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# Birth and Death and Governmental Immunity

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# *Birth and Death of Governmental Immunity*

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MUCH HAS BEEN WRITTEN concerning the doctrine of governmental immunity[1] and the doubtful justice of its application. This article is aimed toward a discussion of the role of the courts in the rise and decline of the doctrine in the United States with primary emphasis upon the reasoning behind the court decisions. The multitude of cases in which this doctrine is invoked presents a zig-zag pattern of conflict in the thinking of the courts, some of which adhere to a rigid rule of stare decisis, others of which attempt to modify and adapt the doctrine to the rapidly expanding present day litigation, and a few of which advocate its complete abolition.

## *I. How the theory originated*

The doctrine of governmental immunity as applied in the United States is that neither the United States nor any of the several states may be sued by a private citizen without its consent. How the doctrine became a part of the American law is still a puzzle.

The doctrine seems to have descended from early English cases based on the maxim "the King can do no wrong." Before the sixteenth century, sovereign immunity was a purely personal right of the kings of England. In the feudal structure the lord of the manor was not subject to suit in his own courts. The king, the highest feudal lord, enjoyed the same protection. No court was above him.

This immunity operated more as a lack of jurisdiction in the king's courts than a denial of total relief. It rarely had the effect of completely denying compensation. The action could not be brought in the king's courts because they had no jurisdiction to hear claims against him, but there was jurisdiction in the Court of Exchequer for equitable relief against the crown. The

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[1] For a comprehensive article as to the background of the doctrine in Iowa and the general scope of governmental immunity in Iowa, discussing substantive rules and procedural aspects applicable to each class of cases (claims against the state, claims against quasi-corporations or involuntary sub-divisions, claims against municipal corporations, claims against individual public officers, agents, and employees), see 11 Drake L. Rev. 79 (May '62).

method of obtaining legal relief against the crown was the petition of right, which stated a claim against the king barred only by his prerogative.[2] Only out of sixteenth century concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state.

When the individual sovereign was replaced by the broader concept of the modern state, the idea was carried over that to allow a suit against a ruling government was inconsistent with the very idea of supreme executive power.[3]

In 1788, in his papers on the new constitution, Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty is now enjoyed by the government of every state of the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states. The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretension to compulsive force. They confer no right of action, independent of the sovereign will.[4]

Early American cases seem to accept the doctrine of the immunity of a state from suit in its own courts without question. In 1857 Chief Justice Taney stated:

> It is an established principle of jurisprudence in all civilized nations that a sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another state. And since this permission is altogether voluntary on the part of the sovereignty, it follows it . . . may withdraw its consent whenever it may suppose that justice to the public requires it.[5]

Some early difficulty arose in the application of the doctrine to cases brought against a state officer or agency in which the state itself had not been named as a party. Chief Justice Marshall

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[2] Holdsworth, The History of Remedies Against the Crown, 38 L. Quar. Rev. 141, 149; 4 Holdsworth, The History of English Law, 202-08 (2 ed. 1937).

[3] Prosser, Torts 771 (2 ed. 1955).

[4] The Federalist No. 81, at 374 (Hallowell ed. 1842) (Hamilton).

[5] Beers v. Arkansas, 61 U. S. (20 How.) 527, 529 (1857).

attempted to limit the doctrine in federal courts to those suits in which the state itself was named as a party on the record,[6] but this limitation was not accepted.

Probably the earliest American case faced squarely with a challenge of the doctrine was *Hans v. Louisiana* (1884).[7] This was an action brought in circuit court against the state of Louisiana by Hans, a citizen of that state, to recover the amount of certain coupons annexed to the bonds of the state. The state attorney general filed an exception on the ground that "this court is without jurisdiction ratione personae. Plaintiff cannot sue the state without its permission; the Constitution and laws do not give this honorable court jurisdiction of a suit against the state." [8]

The suit was dismissed and plaintiff brought error. The sole question, which the Court said was presented for the first time, was whether the judicial power of the United States extends to a case arising under the Constitution or laws of the United States and originally brought against a state by one of its citizens.

Plaintiff contended that if a case involved a federal question the case is within jurisdiction of the federal courts without regard to the character of the parties (Article III of the Constitution). Plaintiff further contended that the eleventh amendment is no obstacle because it only prohibits suits against a state which are brought by the citizens of another state.

The Court observed that this contention would present the anomalous result that in cases arising under the Constitution or laws of the United States, a state may be sued in federal courts by its own citizens though it cannot be sued for a like cause by citizens of other states.

The Court further noted that suits and actions unknown to the law were not contemplated by the Constitution when establishing the judicial power of the United States. The suability of a state without its consent was a thing unknown to the law. Even if the cause lies within federal judicial power by reason of its character, the scope of the federal judicial power must be defined in the light of the general principle of state immunity from suit, and if the citizen suing his own state has not obtained

[6] Osborn v. Bank of United States, 22 U. S. (9 Wheat) 738 (1824).

[7] Hans v. Louisiana, 134 U. S. 1 (1890).

[8] *Id.* at 3.

consent to sue, then federal jurisdiction will not lie, though otherwise it would.

In delivering the opinion of the Court, in which the judgment of the circuit court was affirmed, Mr. Justice Bradley reiterated the blanket acceptance of the courts of the doctrine of governmental immunity.

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a state represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The method of blind incorporation of the doctrine into the American law through these early decisions can thus be followed, but why the courts so readily accepted a doctrine originally an attribute of a personal ruler is still not clear. It is difficult to understand why a theory originating in the belief of the divine right of kings should become so firmly imbedded in the law of a country which fought to free itself of this tyranny. Its incorporation into American law has been called "one of the mysteries of legal evolution." [9]

The inviolability of the king was essential to the existence of his powers as supreme magistrate, but the location of undivided sovereignty in the United States is not possible. The executive in the United States is not historically the sovereign, and the legislature is restrained by constitutional limitations. The federal government is one of delegated powers and the states, although retaining certain powers, are not sovereign (according to the Constitution, as demonstrated by the Civil War and the resulting amendments).

The difficulty of reconciling the royal prerogative with demo-

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[9] Borchard, Government Responsibility in Tort, 34 Yale L. J. 4, 5 (1924).

cratic government has led some of our courts to deny the applicability of the English theory of kingly immunity and to rationalize its acceptance on the ground of public policy.[10]

Just what is meant by public policy is equally confusing, but the general reasoning is that inconvenience and danger would follow any different rule. Public service would be hindered and public safety endangered if supreme authority could be subjected to suit at the instance of every citizen. In cases involving the use of funds in the public treasury or the exercise of official discretion, the administration of public affairs could be controlled by the mandates of judicial tribunals in favor of individual interests.[11]

Some of the excuses given are: that public funds should not be dissipated to compensate for private injuries; the absence of funds for satisfaction of judgments; the government derives no profit from its activities, which are solely for the public benefit; and the government should not be subjected to the private control of tort litigation.[12]

Some of the practical reasons given are the lack of jurisdiction, as a court has no authority to render a judgment on which it has no power to issue execution, and the need to avoid embarrassing the executive.[13]

Other theories advanced are the dignity of the state; [14] the absurdity of a wrong committed by an entire people; the idea that whatever a state does must be lawful; and the doubtful theory that an agent of the state is always outside the scope of his authority when he commits a wrongful act.[15]

*II. Development through court decisions*

The theories emitting from the doctrine of governmental immunity have appeared in cases involving not only the federal and state governments but also the political subdivisions of the states. A brief review of its application in various cases shows the forms the doctrine has taken in different areas of government.

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[10] *E.g.*, United States v. Lee, 106 U. S. 196 (1883); Langford v. United States, 101 U. S. 341 (1879).

[11] Fitts v. McGhee, 172 U. S. 516 (1898).

[12] Hill v. Boston, 122 Mass. 344 (1877); Prosser, Torts 774 (2 ed. 1955).

[13] See cases cited at n. 10 *supra.*

[14] Fitts v. McGhee, *supra,* n. 11.

[15] Poindexter v. Greenhow, 114 U. S. 270 (1884).

The peculiar nature of the federal government induced special rules governing the legal relations arising out of governmental invasions of private rights.[16] One of the best illustrations of the confused reasoning of the courts as to federal immunity is in the field of admiralty. In the case of *United States v. Thompson*,[17] Justice Holmes wrote that a government vessel could not commit an injury giving rise to a maritime lien, hence at no time, though the vessel subsequently reached private hands, could such lien be enforced. This conclusion was derived from the fact that inasmuch as the lien could never have been enforced against the government, the original collision could not have been a "tort" or an act giving rise to a legal obligation. He also reasoned that the government could not be guilty of fault or "tort" since it makes the law and is therefore not bound by it.

If Justice Holmes' theory is correct, even voluntary submission to suit would not enable the court to impose damages on the government, for there never was a liability and none could be created by merely waiving the immunity from suit. Such a theory, based on the old concept of the absolutism of the king, is unsound when applied to the vast network of our federal government. It finds in the immunity, or the absence of a legal liability, the absence of injury.

By their adoption of the federal Constitution, the states have given their consent to be sued in the Supreme Court of the United States by another state or by the United States. Neither the laws nor the Constitution gives individuals the right to sue a state in either federal or state courts. A state's consent to be sued in its own courts may be expressed in the state constitution but constitutional provisions authorizing or requiring the legislature to direct by law the manner and courts in which the state shall be sued are generally regarded as not being self-executing. No suit can validly be maintained against the state until the legislature has made proper provisions therefor.[18]

Such constitutional provision must, it has been held, be strictly construed since it is in derogation of the state's inherent exemption from suit.[19]

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[16] Borchard, *supra*, n. 9, 34 Yale L. J. 40, 41.

[17] 257 U. S. 419 (1922).

[18] 81 C. J. S., States, 215, at 1304-05 (1953).

[19] *E.g.*, State ex rel. Allen v. Cook, 171 Tenn. 605, 106 S. W. 2d 858 (1937).

In state relations the effort to apply the inhibitions of the eleventh amendment in the federal courts has resulted in a haphazard application of tests to determine merely when a suit directed against an officer or corporate body existing by state authority is in reality a suit against the state.

In *Osborn v. Bank of the United States*,[19a] Justice Marshall tried to establish the rule that the eleventh amendment was inapplicable unless the state was a party to the record. *Poindexter v. Greenhow*,[19b] rejected this theory and reasoned that the question as to whether the state was being sued should be determined by the effect upon the state of the judgment or decree to be rendered. If the object of the suit is to compel specific performance of a state contract, or to obtain possession of property of which the state claims title, or to compel an officer to pay money out of the state treasury, or to prevent the state from using property it claims as its own, it is a suit against the state and the federal courts decline jurisdiction. If the rights of the state would be directly and adversely affected by the judgment or decree sought, the state is a necessary party defendant and if it cannot be made a party, if it has not consented to be sued, the suit is not maintainable.[20]

The state's immunity has been extended to various state agencies, such as prisons, hospitals, educational institutions, state fairs, and commissions for public work, although there is some tendency to find a legislative intent in creating the agency that it shall be subject to liability.[21] In some cases there has been a resort to the function of the agency in determining its suability.[22] The courts seek to decide whether a corporation organized by authority of a state is a state agency acting without pecuniary profit or a private corporation acting in private interests. But it has been held that the governmental or proprietary nature of a particular activity, most often discussed in cases dealing with the liability of municipal corporations, is immaterial and cannot be inquired into where questions of immunity from suit of a state considered as a sovereign arises.[23]

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[19a] *Supra*, n. 6.

[19b] *Supra*, n. 15.

[20] Schwing v. Miles, 367 Ill. 436, 11 N. E. 2d 944, 113 A. L. R. 1504 (1937).

[21] Keifer and Keifer v. Reconstruction Finance Corp., 306 U. S. 381 (1939).

[22] *E.g.*, Scott v. University of Mich. Athletic Ass'n, 152 Mich. 684, 116 N. W. 627 (1908); Green v. State, 107 Wis. 557, 176 N. Y. S. 681 (1919).

[23] *E.g.*, Miller v. Port of New York Authority, 18 N. J. Misc. 601, 15 A. 2d 262 (1939); Voorhis v. Cornell Contracting Corp., 10 N. Y. S. 2d 378 (1938).

The decisions are not harmonious and an attempt to follow the reasoning applied can be most frustrating. The general reluctance of the courts in this area to extend relief to the individual seems to be based on their belief that public agents will perform their duties more effectively if not hampered by fear of tort liability.

For the administration of local government, political subdivisions of the state were developed. Included within these so-called quasi-corporations, (they were not at first incorporated) are counties, towns, school districts, hospital districts, and the like. Their kinship to kingly sovereignty is extremely remote, as the people themselves are closely associated with the management of these bodies, yet the courts have held them not responsible for the torts of their agents in the absence of a specific statute.

Of these political subdivisions the county is the largest. Immunity was first extended to it by a court of Massachusetts[24] which relied upon the English case of *Russell v. Men of Devon,*[25] a 1798 case in which the tort action was disallowed on the ground that there were no corporate funds out of which reparation could be made and that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." The only similarity between the *Russell* case and the Massachusetts case was that the defendants were both counties. There was no reason for immunity to be found on the same basis, but the rule was applied even though there was a corporate fund out of which judgment could have been satisfied.

The Massachusetts court held the defendant was not liable on the ground that the county was created by the legislature and as a state agent it was therefore immune. Thus, a decision based on a case which denied liability for an entirely different reason became the "common law of the states of the United States." [26]

As the old reasons for immunity disappeared, the courts looked for other reasons to support their decisions. The majority followed Massachusetts and gave immunity to the county be-

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[24] Mower v. Leicester, 9 Mass. 247, 250 (1812).

[25] (100 Eng. Rep. 359) This case is often cited as the parent of the doctrine of governmental immunity.

[26] Borchard, *supra,* n. 9, at 34 Yale L. J. 42.

cause it was created for public purposes and was an agent of the state.

The greatest confusion in the decisions of the courts has been in the area of municipal corporations. This may be due to the difficulty which arises in an effort to apply the rule that the municipal corporation is not liable for torts committed by its agents in performance of governmental functions, but it is liable when the tort is committed in performance of a proprietary function.

Municipal corporations have a dual character. They are subdivisions of the state charged with governmental functions and responsibilities. They are also corporate bodies capable of much the same acts as private corporations. The difference between acts beneficial to the public at large and those beneficial to the city itself is a fineline test which has not been easy to follow.

Since the doctrine of immunity has been particularly criticized in this area, the courts have developed exceptions to it. The above mentioned distinction between governmental and proprietary functions was first declared in 1842 by a New York court.[27] Another frequently applied exception is that the municipality is liable if it maintains a nuisance even though in the course of a governmental function.[28] This attempt to clarify when liability should lie may only add to the confusion since liability for a nuisance often rests on negligence for which the municipality is not liable. The third exception allows recovery when the injury is caused by the municipality's failure to perform a duty required by state statute, such as failure to adequately maintain a road or street which it is under statutory duty to maintain.[29]

In *Linstrom v. Mason City*[30] the question arose as to the distinction, if any, between responsibility of a city to persons using municipal facilities and liability of other property owners to invitees. An action was brought against the city for damages sustained by plaintiff in a fall on steps in a garden area adjacent to the city library. The court reasoned that the theory of governmental immunity has faded in the face of statutory responsibility for streets and public places. In Iowa the city's

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[27] Baily v. Mayor of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669 (1842).

[28] Jeakins v. City of El Dorado, 142 Kan. 206, 53 P. 2d 798 (1936).

[29] 38 Am. Jur., Municipal Corps., 580, and at 274-75 (1941).

[30] 126 N. W. 2d 292 (Iowa 1964).

responsibility is statutory. (Sec. 389.12 of the Iowa Code.) "They shall have the care, supervision, and control of all public highways, streets, avenues, alleys, public squares, and commons within the city and shall cause same to be kept open and in repair and free from nuisances."

In connection with governmental functions, the court goes on, liability of the city does not rest on any theory of respondeat superior. To that extent there is governmental immunity. There is no such immunity when the negligence of an employee occurs in performing proprietary duties. It is not complete immunity from judicial accountability such as is accorded the state. It is only freedom from the rule of respondeat superior where the servant is engaged in governmental activity. The liability of the city rests upon an obligation imposed by law to keep its thoroughfares and places safe for the public use they are designed to serve. The statute does not make a city an insurer of the safety of users of its streets and public places, but it does impose a different standard of care than rests upon private owners. When a city fails to meet this statutory standard of care, it is liable in tort for resulting injuries.

The idea that the purchase of liability insurance may constitute a waiver of immunity has been considered by some courts, but the decisions are not in agreement. In *Brooks v. One Motor Bus,*[31] a South Carolina court took the view that the city could not waive immunity from tort by taking out public liability insurance. It stated that there is no statute in the state which empowers a municipal corporation to waive immunity to tort liability.

> The surrender of an attribute of sovereignty being so much at variance with the commonly accepted tenets of government, so much at variance with sound public policy and public welfare, the courts will never say that it has been abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect.[32]

In Tennessee,[33] however, carrying liability insurance results in a waiver to the extent of the insurance coverage. The Illinois appellate court[34] also has held that liability insurance,

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[31] 190 S. C. 379, 3 S. E. 2d 42 (1939).

[32] *Id.* at 43-44.

[33] City of Knoxville, Tenn. v. Bailey, 222 F. 2d 520 (6th Cir. 1955).

[34] Thomas v. Broadlands Community Consol. School Dist. No. 201, 348 Ill. App. 567, 109 N. E. 2d 636 (1952).

to the extent that it protects the public funds, removes the reason for and thus the immunity to suit. In the majority of states, however, an immunity continues notwithstanding the purchase of liability insurance.

*III. Reluctance of courts to abolish the doctrine*

Many courts have been reluctant to abolish the doctrine of governmental immunity in spite of a belief that it is no longer applicable. They feel that a strict adherence to the principle of stare decisis must be followed because of the reliance of the parties on prior decisions. Some courts have surmounted this obstacle by ruling that the doctrine applies in the present case but that they will not apply it in future cases, thus warning parties of their future intentions.

In an action[35] alleging negligent operation of a city's fire engine, the court held the city was immune from liability, but went on to criticize the doctrine as an erroneous and illogical extension of an initial misinterpretation of certain English cases. The court's feeling was acutely expressed in its opinion.

> We are frank to say that if this was a question of first impression, we would be disposed to accept the appellant's arguments against municipal immunity to suit for tort, since it would seem to be a matter of common justice that a loss occasioned by the negligent performance of a function designed to benefit the community as a whole should fall on the community generally, rather than upon the hapless individual injured through no fault of his own . . . . We think, therefore, in view of the repeated application of the doctrine of municipal immunity from suit by our courts, that we are not at liberty to ignore or overturn it. It is established by too long a series of judicial decisions. Any change must be made by the legislature . . . . Requests for change of policy involving an overthrow of long settled rules of law should be addressed to the legislature rather than the courts. . . . The distinction between governmental and corporate functions of a municipality is at best unsatisfactory, since all services maintained by the municipality are presumably for the benefit of the citizens generally. As long as the distinction is maintained in the law, however, the courts must cope with it.

In Minnesota the doctrine was rejected but only prospectively. *Spanel v. Mounds View School Dist. No. 621*[36] in-

[35] Flait v. Mayor and Council of Wilmington, 48 Del. 89, 97 A. 2d 545 (1953).
[36] 264 Minn. 279, 118 N. W. 2d 795 (1962).

volved a defective slide in a kindergarten classroom. The plaintiff alleged negligence of the school district, teacher and principal. The action as to the school district was dismissed. By denying recovery, the court recognized the remainder of the decision became dictum, but they were unanimous in expressing their intention to overrule the doctrine in the future.

> Finding that sovereign immunity is an unjust and archaic doctrine but recognizing the reliance which has heretofore been placed on it the court overrules immunity as a defense available to school districts, municipal corporations, and other subdivisions of government on whom immunity has been conferred by judicial decision, with respect to torts which are committed after adjournment of the next regular session of the Minnesota legislature, subject, however, to any statutes which now or hereafter limit or regulate the prosecution of such claims.

The court made it clear, however, that it was not abolishing sovereign immunity as to the state itself.

Still another court suggests that a long period of acquiescence in the doctrine makes it part of the public policy of the state and not subject to change by the courts. In *McKenzie v. City of Florence*,[37] plaintiff alleged negligent, reckless, willful and wanton conduct of police officers in his arrest and imprisonment. Plaintiff contended that the acts of the policemen represented failure on their part to perform their duties as members of the police department of the city. The City of Florence demurred upon the ground that a municipal corporation, an agency of the state, cannot be sued in tort for acts of police officers except when such action is given by statute, and that there is no legal authority whereby the city is liable in tort for acts of officers. After noting that the state of South Carolina made no distinction between municipal activities which are governmental and those that are proprietary, the court traced the doctrine of governmental immunity in the state to *Young v. Commissioners of Roads,* 2 Nott and McC 537, 11 S. C. L. 537 (1820).

> Immunity rule in this state had its inception in approval of the courts of the Men of Devon case and has been a part of public policy of this state for one hundred and thirty-nine years. Acquiescence in it for this period of time justifies the conclusion that it is now agreeable to, and part of, the public policy of the state . . . . To depart from such rule would,

[37] 234 S. C. 423, 108 S. E. 2d 825 (1959).

> of necessity, overrule many decisions of this court. . . . This court is not invested with the power to make laws.[38]

The *McKenzie* case also proffered the idea that since the legislature has partly modified the rule in some respect, they have already legislated with respect to the remaining effects of the rule. The court reasoned that by enacting various statutes affecting immunity, the legislature has determined that no further change is to be made by the courts. This court even went further to contend that the legislature had shown its intent not to abolish the doctrine if bills concerning it had not been passed. It appears that concurring with the idea that the court must adhere to a strict rule of stare decisis is the thought that only the legislature can make changes in public policy of the state.

Another South Carolina case[39] flatly states that since the courts have over such a long period of time consistently followed the rule of immunity, it should not be changed except by legislative enactment. That court distinguishes between the establishment of public policy by the court where none on the subject exists and the overthrow by the courts of existing public policy. The idea being that once firmly rooted, such policy becomes in effect a rule of conduct or of property within the state and the courts should leave it to the people, through their elected representatives, to say whether or not it should be revised or discarded.

In *Maffei v. Town of Kemmerer*,[40] the court also followed the reasoning that the legislature must make any changes in the doctrine because of its long standing. This was an action for wrongful death of plaintiff's decedent through the negligence of police officers in directing him to assist in pursuit of a felon. Although,

> . . . a rule of law which is merely the product of judicial decision, born of the necessities of particular circumstances is subject to judicial repudiation when the reasons which rise to its judicial adoption have failed or not longer exist. . . an ancient doctrine firmly imbedded in . . . common law and which became that law through early usage and custom, cannot be judicially abrogated any more than courts are authorized to abolish statutory law because in their opinion the reason for the legislative enactment no longer justifies

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[38] *Id.* at 828.

[39] Rogers v. Florence Printing Co., 233 S. C. 567, 106 S. E. 2d 258 (1958).

[40] 80 Wyo. 33, 338 P. 2d 808 (1959).

> the continuance of the law. That which is considered to be the merit of a law is not the criterion upon which courts base their decisions as to the law's continued existence.[41]

This Court took a somewhat exceptional view as to the origin of the doctrine, repudiating the often quoted statement that it stemmed from the English case of *Men of Devon.* According to the court's research, the *Devon* decision cited a case from *Brooke's Abridgment* as direct authority to show that no action against the public could be maintained. Thus, this Court rejected the Florida court's assumption (*Hargrove v. Town of Cocoa Beach, infra*) that the 1788 judicial recognition of the common law of England amounted to a court-originated doctrine. The *Devon* case only gave recognition to a principle which had appeared in an earlier decision rendered at least prior to 1558.[42] Based on this contention, the court felt it seemed more logical to conclude the doctrine was already a part of the common law, engrafted therein through long usage and custom.

The state statute says the common law of England prior to the fourth year of James I (1607) "shall be the rule of decision in this state." Thus by statute, the Wyoming court reasons, the doctrine of municipal immunity became the rule of decision in our state and it is only by statute that the doctrine should be abrogated.

*IV. Abolition of the doctrine by some courts*

One of the initial attempts to abrogate the doctrine was made in 1957 in the case of *Hargrove v. Town of Cocoa Beach, Florida,*[43] a wrongful death action. Plaintiff's husband was locked in the city jail for the night because intoxicated. The cell became filled with smoke and he suffocated. No one was on duty at the jail at that time. Defendant's motion to dismiss on the ground of immunity was granted and the plaintiff appealed.

The Florida court took the view that the idea that it is better for an individual to suffer a wrong than to impose vicarious liability on the public is inconsistent with the constitutional guarantee that the courts shall always be open to redress wrongs and "to our sense of justice that there shall be a remedy for

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[41] *Id.* at 816.

[42] The author of Brooke's Abridgments died in 1558.

[43] 96 So. 2d 130 (Fla. 1957).

every wrong committed." [44] In regard to the contention that only the legislature could act to abolish governmental immunity because the doctrine was statutory through Florida statutory acceptance of common law, the court voiced the opinion that this ignored both the fact that *Men of Devon* postdates American independence and the fact that the courts are competent to act independently of the legislature in an area of law which the courts originated.

To the argument that the courts should follow the doctrine of stare decisis, the court refused to remain blindly loyal, stating that the law is not static and that:

> Our laws are the product of progressive thinking which attunes traditional concepts to needs and demands of changing times . . . . We now recede from the prior cases in order to establish a rule we are convinced will be productive of results more nearly consonant with the demands of justice.[45]

In *Molitor v. Kaneland Community Unit Dist. No. 302*,[46] the Illinois court held the doctrine of immunity had no further effect in that state. The supreme court of Illinois agreed with the *Hargrove* opinion that the doctrine of stare decisis is not an inflexible rule and that when public policy and social needs require a departure from prior decisions, it is the duty of the court to overrule those decisions. The court stated that it is a basic concept underlying the whole law of torts today that liability follows negligence and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The doctrine of immunity runs directly counter to that basic concept.

In 1962, the supreme court of Wisconsin held the doctrine of sovereign immunity would not be available as a defense in the suit of *Holytz v. City of Milwaukee*[47] or any future case. In a 1959 case[48] the same court had made the statement that "recent attempts in the Wisconsin legislature to abolish the tort immunity have failed. This is strong evidence of legislative intent that such immunity should not be abolished." But in spite of

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[44] *Id.* at 132.

[45] *Id.* at 133.

[46] 11 Ill. 2d 11, 163 N. E. 2d 89 (1959).

[47] 17 Wis. 2d 26, 115 N. W. 2d 618 (1962).

[48] Smith v. City of Jefferson, 8 Wis. 2d 378, 99 N. W. 2d 119 (1959).

such strong language, in the *Holytz* case, the court made no elaborate excuses for its change of position. It simply stated,

> We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments.

In Michigan[49] four justices joined in the opinion overruling the doctrine of sovereign immunity and asking for prospective operation which would not prevent the plaintiff from recovering and four justices refused to overturn the doctrine. Mr. Justice Black wrote a separate opinion asking for repudiation of the doctrine to operate wholly prospectively. The minority opinion based their argument that repudiation was a legislative task on a separation of powers theory. The majority relied on four years of legislative inaction[50] plus decisions in other jurisdictions overruling the doctrine.

One of the most lucid opinions is that of Justice Traynor in *Muskopf v. Corning Hospital District.*[51] This action against a hospital district was predicated upon the alleged negligence of the hospital staff in treating the plaintiff. The superior court sustained the demurrer of the defendant on the ground of governmental immunity from tort liability. In its reversal, the supreme court held that the doctrine would be rejected as mistaken and unjust.

Justice Traynor made the following observations in his persuasive opinion. After first determining that the rule of county or local district immunity did not originate with the concept of sovereign immunity but with *Russell v. Men of Devon* in which recovery was disallowed on the grounds of no funds and that the public should not suffer the inconvenience, he says, "If the reasons for *Russell v. Men of Devon* ever had any substance they have none today. Public convenience does not outweigh individual compensation and the county hospital is an entity legally and financially capable of satisfying a judgment." He further contends, "None of the reasons for its continuance can

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

[50] See, Richards v. Birmingham School Dist., 348 Mich. 490, 83 N. W. 2d 643 (1957) in which the court stated that the remedy to the problem of governmental immunity lies with the legislature.

[51] 11 Cal. Rptr. 89, 359 P. 2d 457 (1961).

withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality." [52]

He points out that some injured by government agencies can recover while others cannot and cites as examples the case of *Rhodes v. City of Palo Alto*[53] in which one injured while attending a community theater in a public park recovered and the case of *Farrell v. City of Long Beach*[54] in which recovery was not allowed to one injured in a children's playground. Justice Traynor felt the illogical and inequitable extreme had been reached in the *Muskopf* case. To affirm the rule would deny recovery to one injured in a county or hospital district hospital but might allow recovery in a city and county hospital.

Two of the basic arguments advanced to deny the courts' power to remove governmental immunity are:

1. That by enacting various statutes affecting immunity, the legislature has determined that no further change is to be made by the court.

2. By force of stare decisis the rule has become so firmly entrenched that only the legislature can change it.

As to the first, Justice Traynor refutes it by holding that a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most, is not comprehensive legislative enactment designed to cover a field. As to the second, he feels that the rule of governmental immunity has not existed with the force that its repetition would imply. Both judicial and legislative restrictions are constantly being placed upon it.

Justice Traynor concluded by stating that abrogation of governmental immunity does not mean that the state is liable for all harm that results from its activities, but once it has been determined that the state through its agents has committed a tort, it must meet its obligation therefor.

> Nor does our . . . decision affect the settled rules of immunity of government officials for acts within the scope of their authority . . . . Government officials are liable for

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[52] *Id.* at 460.

[53] 100 Cal. App. 2d 336, 223 P. 2d 639 (1950).

[54] 132 Cal. App. 2d 818, 283 P. 2d 296 (1955).

> negligent performance of their ministerial duties but are not liable for discretionary acts within the scope of their authority . . . . "The justification for doing so is that it is impossible to know whether the claim is well founded until the case is tried . . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." (Learned Hand, J., in *Gregoire v. Biddle,* 177 F. 2d. 579, 581.) This immunity rests on grounds entirely independent of those advanced to justify immunity of state from liability for torts for which agents are admittedly liable. . . .

Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law, we make no startling break with the past, but merely take the final step that carries to its conclusion an established legislative and judicial trend.[55]

Two years later in *Stone v. Arizona Highway Commission,*[56] the court deciding that case felt the reasoning of *Muskopf* was valid and completely abrogated the doctrine in Arizona. That court, after noting most writers claim the only basis of survival of the doctrine has been on the ground of antiquity and inertia and that the doctrine has been overruled in England, went on to unquestionably assert that they were reversing their past position. In previous decisions this Court concurred in the reasoning that the principle had become so firmly fixed that change must come from the legislature. "Upon reconsideration, we realize the doctrine of sovereign immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack." [57]

*V. Situation since some courts abrogated the doctrine*

In Illinois, after the *Molitor* case, the legislature reacted to the situation by reinstating tort immunity with respect to a number of government subdivisions.

Following the *Muskopf* case, the California legislature promptly declared a moratorium on this and other claims similarly situated. Two years later the legislature again passed

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[55] Muskopf, *supra,* n. 51, at 462-63.

[56] 93 Ariz. 384, 381 P. 2d 107 (1963).

[57] *Id.* at 113.

laws on the subject of immunity and the intermediate appellate court held the effect of both enactments was to merely suspend operation of the *Muskopf* decision.[58]

The future trend is still very uncertain in Wisconsin and Minnesota where the doctrine was prospectively abandoned in the *Holytz* case and the *Spanel* case since the bulk of those decisions were dictum. The *Holytz* case stated that even though that case related specifically to the city, the abrogation of the doctrine should be considered as total. The Minnesota court was not so bold. It specified its intention was to abolish immunity as a defense for school districts, municipal corporations and other subdivisions of the government, subject to legislative action, and expressly excluded the state. In 1965 the Minnesota legislature authorized a waiver of immunity as to certain claimants. In Michigan subsequent opinions[59] to the *Williams* case made it clear that only municipal corporations were affected by that decision. Following *Hargrove*, the Florida court also limited its position by saying that the abolition of immunity as to governmental functions of municipalities does not apply to the state, its counties and county school boards.[60]

Colorado had taken an early lead in 1957 in the case of *Colorado Racing Comm'n v. Brush Racing Ass'n.*[61] "In Colorado sovereign immunity may be a proper subject for discussion by students of mythology but finds no haven or refuge in this Court." This feeling was short lived, however, for three years later the same court invoked the immunity theory as to governmental functions of a county.[62]

New Jersey takes the position that complete immunity does not exist. It imposes liability for injurious acts performed by a municipality in its governmental capacity when these acts constitute active wrongdoing as distinguished from negligent failure to act.[63]

The tug of war as to whether legislative action or judicial

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[58] Bell v. City of Palos Verdes Estates, 36 Cal. Rptr. 424 (Cal. App. 1964).

[59] Buck v. McLean, 115 So. 2d 764 (Fla. App. 1960); Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1962).

[60] McDowell v. Mackie, 365 Mich. 268, 112 N. W. 2d 491 (1962); Sayers v. School Dist. No. 1, 366 Mich. 217, 114 N. W. 2d 191 (1962); Stevens v. City of St. Clair Shores, 366 Mich. 341, 115 N. W. 2d 69 (1962).

[61] 136 Colo. 279, 284, 316 P. 2d 582, 585 (1957).

[62] Liber v. Flor, 143 Colo. 205, 353 P. 2d 590 (1960).

[63] McAndrews v. Mularchuck, 33 N. J. 172, 162 A. 2d 820 (1960).

action should be followed in dealing with the doctrine of governmental immunity still continues and it appears that it will be some time before enough weight is thrown on one side to give any certainty as to how the matter will be handled in the courts.

An excellent review of the various positions taken by the courts is given by the Iowa supreme court in *Boyer v. Iowa High School Athletic Ass'n.*[64] In this action to recover for personal injuries to two spectators from the collapse of bleachers at a high school basketball tournament the county district court sustained the defendant school district's motion to dismiss on the ground of governmental immunity. In a five to four decision the supreme court affirmed the district court. Justice Garfield made the following comment in support of the majority opinion: "We think the experience of the few states where the court has attempted to abrogate the immunity doctrine indicates legislative action is a better solution." [65] He makes this comment after citing some recent cases abrogating the doctrine in one area or another and points out that the decisions are followed by legislative enactment or confined to a limited area in the court's opinion or in subsequent cases.

In the dissent Justice Moore makes a strong plea for judicial abrogation of the doctrine.

> The majority opinion does not dispute the modern trend which recognizes the immunity rule is unjust, unsupported by any valid reason and has no rightful place in modern society, but refuses to follow the holding of an overwhelming majority of the more recent cases that being court made the rule should be eliminated by its creator. To hold the legislature should bury this court's mistakes of the past seems as illogical as the rule itself.[66]

He concludes that "it is our responsibility and duty to alter decisional law to produce common sense justice." [67]

### *VI. Conclusion*

Since no justification for the retention of the rule of governmental immunity remains other than that the courts are

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[64] 127 N. W. 2d 606 (Iowa 1964).

[65] *Id.* at 609.

[66] *Id.* at 614.

[67] *Id.* at 618.

bound by stare decisis and should give deference to the legislature, it seems a gross flaw in our system of justice to leave the situation as it is. Even in those courts which adhere to the rule, the opinions indicate a desire to be relieved of its shackles.

The cases holding that the courts themselves should abrogate the rule of governmental immunity and those maintaining that only the legislature is qualified to act should be considered together to arrive at the best solution. If the courts alone attempt to abolish the rule, inadequate piecemeal rules of law which would apply in some cases and not in others would evolve. Since each case usually involves only one area of immunity, the question as to whether that decision would apply in another area under different circumstances would remain. The legislature could define the extent to which the rule is abolished and give concrete standards for the courts to follow.

However, other than the theory that the legislature should handle questions of public policy and that they are better able to remedy the problem, there is no valid reason why the courts must wait for the legislature to act. While legislative action, as a solution to this problem, would give more uniformity to subsequent case decisions, it appears that most state legislatures are reluctant to take this responsibility until prodded into action by the courts. The courts, therefore, must take the initiative as an impetus to obtaining appropriate legislation.