

*Could you explain the doctrine of sovereign immunity and how it might apply to shield Vermont municipalities from legal liability?*

Sovereign immunity is a common law doctrine adopted by the Vermont Supreme Court in the mid-1800s. Generally, the doctrine operates to protect a municipality from tort liability. The individual liability of municipal employees and elected officials is governed by statute and is subject to a different, qualified immunity analysis. Qualified immunity is discussed later, in our second question.

Since adopting the sovereign immunity doctrine, the Vermont Supreme Court has attempted to limit its application by applying a governmental function/proprietary function distinction. The rationale for the distinction is that municipalities perform governmental responsibilities for the general public as instrumentalities of the state; they conduct proprietary activities only for the benefit of the municipality and its residents. A municipality is given no immunity for its proprietary activities. See *Hillerby v. Town of Colchester*, 167 Vt. 270 (1997).

While the conceptual difference between governmental and proprietary functions is fairly clear, the practical difference is not. In fact, the courts in most states have found the distinction almost unworkable and have rejected the doctrine of sovereign immunity entirely. The difficulty of the governmental/proprietary distinction, and the general disfavor in which sovereign immunity is held, was described by the Vermont Supreme Court in 1993:

*The governmental-proprietary distinction was the first attempt by many courts, including this one, to alleviate the harsh results of [sovereign] immunity, which had long been under attack. Most courts eventually abolished municipal immunity. Vermont is one of a minority of states that retains the governmental-proprietary distinction, which has been criticized by courts and commentators for many years as unworkable.*

*This Court, too, has at times expressed dissatisfaction with the governmental/proprietary distinction. The arbitrariness of the doctrine is exemplified by our prior cases involving the repair of roads and sewers. Although most jurisdictions retaining the distinction have classified the repair of both roads and sewers as proprietary in nature, this Court has held that the maintenance of streets and sidewalks is governmental, while the maintenance of sewers is proprietary. Thus, as the law now stands, a person who drives a car into an excavation on a town street may sue the town if the hole is the result of repair to a sewer or water line, but not if the hole is the result of repair to the street. Hudson v. Town of East Montpelier, 161 Vt. 168 (1993).*

As the Court pointed out in *Hudson*, the sovereign immunity doctrine is riddled with almost indiscernible subtleties, such as the distinction between damage resulting from excavation undertaken to repair sewer lines versus repair to the streets. See *Kelly v. Town of Brattleboro*, 161 Vt. 566 (1993). Another example is the distinction between damage resulting from the failure to repair a culvert over a natural stream as opposed to damage resulting from the failure to repair a culvert that is part of a “surface water drainage system” installed to protect the town’s road system. See *Graham v. Town of Duxbury*, 173 Vt. 498 (2001). Ice is another example. If the ice upon which a person falls was produced by water escaping from a fire hydrant connected to the village water system while a thawing operation was being carried out by the village firemen, there may be no liability. See *Welch v. City of Rutland*, 56 Vt. 228 (1883). On the other hand, if

the ice was due to a leak in the village water main, there may be liability. See *Wagner v. Village of Waterbury*, 109 Vt. 368 (1936).

In some cases, application of the sovereign immunity defense may turn on whether a particular object is being used in a governmental or proprietary capacity, at a particular point in time. See *Dugan v. City of Burlington*, 135 Vt. 303 (1977)(addressing a catch basin).

In a dissent to a 1997 opinion, Supreme Court Justice Dooley stated that “the governmental/ proprietary distinction is neither appropriate nor workable and should be abandoned.” *Hillerby v. Town of Colchester*, 167 Vt. 270(1997). Nonetheless, sovereign immunity is still a valid legal doctrine. For example, a girl was struck and killed by a motorist in Rutland while she was crossing the street. Her mother brought suit against the City seeking damages for her death. The mother alleged that the City was negligent in failing to maintain adequate crosswalks and in failing to provide adequate street lighting. The City moved to dismiss, asserting that because maintaining and designing streets, street lighting, and crosswalks are governmental functions, the City was immune under the sovereign immunity doctrine. The Vermont Supreme Court upheld application of the doctrine and the trial court’s dismissal of the suit. See *O’Connor v. City of Rutland*, 172 Vt. 570 (2001).

The Supreme Court’s reluctance to abandon the doctrine comes, in part, from its deference to the Legislature, which has implicitly acknowledged the sovereign immunity doctrine and the governmental/proprietary distinction, and has modified the doctrine through statute, specifically 29 V.S.A. § 1403. This statute provides that when a municipality purchases a policy of liability insurance, it waives its sovereign immunity from liability. (Being a VLCT PACIF member does not waive sovereign immunity. See *McMurphy v. State*, 171 Vt. 9 (2000)). That being said, the Court has signaled that its reluctance to meddle in sovereign immunity is not limitless. Given an extended period of non-action by the Legislature (though there was an indirect reference to municipal sovereign immunity in a bill passed in 2003) and the right facts, the Court may abandon the doctrine altogether.

Because the governmental/proprietary distinction is essentially a question of fact, prospectively laying out a bright line rule for its application is very difficult. Each application necessarily turns on the facts of the particular case and 150 years of oft-confusing case law. For this reason, the VLCT Municipal Assistance Center advises a relatively conservative approach to the sovereign immunity doctrine and its application. Sovereign immunity is a powerful doctrine, but one whose nuances may result in a false sense of security for municipal officials. The doctrine of sovereign immunity is there and available for municipalities as a defense, but because of the fuzzy governmental/proprietary distinction, its application to a particular set of facts is rarely clear. Moreover, the doctrine is generally held in disfavor by the courts and a particularly egregious case may give the Supreme Court opportunity to abandon the doctrine altogether.

The bottom line is that when considering any action that may result in tort liability, the doctrine of sovereign immunity should never be relied upon as the town’s “first line of defense.”

- *Jim Barlow, Attorney, VLCT Municipal Assistance Center*

*VLCT News*, February 2006