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> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[1]

UNFORTUNATELY, THE ABOVE QUOTATION illustrates the situation which presently exists in the majority of jurisdictions, regarding municipal immunity from liability for torts committed by police officers. This note will attempt to summarize and analyze this area of the law.

In general, a police officer is personally liable for the torts he commits during the performance of his duty.[2] The victim of the tort may sue the officer civilly for punitive as well as consequential damages,[3] if the jurisdiction permits such suits and exemplary awards.[4] Justification for punitive damages is rooted in the deterrent effect they exert upon the future conduct of the convicted and upon the behavior of all individuals similarly inclined.[5] Such awards are not a matter of right as are compensatory damages, but are incidental to the cause of action.[6] In addition to the civil action maintained by the victim, the state may press criminal charges against the officer if it is felt that the violation warrants such a measure.[7]

Any discussion of police tort liability hinges upon a desired balance between the necessity of law enforcement and the preservation of individual rights and liberties. This balance is reflected by the limits imposed upon an officer apprehending a suspect.[8] Thus, where an officer does exceed these limits while in the performance of his duty and injures the suspect or an innocent third-party, the victim may sue him

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1 Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

2 Downs v. Swann, 111 Md. 53, 73 A. 653 (1909). See also City of Miami v. Albro, 120 So.2d 23 (Fla. 1960).

3 Fisher v. City of Miami, 172 So.2d 455 (Fla. 1965).

4 See generally McCormick, Damages 278 (1935).

5 Fisher v. City of Miami, *supra* n. 3 at 457.

6 Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954). See also Fisher v. City of Miami, *ibid.*

7 Bonahoon v. State of Indiana, 203 Ind. 51, 178 N.E. 570 (1931). See also White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951); Noback v. Town of Montclair, 33 N.J. Super. 420, 110 A.2d 339 (1954).

8 Human v. Goodman, 159 Tenn. 241, 18 S.W.2d 381 (1929). See also Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A.2d 235 (1946); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

for damages.[9] Whether the cause of action is a viable one depends to a large degree upon whether the act of the police officer was unlawful. In *Young v. Kelley,*[10] the officer was found to be liable to a bystander since he was not justified in shooting at his suspect who was only a misdemeanant. Negligence is also a factor in considering viability. In *Davis v. Hellwig,*[11] although justified in shooting at the suspect, the officer was found liable to a bystander due to the circumstances in which the shooting occurred. The rules governing an assault and battery case in respect to police officers are the same as those for private citizens,[12] which vary slightly according to the jurisdiction.

Since the courts are in agreement that the police have no right to assault a person needlessly and that the police are liable in the same manner as an ordinary individual would be, one should give some consideration to the remedies available to the tort victim. Despite the fact that the victim is legally entitled to collect a judgment from the officer, it is rare indeed when the officer is in a financial position to pay that judgment. This situation leaves a victim who has suffered a decided loss and a defendant who has not been subjected to the deterrent force of court action since he cannot pay the judgment—a certainly inequitable and deplorable condition.

There is one other aspect that should be noted before any alternatives are considered. Occasionally the victim is not of such moral character and financial position to press a claim against a police officer.[13] In many cases the victim possesses a criminal record or was attempting to commit a crime at the time the offense against him took place, items which would decidedly influence the amount of a judgment awarded by a jury, if not the judgment itself.[14] However, this aspect does not in any way alter the above condition, but merely serves to confuse the issue in the mind of the public interested in a just solution.

The defects of imposing complete liability for tortious conduct are readily apparent. It not only discourages persons from entering the law enforcement field but also discourages persons in law enforcement from performing their duties vigorously and fearlessly. It unjustly penalizes police officers for performing their jobs—protecting the general

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[9] American Motorista Ins. Co. v. Rush, 88 N.H. 383, 190 A. 432 (1937). See also Noback v. Town of Montclair, *supra* n. 7.

[10] 60 OhioApp. 382, 21 N.E.2d 602 (1938).

[11] 21 N.J. 412, 122 A.2d 497 (1956).

[12] Downs v. Swann, *supra* n. 2 at 64.

[13] Foote, Tort Remedies For Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955).

[14] Such a plaintiff is found in City of Miami v. Bethel, 65 So.2d 34 (Fla. 1953), in which Bethel admittedly was shooting craps in the backyard of a poolroom. Losing all his money, he went into the poolroom. The police arrived and the remaining crap shooters fled. Bethel was accosted and accused of the crime, which he denied. He then was taken outside the poolroom and severely beaten by the police.

public. As for the victim, this system gives him a meaningless remedy since the officer is generally judgment-proof.

The most obvious answer to this situation, and one that has been proposed by many legal scholars,[15] is that the municipality employing the police officer be made liable for any injuries judged to be inflicted unlawfully or negligently by the officer while performing his law enforcement duties. Edgar Fuller and A. James Casner recommend that such municipal liability be limited to actual monetary damages suffered and claim this procedure "would adequately and promptly compensate the tort victim and would not remove incentives to non-tortious conduct among officers. . . Persons victimized by the police officers' torts would receive damages more in proportion to their real losses, and the unpredictable results of emotionalized jury verdicts would be largely eliminated." [16] Whether one agrees wholly with this proposal which would eradicate jury trials from this area of the law, or partially with its theory of shifting the monetary burden for compensation of the tort victim to the municipality, one finds that the majority of jurisdictions in the United States completely reject this theory.

These states adhere strictly to the doctrine of governmental immunity. The basis of this doctrine is traced by the various courts to several authorities: the case of *Russell v. Men of Devon,*[17] which held that an unincorporated county was immune from suits because it had no funds from which to pay judgments and because it would be better for the victim to suffer an injury rather than impose vicarious liability upon the people,[18] the idea that "the King Can Do No Wrong;" [19] or in one instance not to any court-originated doctrine but to the common law.[20] However, there is a divergence from these views in a growing minority of jurisdictions. Nine states have completely or partially disavowed governmental immunity and held municipalities to be liable for the torts of its police officers. A tenth state did abrogate the doctrine only to have its legislature reinstate it.

Florida was the first state to declare such disavowal. In 1957, with *Hargrove v. Town of Cocoa Beach,*[21] the Supreme Court of that state

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[15] See Foote, *supra* n. 11; Fuller and Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963); Lawyer, Birth and Death of Government Immunity, 15 Clev.-Mar. L. Rev. 529 (1966); Marcus and Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo. L. J. 889 (1965); Tooke, The Extension of Municipal Liability in Tort, 19 Va. L. Rev. 97 (1932).

[16] Fuller and Casner, *supra* n. 15 at 462.

[17] 2 Term Rept. 667, 100 Eng. Rep. 359 (1788).

[18] See Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

[19] Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938).

[20] Maffei v. Incorporated Town of Kenmore, 80 Wyo. 33, 338 P.2d 808 (1959).

[21] *Supra* n. 18.

reversed its decisions of *Kennedy v. City of Daytona Beach*,[22] and *City of Miami v. Bethel*.[23] The *Kennedy* case held that the police officer was individually liable for damages and the municipality was not, due to the theory of sovereign immunity. The Court at that time felt bound to adhere to precedents in the area and stated that any change in the law must be enacted by the legislature. The *Bethel* case based its finding of governmental immunity upon the theory that the police officers committed an offense while exercising a governmental function—law enforcement. Such functions are carried out in the interest of the general public and accordingly, for policy reasons, have immunity from liability for the torts of the officers involved. *Hargrove v. Town of Cocoa Beach*[24] reversed these cases, holding "that when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress from the municipality for the wrong done." [25] This case involved an action by a widow against the Town of Cocoa Beach for the alleged negligent death of her husband who was jailed while in a helpless state of intoxication and who died of smoke suffocation after being locked in an unattended jail. The court found the municipality liable under the doctrine of *respondeat superior*. This landmark case imposing liability for negligent torts upon the municipality was extended by subsequent decisions to include liability for intentional torts. This extension was promulgated in *Simpson v. City of Miami*,[26] in which it was held that the *Hargrove* decision placed no limitation upon the nature of the tort and that the municipality was not immune from liability for intentional torts committed by the police while performing their law enforcement duties. *City of Miami Beach v. Nye*,[27] a case involving an assault and battery action, supported the *Simpson* decision. The only qualification in Florida law concerning municipal liability for police torts is found in *Fisher v. City of Miami*,[28] which held that the tort victim could sue the municipality only for compensatory damages, not punitive damages. The reasoning behind this view is that since the municipality did not commit the tort, the deterrent effect of such action is not only useless but also unnecessarily expensive to the taxpayers.

California in 1961 followed the example set by Florida. In *Muskopf v. Corning Hospital District*,[29] the Court abolished governmental im-

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[22] *Supra* n. 19.
[23] *Supra* n. 14.
[24] *Supra* n. 18.
[25] *Id.* at 133.
[26] 155 So.2d 829 (Fla. 1963).
[27] 156 So.2d 205 (1963).
[28] *Supra* n. 2.
[29] 11 Cal. Rptr. 89, 389 P.2d 457 (1961).

munity for torts, stating that it was "an anachronism without rational basis . . . [which] has existed by the force of inertia." [30] Justice Traynor who wrote the decision observed that the rule of governmental immunity has many exceptions which are illogical and unjust. This case illustrated such a situation since the plaintiff had filed an action against the hospital district, a state agency, for negligence in the treatment he had received while a patient. If the hospital had not been connected with the state, liability would have been clear, but since it was a state agency it would have escaped from answering for its torts under previous cases. However, in the same year as the *Muskopf* decision the California legislature passed moratorium legislation which held in abeyance until 1963 the operation of abrogating governmental immunity. In 1963 the legislature reinstated governmental immunity with certain exceptions that do not affect the subject under discussion.[31] Unfortunately, this action is the present law in that state.

It should be pointed out that in California, and the subsequent states that will be discussed in this study, the cases that reverse earlier decisions supporting governmental immunity are not those involving police torts but rather injuries that have befallen school children or hospital patients. These plaintiffs present a more inequitable case to the court and arouse much public sympathy. However, the decisions do abolish governmental immunity involving all employees including the police.

In Illinois the doctrine of governmental immunity was overturned by such a case. In *Molitor v. Kaneland Community Unit District No. 302,*[32] an action was maintained on behalf of a school child who had sustained injuries when the school bus in which he was riding left the road due to the alleged negligence of its driver. The question as to whether a city may he held liable directly for an assault committed by one of its police officers in the scope of his employment was presented in *Peters v. Bellinger,*[33] and disposed of by adhering to the *Molitor* case and finding the city liable.

Colorado abrogated the governmental immunity rule in *Colorado Racing Comm'n v. Brush Racing Ass'n,*[34] saying that the doctrine "may be a proper study for discussion by students of mythology but finds no haven or refuge in this Court." [35] This progressive attitude suffered

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[30] *Id.* at 92.

[31] Cal. Govt. Code § 810.

[32] 18 Ill.2d 11, 163 N.E.2d 89 (1959).

[33] 22 Ill.App.2d 105, 159 N.E.2d 528 (1959), reversed on grounds that cause of action arose before the Molitor case, 19 Ill.2d 367, 166 N.E.2d 581 (1960).

[34] 136 Colo. 279, 316 P.2d 582 (1957).

[35] *Id.* at 284.

a reverse when a county was declared to possess such immunity in *Liber v. Flor*,[36] but it is still the law regarding police tort liability.

Arizona found that the doctrine of sovereign immunity was a judicially-created creature which should be discarded and in *Stone v. Arizona Highway Com'n*,[37] followed the reasoning set out in *Muskopf v. Corning Hospital District*.[38] Wisconsin, as of 1962, also abolished governmental immunity in *Holytz v. City of Milwaukee*.[39] This case was further supported by legislative action in which the only limitations placed upon tort liability were: (1) the claim must be filed within 120 days after the event, (2) no punitive damages shall be awarded, and (3) the amount received by the victim shall not exceed $25,000.[40]

While the above-mentioned states had to overturn precedents to arrive at their decisions, Alaska announced that governmental immunity had never been part of the law in that state, therefore, a municipality was liable for the torts of its employees whether connected with either a governmental or proprietary function.[41]

In New Jersey a distinction was drawn between acts of omission and those of commission. In *McAndrew v. Mularchuk*,[42] the Court held that negligent acts of commission could render the municipality liable under the doctrine of *respondeat superior* so that "complete immunity does not exist."[43] This was an action for injuries sustained by a minor child when he was struck by a bullet fired by a police officer who was attempting to "scare him off." Therefore, in New Jersey a municipality would be liable for the torts of assault and battery committed by police officers, since these are definitely acts of "commission," while for injuries resulting from acts of "omission" the municipality would not be rendered liable. This reasoning is not followed by any other state.

Several jurisdictions have prospectively overruled the doctrine of governmental immunity. These are Michigan[44] and Minnesota[45] with New York[46] appearing to be headed in that direction.

Among the remaining jurisdictions there is a divergence of views. Some courts have stated that if there is to be any change in the law, it

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[36] 143 Colo. 205, 353 P.2d 590 (1960).

[37] 93 Ariz. 384, 381 P.2d 107 (1963).

[38] *Supra* n. 29.

[39] 17 Wis.2d 26, 115 N.W.2d 618 (1962).

[40] Wis. Stat. Ann., vol. 40 K, § 895.43 (1966).

[41] City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962).

[42] 33 N.J. 172, 162 A.2d 820 (1960).

[43] *Id.* at 181.

[44] Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

[45] Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).

[46] Fields v. New York, 175 N.Y.S.2d 27, 151 N.E.2d 188 (1958); Schuster v. City of New York, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958).

must come from the legislature.[47] These holdings are in direct disagreement with *Stone v. Arizona Highway Commission*,[48] in which it was ruled that the doctrine of governmental immunity was judicially created, therefore, could be judicially abolished. *Stare decisis* does not and should not preclude the courts from overturning a doctrine which is no longer suited for modern society and which is working an injustice. The courts should assume the responsibility to outlaw this archaic doctrine. If, as in California, the legislature feels the rule should be reinstated, they will pass the necessary laws. Courts in other jurisdictions simply have stated that governmental immunity is the law of that particular state.[49] In *Valdez v. City of Las Vegas*,[50] the Court went so far as to state that in a complaint filed by a citizen against the city for the tortious conduct of one of its police officers, it must be alleged that the specific tortious act was committed by the officer under the direction of the city.

In review, despite the existence of a strong minority, the climate in the United States is not one in favor of the abrogation of the doctrine of governmental immunity in the near future. This is regrettable since the doctrine "is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons. . . ." [51] and . . . "is utterly unsuited to the twentieth-century state. . . ." [52] It should be hoped that in the states where the legislatures have failed to act, the courts will see it as their duty to overturn this anachronism, and that in the states where the courts have refused to part with the past, the legislatures will enact laws to abolish the doctrine. For, as Abraham Lincoln observed: "It is as much the duty of government to render proper justice against itself, in favor of its citizens, as to administer the same between private individuals." [53] Until such changes in the laws of the majority of the states are enacted, police officers will be held personally liable for their torts, and their employers will not.

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[47] Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966); Defender v. City of McLaughlin, 228 F.Supp. 615 (N.D.S.D. 1964).

[48] *Supra* n. 37.

[49] Taylor v. City of Roswell, 48 N.M. 209, 147 P.2d 814 (1944); City of Nampa v. Kibler, 62 Idaho 511, 113 P.2d 411 (1941).

[50] 68 N.M. 304, 361 P.2d 613 (1961).

[51] Marcus and Jones, *supra* n. 15 at 896, quoting Robson, Report of the Committee on Ministers' Powers, 3 Pol. Q. 346, 357-58 (1932).

[52] *Ibid.*

[53] Quoted in Swaya v. Tucson High School Dist. No. 1, 78 Ariz. 389, 391, 281 P.2d 105, 107 (1955).