The same finding of a proprietary function occurred in *K & S Realty Co. v. City of New York*, where a city crew had inspected the main for leaks months before a 48-inch water main broke and flooded nearby properties. The inspection for leaks “was prompted principally by the desire to avoid waste of a commodity, i.e. water.” The court found the plaintiff’s claim was actionable, even in the absence of a special duty running from the City to the plaintiffs, since the decision made by the City to inspect for leaks “was conducted by the City acting proprietarily as a water vendor rather than in its governmental capacity as a protector of the public health and safety.”

On the other hand, the protection and safety of the general public pursuant to the general police powers is a governmental rather than a proprietary function. When a municipality acts in a governmental capacity, it will only be held liable for injuries resulting from its negligent performance when a “special relationship” exists between it and the injured party.

A municipality’s construction, installation, and extension of a water system have been found to be governmental actions because these functions are necessary for the preservation of public health and safety. Therefore, where it is alleged that negligence occurred during the construction, installation, or extension of a water system, liability can only attach if the plaintiff can establish a special relationship with the municipality.

Continuing to utilize the governmental/proprietary distinction in claims involving a municipal water supply system has come under criticism. While supplying water may have historically been undertaken by private agencies,

[i]n this day and age, municipal water corporations have flourished to the relative exclusion of private utilities. Moreover, in our modern, complex urban civilization, it is readily apparent that the supplying of water by a municipality is as immediately and directly related to the health, safety and welfare of its inhabitants as is the construction of sewers which are all but universally regarded as governmental.

Despite this criticism, New York courts have yet to abolish this distinction in actions involving a munici-
pal water supply system, although the governmental/proprietary distinction has been abolished in other areas of the law, such as zoning.\textsuperscript{15}

\section*{Reasonable Care}

Although the distinction between governmental and proprietary functions has been questioned, there is no question that courts in New York have long recognized that a municipality is not an insurer of its water system. A municipality, therefore, cannot be held liable for injury unless it is shown that the injury was caused by negligent construction or subsequent maintenance.\textsuperscript{16} All that is required of a municipality in the construction or maintenance of its water system is reasonable care.\textsuperscript{17}

Reasonable care was exercised in Biancaniello \textit{v. Town of Colonie}. The plaintiff alleged that the town, despite notice of a leak, had negligently permitted a leak in a water main to continue for three months, causing water to accumulate in the cellar of the plaintiff’s house.\textsuperscript{18} In response to first being told of a leak, the town’s employees inspected a hydrant and the surface of the ground adjacent to the premises above the pipe leading into the house, which was the usual and customary method of examination. If a leak existed, it would ordinarily appear on the surface of the ground, but no evidence of a leak was visible. When the employees made another inspection a few weeks later, they excavated around the hydrant down to the bottom of the line. Again, no leak was detected. The court found that the town employees responded whenever notice was given and employed the usual tests to discover a leak, and “[t]hey were not required to do more in the exercise of reasonable care.”\textsuperscript{19} To hold otherwise and “require them to excavate to a point where the leak was finally discovered when the application of customary tests failed to show any evidence of a leak” would have impermissibly made the town an insurer of its water system.\textsuperscript{20}

In the exercise of reasonable care, a municipality is not expected or required to regularly unearth its entire system to detect a leak or inspect its system because imposing such a duty upon a municipality “is obviously impractical and would undoubtedly create new hazards.”\textsuperscript{21} There is, however, an obligation to exercise reasonable care when there is some warning of a possible defect. Often, upon being notified of a leak, a municipality’s liability for damage caused by its water supply system is predicated on its response to the notice. Failure to act promptly and efficiently can result in liability for damages caused by a municipality’s inaction, which is what occurred in Rochester Gas and Electric Corp. \textit{v. City of Rochester}.\textsuperscript{22} When the utility’s contractor noticed significant water seepage from three places along the city’s water main, which was exposed by the utility while placing its electrical conduits in the ground, it reported the leaks to the city. Despite this actual knowledge, the city took no action, made no inspection, and undertook no program of watchfulness or monitoring. Its failure to act promptly and efficiently after being notified of the leak resulted in liability for damages to the plaintiff’s water conduits.\textsuperscript{23}

By contrast, in Malfatti \textit{v. 13 Gramercy Park S. Corp.}, upon being notified of a leak, the city employees promptly responded and immediately commenced work to stop the leak.\textsuperscript{24} Since the plaintiffs could not demonstrate how the actions of the city employees were deficient or that the leak could have been stopped sooner, there was no basis for liability against the city.

In another case, although there was no indication of actual notice to the city, there was some evidence that for several weeks prior to the breaking of the water main there were depressions in the pavement of the street that became filled with water.\textsuperscript{25} There were also other indications that there was a leak in the water main at that point. Although the city may not have been formally notified of a possible leak, the court found that there was a question of fact as to the existence of wetness and depressions in the street prior to the break. If these conditions did indeed exist, they may have been sufficient to put the city on inquiry as to their cause, and accordingly, a jury might find the city was negligent in failing to make an investigation.\textsuperscript{26}

\section*{Res Ipsa Loquitur and Third Parties}

The doctrine of \textit{res ipsa loquitur} is commonly applicable in cases where a water main breaks and causes damages, as it can be difficult to ascertain what caused a pipe buried deep in the earth to break.\textsuperscript{27}

The theory is that water mains do not ordinarily break if they are properly installed and maintained, and that any break in the main was probably caused by the owner’s neglect of its duty, since the owner is generally in exclusive possession and control. In such a case it is unnecessary to prove the exact cause of the injury in order to hold the owner liable since the circumstances show that the owner is responsible for all reasonably probable causes to which the event can be attributed.\textsuperscript{28}

In New York, to establish a permissible inference of negligence based on this doctrine, a plaintiff must establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.\textsuperscript{29} “[P]roof that third parties have had access
to the instrumentality generally destroys the premise [of res ipsa loquitur], and the owner’s negligence cannot be inferred unless there is sufficient evidence that the third parties probably did nothing to cause the injury.\textsuperscript{33}

Often a water main rupture is caused by activity of a third party that was permitted by a municipality to excavate a public street or sidewalk, and therefore, the doctrine of res ipsa loquitur may not be applicable because the area where the leak occurred was not in the exclusive control of the municipality. The presence of a third party has led to allegations that a municipality was liable to a plaintiff for failing to inspect the third party’s work. Generally, courts have rejected these allegations. For example, in \textit{DeWitt Properties, Inc. v. City of New York}, a landowner sued the city and a gas company to recover for damage to its premises as the result of a burst water main under a street.\textsuperscript{31} The plaintiff alleged that the utility’s negligent installation of a gas pipe on top of the city’s water main caused it to burst. The plaintiff also alleged that the city was negligent in inspecting the work to ascertain whether the utility’s work may have damaged the water main and flooded the adjoining properties. However, the duty to inspect the activity of a third party, such as a utility, has only been imposed on a municipality when it permitted dangerous or imminent dangerous activities in its thoroughfares and it can hardly be said that the actual installation of the [gas] pipes, by trained utility employees, ordinarily poses an obvious risk to existing water mains. Thus there is generally no reason to expect the city to inspect the utility’s installation, and no duty to do so.\textsuperscript{32}

Thus, the mere grant of authorization to a third party to perform work near a water main does not create a duty in a municipality to inspect the party’s work.\textsuperscript{33} If, however, the application for a permit “indicates that conditions at the work site or the methods to be employed might pose a special risk to the [municipality’s] water system,” the municipality may have a duty to inspect the third party’s work because it is actually aware of and has notice of the potential risk.\textsuperscript{34} If a utility’s plans or application for a permit did not note the presence of a water main at the site, a municipality has been held not to be actually aware of the danger created by the utility.\textsuperscript{35}

\textbf{Conclusion}

The applicability of the governmental/proprietary test to water leak claims is archaic, as today it is generally municipalities, rather than private utility companies, that provide water. Although it is “a concededly artificial and illogical distinction,” it is nevertheless utilized by many courts in claims brought against a municipality for injuries caused by a water leak.\textsuperscript{36} Whether the governmental/proprietary test is abolished in this area of law remains to be seen.

It also remains to be seen whether the standard of reasonable care evolves as newer methods of construction and maintenance are developed. Although tearing up streets to inspect pipes and performing extensive excavation to detect a leak is without question impractical, as less intrusive and destructive methods of inspection and detection are developed, a municipality may need to employ those methods to avoid liability especially if those methods become customary in the industry.

\textbf{Endnotes}

\begin{enumerate}
\item \textsuperscript{1} \textit{K & S Realty Co. v. City of New York}, 304 A.D.2d 349, 350 (1st Dept. 2003) (citations omitted).
\item \textit{D & D Delhi, Inc. v. Village of Delhi}, 47 A.D.3d 1117, 1118; \textit{Rochester Gas and Electric Corp. v. City of Rochester}, 118 Misc.2d 420 (City Ct., City of Rochester 1983) (“Water supply systems are not governmental functions, and when municipalities operate such systems, they are not privileged under the limited immunities from tort liability granted to them in the exercise of their police power.”).
\item \textit{Id.} at 350. Although it was equipped with ground microphones capable of detecting leaks, the crew did not use them, which was a discretionary and not a ministerial decision.
\item \textit{Id.}
\item \textit{Id.} at *11.
\item \textit{Id.} at *12; \textit{Jamaica Water Supply Co. v. City of New York}, 180 A.D. 834 (2nd Dept. 1952), aff’d, 304 N.Y. 917 (1953); reargument denied, remittitur amended by 305 N.Y. 560 (1953), cert denied, 346 U.S. 821 (1953).
\item \textit{Carter}, 2004 WL 3078698 at *13.
\item \textit{Id.}, citing, \textit{Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test}, 22 Va. L. Rev., pp. 914-916; \textit{County of Nassau v. South Farmingdale Water Dist.}, 62 A.D.2d 380, 395 (2nd Dept. 1978), aff’d, 46 N.Y.2d 794 (1978)(recognizing “that the question of whether the water district is performing a governmental or proprietary function is not free from doubt”).
\item \textit{See Matter of County of Monroe}, 72 N.Y.2d 338 (1988) (abolishing the governmental/proprietary test in zoning cases).
\item \textit{DeWitt Properties, Inc.}, 44 N.Y.2d at 423; \textit{Biancaniello v. Town of Colonie}, 261 A.D. 161 (3rd Dept. 1941).
\end{enumerate}

18. Biancanello v. Town of Colonie, 261 A.D. 161 (3rd Dept. 1941); see also Olympia v. Town of Poughkeepsie, 23 A.D.3d 445 (2nd Dept. 2005) (finding “[t]he Town established its prima facie entitlement to judgment as a matter of law as to the negligence cause of action by demonstrating that it had inspected the plaintiffs’ flooded property on several occasions, using two separate tests to search for a municipal water leak, and found none”).


20. Id.

21. Gillette Shoe Co., Inc. v. City of New York, 86 A.D.2d 522, 524 (1st Dept. 1982), motion to dismissed appeal denied, 56 N.Y.2d 711 (1982), order aff’d, 58 N.Y.2d 853 (1983) (where the plaintiff’s expert contended that the water main break was caused by an attack of anaerobic bacteria upon the pipe material).

22. Rochester Gas and Electric Corp. v. City of Rochester, 118 Misc.2d 420 (City Ct., City of Rochester 1983).

23. The damage to the plaintiff’s conduits occurred in April when a road collapsed due to a water main break. The city knew that the road had previously collapsed in March because of a water main break. The city argued that the damages caused by the April break were too distant from the March break (the April break was 300 feet farther north from the March break) to consider the March break as notice of where the April break would occur. The court stated that “[w]hile distance is a factor in evaluating the scope of the notice, and while it is true the plaintiff’s letter did not pinpoint the spot of the April break, 300 feet is sufficiently close, as a matter of law, to hold the city on notice to the risk of collapse of Culver Road at the site of the April break.” Id. at 423.


26. Id. at 470. Whether prior written notice statutes, which are in derogation of the common law and strictly construed by the courts, are applicable to water breaks depends on the language in the statute, but generally, they have been found to be inapplicable. See McKinnis v. City of Schenectady, 234 A.D.2d 760 (3rd Dept. 1996) (since the city code made no reference to latent defects or conditions and referred to actual physical defects in the surface of a street or highway the court determined that the notice statute was inapplicable because the leaking water pipe was subsurface and not visible); Windsor Court Associates, LP v. Village of New Paltz, 27 A.D.3d 814 (3rd Dept. 2006) (finding prior written notice laws did not apply to subsurface structures such as water mains).


28. Id. (citations omitted).


30. DeWitt Properties, Inc., 44 N.Y.2d at 425 (citations omitted); Foltis, Inc. v. City of New York, 287 N.Y. 108, 115 (1941) (“Res ipsa loquitur “has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may—but is not required to—draw the permissible inference.” It is a rule of evidence which does not provide a presumption of negligence but rather provides merely a permissive inference of negligence. However, where this doctrine is applied in water break cases, although a plaintiff is relieved from the burden of producing direct evidence of negligence, “it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault.”).


32. Id. at 424.


34. DeWitt Properties, Inc., 44 N.Y.2d at 425.

35. Gillette Shoe Co., Inc., 86 A.D.2d at 524.


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