, § 165. This of course has no reference to "public nuisance" in the criminal sense, where, at common law the remedy was by indictment.

Salmond, op. cit. supra note 41, at 216.

Scott v. Bay, 3 Md. 431 (1853); Hay v. Cahoes Co., supra note 87. Both of the cases dealing with blasting. An action is maintainable against the city for obstructing the street, whereby injuries are caused, on the ground of nuisance, when only the use is unlawful. A water pipe projecting an inch and a half above the walk is not such a nuisance. Calvert v. City of Appleton, 196 Wisc. 235 (1928). Quaere, Whether the court wishes to say that the thing complained of is not a nuisance because not unlawful, or is not unlawful because it is not a nuisance? How would a court determine on the one hand whether such a pipe was unlawful, or on the other, whether it was a nuisance?
The creation of a nuisance *per se* is generally considered to be an exception to the principal rule of non-liability of the employer for the acts of the independent contractor. Nevertheless, it is suggested that it would be more proper to look upon the creation of a nuisance of this sort by an independent contractor simply as a situation in which the law holds the person in possession of land liable, irrespective of the source of the nuisance, the existence of negligence, or, if it existed, who was guilty of it.

On the whole, any scientific application of the term *nuisance* to a given set of facts is apt to be very difficult. It is valuable as a shorthand term of description, but cannot be used in analysis. In *Cole v. Newburyport*, for example, it was held that where a city has, for compensation, granted the right to erect a booth on a public square, for the use and exhibition of an animal, whose offensive appearance and odor greatly frightened horses, the city is not liable for an injury occasioned when the animal frightens a horse, while the animal is being exercised on the highway outside the booth. It has been pointed out elsewhere that "the

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113 In Nemet v. City of Kenosha, 169 Wis. 379, 172 N. W. 711 (1919), the city was held liable for the drowning of plaintiff's son at a municipal bathing beach. Independent contractors, in laying a pipe for the city water supply, across the beach, had left a ditch, because of which the boy's death was caused. It was held: (1) The city, acting in a governmental capacity in maintaining the bathing beach, was exempt from liability for the negligence of its agents; (2) In furnishing water to private consumers, the city was acting in its private business capacity, and was liable for the failure to exercise ordinary care. The court said: "The construction of this excavation at a point adjacent to the grounds used by the public, without giving notice of the presence of the danger, constituted a nuisance, and the city is liable, for the damage proximately caused thereby." The opinion shows the feeling of the court that the condition created, or the work done, by the contractors, was necessarily or intrinsically dangerous.


115 WHITE, *op. cit.* *supra* note 9, § 132 note. If we say that certain acts on the part of the contractor are not a nuisance *per se*, quaere, whether it is not equivalent, both as a description and as to result, to saying that the employer is not liable for the contractor's collateral negligence? Wabash, etc., R. Co. v. Farver, *supra* note 93.
license granted by the city carried with it the implied license to bring the animal on the public street to and from the booth where it was to be exhibited. It seems to be a fairly clear case of nuisance on property over which the owner (the city) had control, for which the city should be liable.

Our examination of nuisance as a basis for the employer's liability for the work performed, indicates the following conclusions (the nuisance being created on the street and the injury occurring there):

1. If the city's liability can be predicated on the nuisance, it is an absolute liability; 2. The concept of nuisance is so variable as to make its application often unsatisfactory. 3. A much better test of the city's absolute liability is to ask whether the city properly performed its duty to make the streets reasonably safe for use.

3. LIABILITY FOR THE ACTS OF THE CONTRACTOR WHERE CITY IS NOT NEGLIGENT AND THE ACT IS NOT ONE IMPOSING ABSOLUTE LIABILITY

In this section we have to deal with two classes of cases:
(1) Where the city is liable solely because of its failure to use reasonable care to keep its streets reasonably safe; (2) Where the city is not liable because the act of the contractor

116 "Where the contractee employs the contractor to do work for his benefit, which, in the ordinary mode of doing it, he, as a prudent man, has reason to believe is a nuisance, he is liable for injuries that may result from it to third persons. The reason for the contractee's liability is that the contractee is liable for injuries resulting from his own unlawful act, and he cannot protect himself from such liability by employing others, under the name of independent contractors, to do the unlawful act. But where he, as a prudent man, has no reason to believe that the act contracted to be done is a nuisance, but is in itself lawful, and it turns out, during the progress of the work that it is necessary to create a nuisance in order to do the work, then the contractee is not liable for injuries to third persons resulting from the nuisance before he had notice of its existence . . . ." Scott Const. Co. v. Webb, 86 Ind. App. 699 (1928).

117 This is not because one test is more precise than the other, but because it is easier to hide behind a technical term with an uncertain meaning, than to say that a thing is reasonable or unreasonable when the average man would clearly think otherwise. Moreover, the principal reason is the one we have often suggested—a clear perception of the underlying policy of making the city liable for its failure to keep its streets safe.
causing the injury was collateral, or where the act causing the injury was not collateral, but the negligence was collateral.

a. Permanent or Semi-Permanent Conditions. Wherever the city is liable solely because of its failure to use reasonable care to keep its streets reasonably safe, independent of the question of the existence of negligence in creating the unsafe condition, or that of whose negligence created it, but subordinated to the requirement of notice, we have what we have defined as absolute liability for the care of the streets. The problems here are relatively simple, depending upon what is reasonable care, what is reasonable safety in the streets, and when it may be said that the city has had notice. The necessity for notice is, in many cases, obviated by the fact that the condition complained of was of a permanent or semi-permanent character. Where there was no notice, and the condition complained of was not of a permanent or semi-permanent character, the city may be held liable on the ground of nuisance.

In view of what has already been said, it will probably not be questioned that where the city has express notice of the defective condition, and fails to use reasonable care to prevent its causing injury, liability for injuries caused thereby will result.

When, however, no actual notice of the defective condition is shown, though the city is not a guarantor of the safety of its streets, if the condition is not merely a transitory one, such as a hose across the sidewalk for momentary use by the

118 See note 41, supra, et seq.
119 Cf. Glasgow v. Gillenwaters, supra note 112 (municipality held liable on the ground of nuisance where the contractor had stretched a barbed wire across the street).
120 See notes 11-18, supra.
121 What is actual notice? It may be (1) knowledge of the condition itself, or (2) it may be knowledge that certain persons are going to create certain dangerous conditions; for example, when a sewer contractor is known to be at work, and no official of the city has actually seen the work, or (3) knowledge on the part of any or particular agents of the city; for example, a garbage collector, a policeman, an independent contractor. Shall we say that notice to such persons is notice to the city?
contractor, it would seem that the city ought to be held liable. This is so since the city’s duty in regard to the streets is not simply to use reasonable care to keep them safe if it knows them to be unsafe, but is an active duty to take note of their condition. So, if defects in the street are of a permanent or semi-permanent character, the fiction of constructive notice is adopted, by which the courts mean that notice is not necessary.

In *City of Lincoln v. Smith* a hole in the sidewalk was hidden by snow. The court held that actual notice of the defect in the sidewalk was not necessary, if ignorance of the hole could arise only from a failure to exercise reasonable official care. In *Kunz v. City of Troy* a child was killed while playing on a counter placed illegally on the sidewalk, and left there for some time. Express notice was held to be unnecessary in order to hold the city liable.

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122 Powell v. Village of Fenton, 214 N. W. 968 (1928) (hose placed across the walk by the fire department while fighting a fire). See Comment 26 Micir. L. Rev. 222.

123 Savannah v. Waldner, 49 Ga. 316 (1873); Birmingham v. McCrary, 84 Ala. 469, 4 So. 630 (1887); Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33 (1889); Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833 (1892).


125 28 Neb. 762 (1890).

126 104 N. Y. 344 (1887).

127 When the defect is hidden so that a reasonable examination would fail to show it, the city has been held not liable. Schmidt v. City of New York, 179 App. Div. 667 (1917), aff’d 228 N. Y. 572, 127 N. E. 921 (defect seems to have been almost impossible of detection); Dougherty v. City of New York, 146 App. Div. 727 (1911) (very doubtful decision since the subway contractor knew that the sidewalk was not properly supported). *Contra:* Biggs v. Huntington, 32 West W. Va. 55 (1889). Cf. Stanton v. City of Parkersburg, 66 W. Va. 393 (1909); Townley v. Huntington, 68 W. Va. 574, 70 S. E. 368 (1911).

128 General note on the cases in this section:

(1) **Actual notice.** Previous notice in any form may be required by statute as a condition precedent to a right of action for defective streets. Goddard v. Lincoln, 69 Neb. 594, 96 N. W. 273 (1903). Such a right of action is not a common law right, and thus a property right which cannot be taken away by statute because of the due process clause of the Constitution. McMullen v Middletown, 187 N. Y. 37 (1907). Notice of the existence of the obstruction is sufficient, not necessarily of its dangerous condition. Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095 (1889). The city has notice of acts done under a license, but after its expiration, notice is required of the conditions actually created. Davis v. City of Omaha, 47 Neb. 836, 66 N. W. 859 (1896). Notice of want of repair is required, but will be presumed where the defect is in original construction of the street. Zeigler v. City of West Bend, 102 Wisc. 17, 78 N. W.
b. **Collateral Acts.** It is generally said that the employer of an independent contractor is not liable for the collateral acts of the contractor, or for his collateral negligence. For example, if a contractor is engaged for work that no reasonable contractor would employ blasting in performing, blasting would be a collateral act; if blasting were con-

164 (1899). *Cf.* Rapho, etc., Townships v. Moore, 68 Pa. 404 (1871) (if defect is latent or work of wrongdoer, express notice must be brought home).

*In general,* see the following: City of Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113 (1885); Berger v. Philadelphia, 196 Pa. 41 (1900); Klepper v. Seymour Housing Corp., 246 N. Y. 85, 158 N. E. 29 (1927); John Wanamaker v. City of New York, 197 App. Div. 44 (1921); Dowling v. City of New York, 239 N. Y. 533 (1924) (memorandum decision). In Connecticut, where the liability of the municipal corporation is strictly limited by statute (as regards defects in the streets), the case of ice-covered sidewalks is on a different basis. Schroeder v. City of Hartford, 104 Conn. 334 (1926); Cloughesy v. City of Waterbury, 51 Conn. 405 (1885) (city must have notice and be able to remedy the defect with a reasonable expenditure).


(2) **Permanent or semi-permanent conditions.** Many of these cases would also fall under the preceding section—"The city has notice of work done under its authority or by its permission." Defects in original construction, knowledge on the part of the city is conclusively presumed: Boltz v. Sullivan, 101 Wis. 608 (1899). Loosened stone: Turner v. Newburgh, 109 N. Y. 301, (1888). Ice on sidewalk: Todd v. Troy, 61 N. Y. 506 (1875). Holes and bumps: Harvey v. Chester, 211 Pa. 563 (1905); Norbeck v. Philadelphia, 224 Pa. 30, 73 Atl. 179 (1909).
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templated, but the contractor carelessly threw a cigarette into the explosives, that would be collateral negligence. Whether or not the distinction is practically important, since it seems to exist, it may as well be made.

For our purposes it is possible to make another distinction: that of collateral acts taking effect on the street, from those taking effect off the street. Since the city is liable for its failure to keep the streets in reasonably safe condition, or at least for its failure to use reasonable care to that end, it would seem that the city should not be able to set up as a defense that the act was collateral, if it caused injury and if the city had such notice as would make it liable if the act were not collateral and injured persons on the street.

Therefore, where the injury results from collateral acts or negligence, and does not occur on the street, the situation is the same as where the employer is a private individual, and the work is to be done on the employer’s land. For example, in Hilliard v. Richardson, the contractor deposited boards in the highway, and a third person was injured. It was held that the employer, and owner of the land, was not liable.

\[\text{Cf.} \] Prowell v. City of Waterloo, 144 Iowa 689 (1909). McClain, J., said: “It may be conceded that even a municipal corporation is not liable for the negligence of an independent contractor in carrying on the work, if such negligence consists in some fault or omission wholly collateral to the performance of the work to be done, and not necessarily involved in doing it. Thus the negligence of the contractor in the use of dynamite or other blasting materials would not render the city liable for resulting injury, although the contractor was employed in performing work on the streets. But on the other hand, the duty of the city to maintain its streets in a safe condition cannot be delegated to an independent contractor so as to relieve the city from liability for failure to perform this duty.” The inference is that the doctrine of collateral acts is important only when the act caused injury off the street, or, when the city had no such notice of the danger created or to be created on the street as to place upon it the burden of taking reasonable care to prevent harm to others. But in this last case, the city would not be liable anyway—notice is essential even in the case of absolute liability. In other words, the doctrine of collateral acts has no special significance in the independent street contractor cases, except that it is inapplicable when the injury occurs on the street.

\[\text{Dean Thayer, in speaking of “collateral” acts of the independent contractor, said:} \]

“So far as that most conveniently question-begging adjective points to a definite conception, it seems to indicate a distinction according to the definiteness of the danger inherent and visible in the nature of the undertaking.” Thayer, \textit{op. cit. supra} note 65, at 810.

\[\text{131} \] 69 Mass. 349 (1855).
since the act was wholly collateral. Nor is the city liable for trespass by its independent contractor,\(^{132}\) nor for the sinking of land in front of the plaintiff's house, because of the negligent way in which the sewer contractor did his work.\(^{133}\)

In such cases there is no question of absolute liability because of failure to keep the street safe. The only question is whether the doctrine of *respondeat superior* applies—that is, when we come to situations in which the contractor's acts are not within the field of the employer's absolute liability, we simply come back to the general rule which asserts that the employer is not liable for the acts of the independent contractor, although liability may be imposed in special cases. This is in accord with what the cases have intimated often, and with Dean Thayer's remarks, given above.\(^{134}\) If the employer-independent contractor relationship exists, the doctrine of *respondeat superior* is out of the picture. When liability is imposed, it is for another reason—because there is liability wholly apart from the employer independent contractor relationship. So, when we say that a certain act is collateral, we simply say that the general rule is applicable, or that the employer has no absolute liability.\(^{135}\)


\(^{133}\) Uppington v. City of New York, 165 N. Y. 222, 59 N. E. 91 (1901).

\(^{134}\) See note 67, supra.

\(^{135}\) McGrath v. St. Louis, 215 Mo. 191 (1908) (city not liable for contractor's trespass); Reed v. Allegheny City, 79 Pa. 300 (1875) (a contractor, grading a street, threw dirt on an abutting lot; held, the city not liable). *Accord:* Bloomington v. Wilson, 14 Ind. App. 476, 43 N. E. 37 (1895). Compare the last two cases with Broadwell v. Kansas City, 75 Mo. 213 (1881), where a retaining wall was necessary to prevent the raised street from encroaching on abutting property; the city was held liable by applying the *respondeat superior* doctrine. The result seems right, but *quaere,* whether the doctrine is applicable? The city should be held, of course, for its own failure to see that the necessary precautions were taken. *Cf.* Chattahoochee, etc., R. Co. v. Behrman, 136 Ala. 508, 35 So. 132 (1902), where it is said that the employer is liable for such trespasses only where the contract itself called for the particular act causing the injury. The city is not liable for trespass by a licensee, operating a stone crusher in the street, when he enters upon private property without the consent of the owner. Somerville Fruit Farms v. John Petrossi Co., 124 Misc. 826, 209 N. Y. S. 367 (1925).

In Thillman v. Baltimore City, 111 Md. 131 (1909), because of improper paving by an independent contractor, water flowed into the defendant's cellar. The court said: "It was the duty of the city to have this work so done that it would not cause unnecessary injury to the public, or to owners of adjoining
Even when the injury from the negligent acts of the contractor occurs on the street, if the person injured is not using the street as a highway, the doctrine which imposes absolute liability on the city for its failure to keep the streets safe is not applicable. Thus it seems that the fact that the act can be styled collateral is immaterial—there would be no liability anyway. In *Salmon v. Kansas City*, the city was held not liable for injury to the contractor's employee, caused by an explosion of dynamite. But in *Gerber v. Kansas City*, where a little boy was hurt when he picked up an unexploded dynamite cap, the city was held liable on the ground that the street was unsafe, and that it was chargeable with notice of the various facts.

Not much can be offered in support of the doctrine of collateral acts as a useful concept. It is simply another of those inexact technical terms to be used at critical moments, when all general principles seem too elusive. By stating an exception to an exception we finally reach again the general rule that the employer is not liable for the negligent acts of the independent contractor. We decide that it is time to apply the second exception, when it is impossible, or incon-
venient to apply the first, i.e., that is, when an independent street contractor allows dirt to be banked into an abutter's yard, the exception (to the general rule of non-liability) which imposes absolute liability on the city for failure to keep its streets safe for traveling, is not applicable. As an exception to the rule of absolute liability we apply the doctrine of non-liability for collateral acts, when simplicity and logic should send us back to general principles. In *Bailey v. Winston*, the court said:

"The duty of the city to erect barriers and establish signals in case of dangerous defects in the streets is not discharged by engaging a contractor to perform it. But where the negligence relates to a matter with reference to which the corporation is under no specific obligation the liability rests on the contractor alone."

III. CONCLUSIONS: THE MODERN LAW

In those jurisdictions where the municipal corporation is held liable for the defective condition of the streets, including the great majority of American states, the early development of this liability shows a great deal of indecision, due to lack of a clear pronouncement on municipal liability in general, as well as to uncertainty as to the exact limitations of the independent contractor doctrine. Instead of rec-

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139 In Cary v. Chicago, 60 Ill. App. 341 (1895), a paving contractor, using a steam roller, blew off steam, which ran away and caused an injury; held, the city was not liable. Accord: Quenrud v. Moore-Seig Const. Co., 191 Iowa 580, 181 N. W. 16 (1921) (on the ground that the city had no notice of the use of the traction engine, or perhaps no notice of the fact that as used it was a nuisance). The Cary case seems very doubtful, if the city had any notice of the use of the roller, since blowing off steam is apt to be more or less automatic action, which the driver cannot prevent if he wishes, if the pressure reaches a certain point.

140 157 N. C. 252, 72 S. E. 966 (1911).

141 Barry v. St. Louis, 17 Mo. 121 (1852); Blake v. St. Louis, 40 Mo. 569 (1867); Smith v. City of St. Joseph, 45 Mo. 449 (1870); Bowie v. Kansas City, 51 Mo. 454 (1873); Bassett v. City of St. Joseph, 53 Mo. 290 (1873); Welsh v. St. Louis, 73 Mo. 71 (1880); Russell v. Town of Columbia, 74 Mo. 480 (1881); Painter v. Mayor of Pittsburg, 46 Pa. 213 (1863); Wray v. Evans, 80 Pa. 102 (1875); Mahoney Township v. Scholley, 84 Pa. 136 (1877); Burger v. Philadelphia, 196 Pa. 41 (1900); Norbeck v. Philadelphia, 224 Pa. 30, 73 Atl. 179 (1909); Blake v. Ferris, 5 N. Y. 48 (1851); Storrs v. Utica, supra note 85; Hickock v. Village of Plattsburg, 16 N. Y. 161 (1856); Creed v. Hartman, 29 N. Y. 591 (1864).
ognizing clearly that, on the one hand, the city was absolutely liable, subject to certain reasonable requirements of notice, for all defective conditions of the streets which caused injury to persons using them as streets, and on the other hand, that the independent contractor doctrine and its exceptions, as well as the doctrine of *respondeat superior*, were inapplicable in such cases of absolute liability, the courts discussed these various concepts side by side, and permitted them to become almost inextricably intertwined.

The result has been some confusion in terminology and reasoning, with unnecessary use of such expressions as *respondeat superior*, "inherently dangerous," "collateral acts" and the like. Even in Pennsylvania, as will appear from an examination of the cases cited in the previous note, the liability of the city for the defects in its streets has been firmly established, with some exceptions.

The subject of this paper, however, was the liability of the municipal corporation for the negligent acts of the independent street contractor. Does such liability exist? The answer is that it does not, in theory. The city's liability is based on different principles than those involved in the doctrine of *respondeat superior*. It is liable for its failure to keep the streets safe, subject to the conditions of notice. In many cases a distinction must be made between those using the streets as such, and those who are there for other purposes. In all cases a distinction should be made between injuries occurring on the street and those occurring elsewhere. Though this appears rather obvious, it is a distinction which the courts have frequently failed to make.

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