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## Governmental Immunity of County Hospitals

Alice K. Henry\*

GOVERNMENTAL OR SOVEREIGN IMMUNITY in tort actions was first established in *Russell v. Men of Devon*,<sup>1</sup> where an action was brought against all the male inhabitants of the county for damages to plaintiff's wagon, caused by a defective bridge. In an early American case, *Mower v. Inhabitants of Leicester*,<sup>2</sup> it was held that no action at common law could be brought against the town for defective highways. In 1907, Mr. Justice Holmes, in *Kawananakoa v. Polyblank* stated:

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but 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.<sup>3</sup>

This common law rule, often attacked as unjust and archaic,<sup>4</sup> has been modified to distinguish between governmental and proprietary functions, holding the county liable for torts committed in performance of proprietary functions.<sup>5</sup>

The weight of authority holds that ownership and maintenance of a county hospital is a governmental function, even though the hospital is maintained for profit, and the county charges for treatment.<sup>6</sup> Although there is no certain rule, there are tests for determining what is a governmental function:<sup>7</sup>

- (a) Does the function benefit the public at large?
- (b) Is the function normally demanded by the state?
- (c) Is the function normally exercised by a sovereign?
- (d) Is the function discretionary, political, or legislative?
- (e) Does the county gain some advantage, pecuniary or otherwise?<sup>8</sup>

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<sup>1</sup> 100 Eng. Rep. 359, 2 T. R. 667 (1788).

<sup>2</sup> 9 Mass. 247 (1812).

<sup>3</sup> 205 U. S. 349, 353, 27 Sup. Ct. 526, 527 (1907).

<sup>4</sup> *Spanel v. Mounds View School Dist. No. 621*, 118 N. W. 2d 795 (Minn. 1962).

<sup>5</sup> 20 C. J. S., Counties, Sec. 215, p. 1067; see, 2 Encyc. Negl., Secs. 312-320 (1962).

<sup>6</sup> 16 A. L. R. 2d 1083 (1951).

<sup>7</sup> *Kardulos v. City of Dover*, 99 N. H. 359, 111 A. 2d 327 (1955); *Fairweather, Test of Sovereign Immunity for Municipal Corporations*, 13 Clev-Mar. L. R. 151 (1964).

<sup>8</sup> 28 Miss. L. J. 247, 248 (1957); *Antin v. Union School Dist. No. 2 of Clatsop County*, 130 Ore. 461, 280 P. 664 (1929).

Whether the patient is paying or non-paying may determine whether the defense of sovereign immunity is available. If he is paying, then the operation is proprietary and the county cannot use governmental immunity as a defense. However, if he is not, it is clearly a governmental function and no liability attaches.<sup>9</sup> This rule seems to place the heaviest burden on those least able to carry it.

In some states, the common law rule of sovereign immunity has been retained by statute.<sup>10</sup> In others, the purchase of liability insurance waives sovereign immunity to the extent of the insurance carried and the defense of sovereign immunity is not available to the insurer.<sup>11</sup>

The trend toward liability for county hospitals is evidenced by statutes abolishing governmental immunity.<sup>12</sup> In some states sovereign immunity has been abolished as the result of judicial decisions.<sup>13</sup> Thus, the burden for error and neglect is being shifted from the injured individual to the general public.

The following chart reflects the holdings in each state from those reported cases involving the issue of immunity of county hospitals in tort actions. Where this question has not been answered by the state courts, their position on some aspect of liability-immunity is indicated in the footnotes.

	No County Hospitals	County Immune	County liable or immunity waived by purchase of liability insurance
Alabama <sup>14</sup>		x	
Alaska <sup>15</sup>			x
Arizona <sup>16</sup>			x
Arkansas <sup>17</sup>			x
California <sup>18</sup>			x

<sup>9</sup> Florida and Idaho decisions illustrate this point, *infra* n. 23 and 26.

<sup>10</sup> Miss. Code Ann. tit. 13 ch. 1 § 3002.3 (1954); Wash. Rev. Code tit. 70 ch. 44 § 060 (8) (1953).

<sup>11</sup> Ark. Stat. tit. 66 § 3240 (1959); Del. Code Ann. tit. 18 § 516 (1955); Idaho Code tit. 41 § 3504 and tit. 41 § 3505 (1961); Ky. Rev. Stat. tit. 67 § 186 (1960); Miss. Code Ann. tit. 25 ch. 6 § 7129-55 (1944); N. H. Rev. Stat. Ann. ch. 412 § 3 (1961); N. D. Century Code Ann. tit. ch. 43 § 07 (1960); Ore. Rev. Stat. ch. 243 § 110 (1959); Vt. Stat. Ann. tit. 29 § 1403, § 1404 (1959).

<sup>12</sup> Alaska Stat. tit. 9 § 09.50.250 (1962); Revised Laws of Hawaii 1955 ch. 245A § 2 (1957); Ill. Rev. Stat. ch. 34 § 301.1 (1961); N. Y. General Municipal Law 50 (d) (1963).

<sup>13</sup> *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P. 2d 107 (1963); *Spanel v. Mounds View School Dist No. 621*, *supra* n. 4; *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N. W. 2d 618 (1962).

<sup>14</sup> *Clark v. Mobile County Hospital Board*, 151 So. 2d 750 (Ala. 1963); *Garrett v. Escambia County Hospital Board*, 266 Ala. 201, 94 So. 2d 762 (1957);

(Continued on next page)

	No County Hospitals	County Immune	County liable or immunity waived by purchase of liability insurance
Colorado <sup>19</sup>		x	
Connecticut <sup>20</sup>	x		
Delaware <sup>21</sup>	x		
Dist. of Columbia <sup>22</sup>		x	
Florida <sup>23</sup>		x	x
Georgia <sup>24</sup>			x
Hawaii <sup>25</sup>			x
Idaho <sup>26</sup>		x	x
Illinois <sup>27</sup>			x
Indiana <sup>28</sup>			x
Iowa <sup>29</sup>			x
Kansas <sup>30</sup>		x	
Kentucky <sup>31</sup>			x
Louisiana <sup>32</sup>	x		
Maine <sup>33</sup>	x		
Maryland <sup>34</sup>		x	
Massachusetts <sup>35</sup>			
Michigan <sup>36</sup>		x	
Minnesota <sup>37</sup>			x
Mississippi <sup>38</sup>			x
Missouri <sup>39</sup>		x	
Montana <sup>40</sup>		x	
Nebraska <sup>41</sup>		x	
Nevada <sup>42</sup>		x	
New Hampshire <sup>43</sup>			x
New Jersey <sup>44</sup>		x	
New Mexico <sup>45</sup>		x	
New York <sup>46</sup>			x
North Carolina <sup>47</sup>		x	
North Dakota <sup>48</sup>			x
Ohio <sup>49</sup>		x	
Oklahoma <sup>50</sup>		x	
Oregon <sup>51</sup>			x
Pennsylvania <sup>52</sup>			
Rhode Island <sup>53</sup>	x		
South Carolina <sup>54</sup>		x	
South Dakota <sup>55</sup>		x	
Tennessee <sup>56</sup>			x
Texas <sup>57</sup>			
Utah <sup>58</sup>			
Vermont <sup>59</sup>	x		
Virginia <sup>60</sup>	x		
Washington <sup>61</sup>		x	
West Virginia <sup>62</sup>		x	
Wisconsin <sup>63</sup>			x
Wyoming <sup>64</sup>		x	

(Continued from preceding page)

Laney v. Jefferson County, 249 Ala. 612, 32 So. 2d 542 (1947); Moore v. Walker County, 236 Ala. 688, 185 So. 175 (1938).

<sup>15</sup> Alaska Stat. tit. 9 § 09.05.250 (1962); All political subdivisions are liable for torts of their officers, agents or employees. Tuengel v. City of Sitka, Alaska, 118 F. Supp. 399 (D. Alaska, 1954).

<sup>16</sup> *Hernandez v. County of Yuma*, 91 Ariz. 35, 369 P. 2d 271 (1962); *McQueary v. County of Yuma*, 91 Ariz. 37, 369 P. 2d 273 (1962).

<sup>17</sup> A liability insurer of a county may be sued direct notwithstanding the fact that the county may not be sued under state law. Ark. Stat. tit. 66 § 3240 (1959). The entity, not subject to suit for tort, is not deemed required to carry liability insurance. Ark. Stat. Sec. 66-3242 (1959). According to an opinion of the Arkansas Attorney General of May 10, 1950, no hospital professional liability insurance need be carried by Arkansas county hospitals.

<sup>18</sup> *Muskopf v. Corning Hospital Dist.*, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961).

<sup>19</sup> *City and County of Denver v. Madison*, 143 Colo. 19, 351 P. 2d 826 (1960); *Schwalb v. Connely*, 116 Colo. 195, 179 P. 2d 667 (1947).

<sup>20</sup> A private hospital receiving state aid in the form of a tax exemption and appropriation was not a state institution or state agency and is not entitled to immunity from liability. *Cohen v. General Hospital Soc. of Conn.*, 113 Conn. 118, 154 A. 435 (1931).

<sup>21</sup> The common law rule of sovereign immunity is adhered to by Delaware courts. *Shelhorn & Hill, Inc. v. State*, 187 A. 2d 71 (Del. 1962). The defense of sovereign immunity is waived by purchase of insurance. Del. Code Ann. ch. 18 § 516.

<sup>22</sup> *Colomeris v. District of Columbia*, 226 F. 2d 266 (D. C. Cir. 1955); *Jones v. District of Columbia*, 279 F. 188 (D. C. Cir. 1922).

<sup>23</sup> In *Smith v. Duval County Welfare Board*, 118 So. 2d 98 (Fla. 1960), the county was held immune from suit by a nonpaying patient; however, in *Suwannee County Hospital Corp. v. Golden et al.*, 56 So. 2d 911 (Fla. 1952), it was held that the county was liable to a paying patient.

<sup>24</sup> *Hospital Authority of Hall County v. Shubert*, 96 Ga. App. 222, 99 S. E. 2d 708 (1957).

<sup>25</sup> *Matsumura v. Hawaii County*, 19 Hawaii 18 (1908); *Mark v. City and County of Honolulu*, 40 Hawaii 338 (1953); Revised Laws of Hawaii of 1955 ch. 245A § 2 (1957).

<sup>26</sup> Liable to paying patient; Immune as to non-paying patients. *Henderson v. Twin Falls County*, 56 Idaho 124, 50 P. 2d 597 (1935), *aff'd* 59 Idaho 97, 80 P. 2d 801, appeal dismissed 305 U. S. 568, 59 Sup. Ct. 149 (1938). Under Idaho Code tit. 41 § 3504, § 3505 there is a waiver of immunity to the extent of insurance coverage for both proprietary and governmental functions. If there is no insurance coverage, governmental immunity is not waived.

<sup>27</sup> *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89 (1959); However, Illinois cases hold that the county may waive its immunity to the extent of its insurance coverage; Comment, 9 De Paul L. Rev. 39 (1959).

<sup>28</sup> *Flowers v. Board of Commissioners of the County of Vanderburgh*, 240 Ind. 668, 163 N. E. 2d 224 (1960). *Burns' Ann. Stat. tit. 39 § 1819* (1952); See, *Decline of Sovereign Immunity In Indiana*, 36 Ind. L. J. 223 (1961).

<sup>29</sup> As to paying patients: *Wittmer v. Letts*, 248 Iowa 648, 80 N. W. 2d 561 (1957).

<sup>30</sup> *Wommack v. Lesh*, 180 Kan. 548, 305 P. 2d 854 (1957); *Smith v. Higgins*, 149 Kan. 477, 87 P. 2d 544 (1939); *Keibert v. Board of County Commissioners*, 134 Kan. 401, 5 P. 2d 1085 (1931); *Isham v. Board of County Commissioners*, 126 Kan. 6, 266 P. 655 (1928).

<sup>31</sup> By statute, Ky. Rev. Stat. tit. 67 § 186 (1960), the carrying of liability insurance by county hospitals is a waiver of immunity to the extent of policy limits. The injured person can sue the insurer on the liability policy when liability has been determined by final judgment; *Taylor v. Knox County Board of Education*, 292 Ky. 767, 167 S. W. 2d 700 (1942).

<sup>32</sup> Public hospitals created by the state and its subdivisions are immune from suit. *Messina v. Societe Francaise De Bienfaissiance*, 170 So. 801 (La. App. 1936).

<sup>33</sup> A town is not liable for neglect in performance of duties imposed upon town officials in relation to a small pox epidemic. *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402 (1876). A municipality maintaining a hospital for public welfare is performing a governmental function and is not liable for negligent performance of duties imposed by the legislature. *Anderson v. City of Portland*, 130 Me. 214 (1931).

<sup>34</sup> *Thomas v. Board of County Commisisoners of Prince George County*, 200 Md. 554, 92 A. 2d 452 (1952). Md. Ann. Code, Art. 48A § 85 (1957) provides for a waiver of charitable immunity to the extent of insurance. It has not been authoritatively determined whether this section applies to governmental hospitals.

<sup>35</sup> A state hospital superintendent, as a public officer, is not liable for any omission to perform his statutory duties or for misfeasance of his servants or agents under the doctrine of respondeat superior, but he might be liable for active misfeasance committed in discharge of his ministerial duties. *Somers v. Osterheld*, 335 Mass. 24, 138 N. E. 2d 370 (1956).

<sup>36</sup> *Lewis v. County of Genessee*, 370 Mich. 110, 121 N. W. 2d 417 (1963).

<sup>37</sup> *Spanel v. Mounds View School Dist. No. 621*, *supra* n. 4; Minn. Stat. Ann. ch. 466 § .02 (1963).

<sup>38</sup> Immunity from suit for negligent, tortious or unauthorized acts is specifically retained. Miss. Code Ann. tit. 13 ch. 1 § 3002, § 3003 (1942). By the purchase of liability insurance, immunity is waived to the extent of insurance carried. Miss. Code Ann. tit. 25 ch. 6 § 7129-55 (1944).

<sup>39</sup> *Hannon v. County of St. Louis*, 62 Mo. 313 (1876); *Lloyd v. Garren*, 366 S. W. 2d 341 (Mo. 1963).

<sup>40</sup> *Witter v. Phillips County*, Ill. Mont. 352, 109 P. 2d 56 (1941).

<sup>41</sup> *Stitzel v. Hitchcock County*, 139 Neb. 700, 298 N. W. 555 (1941); *Davie v. Douglas County*, 98 Neb. 479, 153 N. W. 509 (1915).

<sup>42</sup> Although a public hospital established by a county under a statute was free from liability, the county was not relieved from legal responsibility. *Hughey v. Washoe County*, 73 Nev. 22, 306 P. 2d 1115 (1957).

<sup>43</sup> *Cushman v. Grafton*, 97 N. H. 32, 79 A. 2d 630 (1951); N. H. Rev. Stat. Ann., ch. 412 § 3 provides for a waiver of governmental immunity to the extent of insurance coverage.

<sup>44</sup> *Buckalew v. Middlesex County*, 91 N. J. 517, 104 A. 308 (1918); *Moskowitz v. Herman*, 16 N. J. 223, 108 A. 2d 429 (1954).

<sup>45</sup> *Elliott v. Lea County*, 58 N. M. 147, 267 P. 2d 131 (1954); *Clark v. Ruidoso-Hondo Valley Hospital*, 72 N. M. 9, 380 P. 2d 168 (1963).

<sup>46</sup> N. Y. General Municipal Law 50 (d) (1963).

<sup>47</sup> *Hitchings v. Albemarle Hospital*, 220 F. 2d 716 (4th Cir. 1955).

<sup>48</sup> N. D. Century Code Ann. tit. 40 ch. 43 § 07 authorizes political subdivisions to carry liability insurance. There is, then, a waiver of the defense of sovereign immunity to the extent of such insurance.

<sup>49</sup> *Wierzbicki v. Carmichael*, 118 Ohio App. 239, 187 N. E. 2d 184 (1963).

<sup>50</sup> *Board of Commissioners of Harmon County v. Keen*, 194 Okla. 593, 153 P. 2d 483 (1944); *Hazlett v. Muskogee County*, 168 Okla. 290, 32 P. 2d 940 (1934).

<sup>51</sup> Under Ore. Rev. Stat. ch. 243 § 110 (1959) an Oregon county can purchase liability insurance; the defense of governmental immunity is waived to the extent of the insurance carried.

<sup>52</sup> A county has immunity from tort liability when exercising a governmental function. Whether a hospital is a governmental function or proprietary is undecided. A county is immune while burning brush. *Wandoner v. Central Poor Dist. of Luzerne County*, 267 Pa. 375, 110 A. 175 (1920); also immune in erection and maintenance of a county court house. *Hartness v. Allegheny Co.*, 349 Pa. 248, 37 A. 2d 18 (1944).

<sup>53</sup> A suit against a public hospital was permitted even though the patient paid only a small charge for the services. *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675 (1879).

<sup>54</sup> *Mullins Hospital v. Squires*, 233 S. C. 186, 104 S. E. 2d 161 (1958).

<sup>55</sup> *Jerauld County v. St. Paul-Mercury Indemnity Co.*, 76 S. D. 1, 71 N. W. 2d 571 (1955).

<sup>56</sup> A county hospital is immune: *Webb v. Blount Memorial Hospital*, 196 F. Supp. 114 (D. C. Tenn. 1961); *Johnson v. Hamilton County*, 156 Tenn. 298, 1 S. W. 2d 528 (1927). In Tennessee, governmental immunity is waived by purchase of insurance. *McMahon v. Baroness Erlanger Hospital*, 306 S. W. 2d 41 (Tenn. App. 1957). Cert. den. 1957.

<sup>57</sup> Counties are not liable for torts committed in the exercise of governmental functions. The operation of a ferry boat is governmental function. *In Re Nueces County, Texas, Road Dist. No. 4*, 174 F. Supp. 846 (S. D. Texas 1959). The maintenance of a county bridge is governmental. *Heigel v. Wichita County*, 84 Tex. 392, 19 S. W. 562 (1892). Whether a hospital is a governmental or proprietary function is undecided.

<sup>58</sup> Sovereign immunity does not extend to include immunity from injunction for restraint, creation, and operation of a nuisance. The county was restrained from constructing and operating a hot asphalt plant in a residential area. *Lund v. Salt Lake County*, 58 Utah 546, 200 P. 510 (1921).

<sup>59</sup> Vt. Stat. Ann. ch. 29 § 1403 provides a waiver of sovereign immunity by the state, municipal corporations and counties by the purchase of liability insurance.

<sup>60</sup> An action against a public corporation organized exclusively for governmental purposes will not lie. *Maia's Adm'r. v. Directors of Eastern States Hospital*, 97 Va. 507, 34 S. E. 617 (1899).

<sup>61</sup> Wash. Rev. Code tit. 70 ch. 44 § .060 (8) (1953). This statute applies to both negligent acts of commission and omission. *Gile v. Kennewick Public Hospital District*, 48 Wash. 2d 774, 296 P. 2d 795 (1950).

<sup>62</sup> *Shaffer v. Monongalia General Hospital*, 135 W. Va. 163, 62 S. E. 2d 795 (1950).

<sup>63</sup> Governmental immunity for all public bodies from tort actions is specifically ended. *Holytz v. City of Milwaukee*, 17 Wisc. 2d 26, 115 N. W. 2d 618 (1962).

<sup>64</sup> *Bondurant v. Board of Trustees of Memorial Hospital of Converse County*, 354 P. 2d 219 (Wyo. 1960).