WHAT IS SOVEREIGN IMMUNITY?
Sovereign immunity is a common law or judge-made doctrine that protects governments from liability (legal responsibility) from torts or civil wrongs (e.g., negligence, trespass, nuisance, etc.)\(^1\) for which a remedy would otherwise be available. The doctrine derives from Vermont’s status as a sovereign state and is steeped in the Roman law maxim that “the king can do no wrong.” The justification for sovereign immunity, according to famed U.S. Supreme Court Jurist Oliver Wendell Holmes Jr., is based “on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”\(^2\) Even though municipalities are not sovereign entities, sovereign immunity extends to them due to their status as political subdivisions of the state. For that reason, sovereign immunity regarding a municipality is often referred to as “governmental” or “municipal” immunity.

WHERE DOES IT COME FROM?
Former Vermont Supreme Court Justice John Dooley once remarked that “[o]ne of the mysteries of the American legal system is how or why it ever embraced the doctrine of sovereign immunity.”\(^3\) Less mysterious are its origins. Sovereign immunity originated in England in 1788 in the case of Russell v. Inhabitants of Devon, 100 Eng. Rep. 359 (1788, K.B.). In that case, a British plaintiff sued his own town to recover damages done to his wagon by a bridge that was in need of repairs. The court held that the town was not liable, in part because it was “better that an individual should sustain an injury than that the public should suffer an inconvenience.”\(^4\) This rationale supporting municipal immunity was first adopted in the United States in Massachusetts in 1812\(^5\) and first appeared in Vermont in 1849.\(^6\)

HOW DOES IT WORK?
Sovereign immunity has two components: immunity from suit and immunity from liability. Immunity from suit protects the state from being sued in its own courts without its consent (i.e., a waiver of immunity). Immunity from liability protects the state from judgments. The doctrine of sovereign immunity does not prevent someone from suing a municipality for its tortious (or wrongful) behavior, nor is it an affirmative defense that a municipality must assert in response to a civil lawsuit. Rather, the party seeking to impose liability upon a municipality is required to assert facts sufficient to show that the act in question is not covered by the immunity. Typically, this requires establishing that the municipality was performing some corporate function as opposed to acting in its governmental capacity because municipalities are liable for the former but not the latter. “Vermont is one of a minority of states that retains the governmental-proprietary distinction...”\(^7\)

GOVERNMENTAL ACTS VS. PROPRIETARY ACTS
An oft-cited justification in support of sovereign immunity is that municipalities are not profit makers and exposing them to liability could deprive them of tax revenue which would otherwise serve the

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1 A municipality cannot claim the protections of sovereign immunity when the alleged injury is the taking of private property for public use without just compensation (i.e., eminent domain).
3 Dooley, Modern Tort Law, § 20.01.
5 Mower v. Leicester, 9 Mass. 247 (1812).
public. Arguments against sovereign immunity are that it deprives injured parties of potential remedies\(^8\) and offends the basic legal principle of holding people responsible for their actions.

Historically, Vermont courts have sought to balance these competing viewpoints as a means of mitigating the harshness of sovereign immunity’s application by differentiating between a municipality’s governmental and proprietary functions: “[t]he rationale for this [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.”\(^9\) Since sovereign immunity protects state sovereignty, it also protects municipalities when acting on the state’s behalf: “[a] town is not liable for the results of negligence in carrying out a governmental function.”\(^10\) In this regard, municipalities as instrumentalities of the state are “purely part of the governmental machinery of the sovereignty which creates it”\(^11\) and their immunity derives from the state. Examples of activities Vermont courts have decided are governmental include building and maintaining streets, sidewalks and accompanying drainage systems, constructing public playgrounds, and thawing out fire hydrants.

In contrast to their governmental activities, municipalities are afforded no protection for their proprietary ones, that is, those acts they carry out solely for local purposes or for the convenience of their own citizens. The former is a duty, the latter a privilege. The test that Vermont courts have used to distinguish between the two is whether an activity is “so necessary and so vital to the inhabitants that the municipality ought to be immune from liability for the methods it uses in performing such functions.”\(^12\) While a municipal activity may be desirable, it must “partake of the critical essence of the basic concerns of government”\(^13\) in order to be protected from liability. Failing to repair passages constructed for natural streams, operating mechanical rope ski tows, constructing municipal housing projects, building and maintaining water service pipes and sewers, owning municipal buildings not put to a public use, and operating and maintaining public swimming areas are examples of activities Vermont courts have deemed proprietary.

Discerning between what functions are “governmental” and which are “proprietary” can be perplexing. As the Vermont Supreme Court has itself pointed out, this distinction oftentimes appears arbitrary. “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.”\(^14\) Despite calls to abandon this distinction, even amongst its own, the Vermont Supreme Court has been loath to do so, adjudging it a task better suited for the legislature. Keep in mind that the mere fact that an activity is proprietary in nature does not mean that it is prohibited, nor does it necessarily mean that liability will even attach; its status as proprietary means only that sovereign immunity will not apply. Liability for a negligent proprietary act would still require some showing of harm caused by the breach of a duty owed in order for damages to be recovered.

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\(^8\) “There can be no doubt that its effect is to sacrifice the injured citizen to the benefit of the public treasury.” *The Roman Catholic Diocese of Vermont, Inc. v. City of Winooski Housing Authority*, 137 Vt. 517, 519 (1979).


\(^10\) *Sargent v. Town of Cornwall*, 130 Vt. 323, 327 (1972).


\(^12\) *Roman Catholic Diocese v. City of Winooski Hous. Auth.*, 137 Vt. 517, 519 (1979).

\(^13\) Id. at 520.

THE DISCRETIONARY-FUNCTION IMMUNITY

The application of immunity may also hinge on whether the activity involves the exercise of discretionary decision making. Whereas the governmental/proprietary distinction is grounded in the common-law principle of sovereign immunity, discretionary-decision immunity is founded on concerns of constitutional separation of powers. The purpose of the discretionary-function immunity is to “assure that courts do not invade the province of coordinate branches of government through judicial second guessing of legislative or administrative policy judgments.” This immunity is based on the theory that certain governmental functions — specifically those that involve policy making — should not be subject to judicial review. This protection does not extend to routine ministerial tasks that merely carry out previously made policy decisions.

Courts typically apply a two-part test to determine whether the discretionary-function immunity applies: (1) “whether the acts involved were discretionary in nature, involving an element of judgment or choice”; and, if so, (2) “whether that judgment involved considerations of public policy which the discretionary function exception was designed to protect.” In short, for this immunity to apply, the decisions must be policy based. Some examples of acts found by Vermont courts to be covered by the discretionary-function immunity include adopting a drainage plan and the placement of guardrails.

THE EFFECT OF GROUP INSURANCE

Municipal immunity is not unlimited. Lawsuits against the state — and, by extension, its municipalities — are barred unless the state consents by waiving its sovereign immunity (i.e., the Vermont Legislature passes a law permitting it to be sued). One such law provides that a municipality waives its sovereign immunity and consents to be sued to the extent of its coverage whenever it purchases liability insurance. This law, however, does not apply to participation in a group insurance plan: “[p]articipation by a municipality in an agreement or association established hereunder shall not create joint and several liability as a result of any act or omission of any other municipality or association, nor shall such participation constitute a waiver of sovereign immunity under 29 V.S.A. § 1403.” Waiver, the Vermont Supreme Court summarized, only occurs when a municipality purchases liability insurance on its own, and “[s]uch waiver does not occur when insurance or reinsurance is acquired through participation in an intermunicipal insurance agreement such as VLCT PACIF.”

CONCLUSION

Sovereign immunity, when it applies, is a powerful legal doctrine which protects municipalities from tort liability. The problem is knowing when it applies to municipal actions. The discretionary-function immunity is relatively easy to discern both conceptually and in practice. It protects municipalities for their discretionary as opposed to their ministerial functions. For instance, planning and designing a water/sewer system is protected from liability but constructing and maintaining one is not. In contrast, as the Vermont Supreme Court has recognized, the governmental/proprietary distinction “is not clearly defined[,]” is characterized by almost indiscernible nuances, and has no good rule for telling them apart. The application of the distinction has been called by courts “unsound and unworkable” as it

16 Lorman v. City of Rutland, 2018 VT 64, ¶ 14.
17 Id.
18 Estate of Gage v. State, 2005 VT 78.
19 29 V.S.A. § 1403.
20 24 V.S.A. § 4946.
“sometimes leads to divergent consequences in cases factually similar.”\textsuperscript{24} It is precisely because this doctrine has seemed to be inconsistent and arbitrary that municipalities should not risk their exposure to liability by depending on it, unless through consultation with a municipal attorney. Consider, too, that whether a function is governmental or proprietary, a duty or a privilege rarely relieves a municipality from the necessity or expectation of performing it. Rather, municipalities should focus on what they can control, which is avoiding negligence and exercising reasonable care in all activities with the goal of preventing harm from occurring in the first place. If there is no harm, there can be no damages.

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\textsuperscript{24} \textit{Marshall v. Town of Brattleboro}, 121 Vt. 417, 424 (1960).