

GOVERNMENTAL IMMUNITY IN TORT: A WANING PRIVILEGE

The past quarter century, itself a period characterized by marked political, economic and social changes and by the spirit of "anti-establishmentarianism", has produced many changes in Anglo-American private law, one of the most significant of which has been the increased subjection of the state to responsibility in tort or, to put it in another way, the shrinking immunity of the state from responsibility to repair damage caused by the delicts of its agents and servants. Commentators have long singled out this doctrine of governmental immunity in tort as a target for their criticism¹ but only now is their effort beginning to bear fruit. Retreat has been sounded: but it is neither orderly nor complete. One of the prime difficulties is that of discovering just what it is that one wishes to destroy or reform. When one sets about to uproot a doctrine or a shrub, it is necessary to find and trace all the roots, lest some be left to flourish in contradiction, and when one sets about to discover the roots of the doctrine of state immunity, one digs in dark and deep earth indeed.

I

Beginning with Bracton and Henry III because little reliable evidence on the matter exists earlier, the "immunity" of the king appeared to rest on his "prerogativity" or "exceptionality".² "Writs do not run against the King" wrote Bracton.³ "Our Lord the King can not be summoned or receive a command from anyone", declared the King's Court in 1234.⁴ "The king could not be sued in the central courts of law because they were his courts, and no lord could be sued in his own court".⁵ Pollock

¹ The classic articles are still those of Professor Borchard on *Government Liability in Tort*, 34 "Yale L. Jour." 1, 129, 229 (1924-5) and 36 "Yale L. Jour." 1, 757, 1039 (1926-7).

² Pollock and Maitland, *History of English Law*, 2d ed. v. I, p. 512.

³ Bracton f. 5b.

⁴ Bracton's Notebook pl. 1108.

⁵ Holdsworth, *History of English Law*, v. III, pp. 356-7.

and Maitland put the matter quite practically: "If Henry III had been capable of being sued, he would have passed his life as a defendant".⁶ The king could himself appear as plaintiff and use the ordinary writs or he could submit to be treated as a defendant,⁷ but he could not be commanded. This "prerogativity" (immunity) was personal to the king and for example did not apply to the consort, but Pollock and Maitland add that the king had the power to shield those who did unlawful acts in his name and could withdraw from the ordinary course of justice cases in which he had a concern.⁸ During this first period of the development of the doctrine of immunity, the dominant root appears to be that the king could not be sued or commanded not because he could do no wrong but because it was contrary to kingship that he be commanded.

The hardship resulting from the non-suability of the king was somewhat relieved by the use and development of another remedy, namely, that of petition: the injured subject could not command the king by writs but he could petition the king "as the fountain of justice and equity" asking him to redress the wrongs done to the subject. In so doing, it was urged that the king was morally bound to do for his subjects the same justice which his courts could compel them to do to one another.⁹ The period between the fourteenth and eighteenth centuries produced two important modifications of the doctrine of immunity: first, the development of the petition of right and its differentiation from the normal petition of "grace and favour"; and, secondly, the almost imperceptible shift of emphasis from the concept of a personal prerogative of the *king* to an immunity of the *crown*. With regard to this latter effect, historians have referred to the lawyers of the sixteenth century as having elaborated "a creed of royalty which shall take no shame if set beside the Athanasian model" so that the king had "a body corporate in a body natural and a body natural in a body corporate", but they also admit that such may have been a "necessary expedient" to solve difficulties arising out of the increased activities of the "kingly office", so that it indeed resembled a "corporation sole".¹⁰

Down to the nineteenth century the petition of right was primarily used in connection with the recovery of property, although we must be reminded that property and tort were not then clearly distinguished as to available and proper remedies. Its use was supported on the theory that "the subject ought to be able to get some sort of equitable relief against the Crown".¹¹ An important link in the ultimate development of the

⁶ Pollock and Maitland, *op. cit. supra* n. 2 at p. 516.

⁷ Pollock and Maitland, *op. cit. supra* n. 2 at p. 517.

⁸ *Ibid.*

⁹ Holdsworth, *op. cit., supra* n. 5 v. II, pp. 198-9. See also: Holdsworth, *History of Remedies against the Crown*, 38 "L.Q.R." 141 at p. 280 (1922).

¹⁰ Pollock and Maitland, *op. cit. supra* n. 2 at p. 511.

¹¹ Holdsworth, *loc. cit. supra* n. 9 at pp. 280-3.

petition came in *The Bankers Case*,¹² where the petition of right procedure was accepted as a proper method by which to recover an annuity from the Crown. While annuities were then usually regarded as recoverable by a real action, yet the theory was developing that they might be treated as rights against the Crown resting on *contract*. However, it was not until 1874 that the full step was taken and the petition of right was extended to recovery in cases of breach of contract made by the Crown.¹³

Although the petition of right came to be accepted as a means to recover for breach of the king's contracts, yet all authorities agreed that it would not lie for a pure tort (as distinct from mixed tort and property aspects such as nuisance). As Holdsworth put it: "no one ever thought of petitioning the king for redress of a tort committed by the king himself".¹⁴ Here we come face to face with a second major root of the doctrine of immunity, namely, the concept that "the King can do no wrong". But by the end of the eighteenth century the rule that a petition of right would not lie for a tort was being subjected to exceptions and limitations in the case of torts committed by the king's servants,¹⁵ and the nineteenth and twentieth centuries which have seen the ever increasing activities of the modern state have emphasized the necessity of subjecting the state or crown to responsibility for damage caused by broken contracts and for damage caused by agents or servants in the course and scope of their employment. Ultimately, this subjection was accomplished in England by the Crown Proceedings Act of 1947¹⁶ and in the United States the federal government consented to claims in contract as early as 1855¹⁷ and in tort in 1946.¹⁸

II

Up to this point we have been tracing the roots of the doctrine in England, but what can we say of its roots in the United States where there was neither king nor a concept of unified sovereignty?¹⁹ To what extent did the United States receive as part of the law of England this doctrine of sovereign immunity along with other legal principles set forth in Blackstone's Commentaries?²⁰ The matter was clearly raised by article

¹² (1690-1700) 14 St. Tr. 1.

¹³ Holdsworth, *loc. cit.*, *supra* n. 9 at pp. 286-7, 292.

¹⁴ *Id.* at p. 289.

¹⁵ *Ibid.*

¹⁶ 10 and 11 George VI c. 44.

¹⁷ 10 Stat. 612 ad amended 12 Stat. 765.

¹⁸ 60 Stat. 842.

¹⁹ See excellent study: G. W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 "La. L. Rev." 466 (1953).

²⁰ "Blackstone and Coke were read and reread by the American lawyer and the Revolution did not sever the tie of the colonists with the common law." G. W. Pugh, *loc. cit. supra* n. 19 at p. 481.

III section 2 of the Federal Constitution which provided that the "judicial power shall extend to controversies between a state and citizens of another state" and by the celebrated case of *Chisholm v. Georgia*²¹ decided by the United States Supreme Court in 1792. Citizens of South Carolina brought suit against the State of Georgia pursuant to article III section 2 of the Constitution and Georgia refused to appear before the Supreme Court to answer the suit on the ground that Georgia was a sovereign state and so not subject to such action. In deciding that Georgia was subject to such suit the court laid down three bases for decision which are relevant. First, Mr. Justice Cushing refused arguments based upon the law of England, saying that the point before the court turned not upon the law and practice of England or indeed upon that of any other country, but *solely* upon the Constitution of the United States as established by the people.²² Secondly, Chief Justice John Jay declared that in the United States sovereignty lies with the people, it having passed on the Declaration of Independence directly from the Crown of Great Britain to the people of what was later to become the United States of America. He continued by stating that while in Europe and England the feudal notion of a prince as sovereign and the people as subjects prevailed, yet in the United States the people were sovereign without subjects, equal as fellow-citizens and joint-tenants of sovereignty.²³ Hence the suit by the citizens of South Carolina against all the citizens of Georgia did not involve a diminution of Georgian sovereignty but merely a dispute among joint-tenants of sovereignty. Thirdly, Mr. Justice Wilson attacked the inequity of any other result by posing the question: "a state like a merchant makes a contract. A dishonest state, like a dishonest merchant, wilfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former, when summoned to answer the fair demands of its debtor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring I am a sovereign state? Surely not".²⁴

But however cogent the reasoning of the Supreme Court, many states (their credit having been vastly overextended due to the issuance of bonds and paper to defray the expenses of the Revolution)²⁵ fearing that the decision in *Chisholm v. Georgia* might result in a flood of federal court judgments against them brought by-out-of-state creditors, procured the adoption of the Eleventh Amendment to the Federal Constitution.²⁶ Therein it was provided that "the judicial power of the United States

²¹ 2 Dallas 419.

²² 2 Dallas at 466.

²³ 2 Dallas at p. 471.

²⁴ 2 Dallas at p. 456.

²⁵ See *Cohens v. Virginia*, 12 U.S. 264 at 406 (1821).

²⁶ Proposed to the legislatures of the various states on 5 September 1794 and declared ratified on 8 January 1798.

shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another state”.

A quarter century later, in *Cohen v. Virginia*²⁷ the Supreme Court of the United States had to interpret that portion of the Federal Constitution which extended the judicial power to all cases in law and equity arising under the Constitution, the laws of the United States or treaties made or which shall be made under their authority. The question before them was the extent to which this section authorized the Supreme Court to review an action between a state and its citizens which had been tried in the state's own courts. In upholding the right to review, Chief Justice Marshall pointed out that the Supreme Court possesses original jurisdiction to hear controversies to which the United States shall be made a party and controversies between two or more states, so that nothing was repugnant to a state's sovereignty in the court's exercise of appellate jurisdiction over controversies involving the Constitution or laws of the United States wherein a state was a party. The argument was made by counsel for Virginia that “a sovereign independent state is not suable except by its own consent.”²⁸ To which the Chief Justice replied that consent may be given in a general law, for example by the Constitution itself, and that if “upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions and has entrusted that power to a tribunal in whose impartiality it confides”.²⁹

Implicit in these early decisions is the doctrine that neither, the United States nor any state could be sued without its consent, but that such consent might be found in the federal or state constitutions or in particular statutes or treaties.³⁰ This immunity of the sovereign, often invoked, was neither discussed nor explained, despite the fact that so far as the United States was concerned, it could neither logically nor historically be supported by the English feudal notion of the relation of prince and subject. Those citizens who were denied relief because of the non-suability of the United States (as indeed of the several states) turned to the legislature for relief in the form of private acts, a response quite different from the English who addressed their petition of right to the king. Finally, in 1855³¹ in order to save the time of the Congress, it created a court for the investigation of claims against the United States, which court was directed to report on such matters to the Congress, and in 1863³² was created the present Court of Claims with authority to render judgments

²⁷ 12 U.S. 264 (1821).

²⁸ *Id.* at p. 380.

²⁹ *Ibid.*

³⁰ E.g. *Beers v. Arkansas*, 61 U.S. 527 (1857).

³¹ Act of 24 February 1855. 10 Stat. 612.

³² Act of 3 March 1863. 12 Stat. 765.

on claims (except tort) against the United States. Thus was laid the pattern for the giving of consent by statute, and in *Nicholl v. United States*³³ a theory was announced by the Supreme Court upon which to base this immunity. Mr. Justice Davis wrote that "every government has an inherent right to protect itself against suits and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applied to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created".³⁴

Thus in the United States as in England the nineteenth century saw the creation of a remedy against the state in claims based on contract, yet in both countries claims based on tort received less friendly treatment. Mr. Justice Miller in *Langford v. United States*³⁵ declared that "while Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid against the United States when made by some officer of the government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of someone. For such acts, however high the position of the officer or agent who did or commanded them, Congress did not intend to subject the government to the results of a suit in that court. This policy is founded in wisdom and is clearly expressed in the act defining the jurisdiction of the court, and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives".³⁶ And again in the United States as in England we find statutes which expressly authorized suits against the government for certain torts, for example, admiralty and maritime torts,³⁷ federal employees' compensation,³⁸ small torts³⁹ and postal claims,⁴⁰ culminating in 1946 in the United States in the Federal Tort Claims Act of 1946,⁴¹ Professor Street noting that the bill was introduced under the heading "more efficient use of Congressional time".⁴²

³³ 74 U.S. 122 (1868).

³⁴ *Id.* at p. 126.

³⁵ 101 U.S. 341, at p. 345 (1879).

³⁶ *Ibid.*

³⁷ 41 Stat. 925 (1920).

³⁸ 39 Stat. 742 (1916).

³⁹ 42 Stat. 106 (1922).

⁴⁰ 42 Stat. 63 (1921).

⁴¹ 60 Stat. 842 (1946).

⁴² Street, *Government Liability* (1953). at p. 13.

In summary, it can be observed that the doctrine of sovereign immunity has at one time or another been rested on one or more of the following grounds:

- 1) that there exists no court which can command the sovereign to submit to its jurisdiction. In this connection, it is interesting to note that in the United States a special court of claims was created for claims other than tort but that tort claims are submitted to the ordinary courts but without a jury;
- 2) that the king can do no wrong. The Supreme Court of the United States clearly rejected this notion pointing out that the president not only can do wrong but can be impeached for it and if found guilty removed from office.⁴³ However, Mr. Justice Holmes, in opinions which have been roundly criticised,⁴⁴ put forth the notion that "there can be no legal right as against the authority that makes the law on which the right depends"⁴⁵ and, as we shall see later, some of the states have adhered to this absolutist theory;⁴⁶
- 3) that it is justified by public policy. In this connection, it is important to note that almost without exception the Congress in establishing new corporations to discharge governmental functions has included the authority "to sue and be sued" in the provision, thus indicating the existence of a climate of opinion unfavorable to the extension of immunity.⁴⁷ On the other hand, the Federal Tort Claims Act in the United States falls short of subjecting the state to full responsibility in tort, excepting from its operation such matters as claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights,⁴⁸ and the courts have further narrowed the field by excluding actions based on strict liability for ultrahazardous undertakings.⁴⁹

⁴³ *Langford v. U.S.*, 101 U.S. 341 (1879).

⁴⁴ E.g. Borchard, *Government Responsibility in Tort V*, 36 Yale L. Jour. 757 (1927).

⁴⁵ *Kawananakoa v. Polyblank*, 205 U.S. 349, at p. 353 (1907). See also: *The Western Star*, 257 U.S. 419, at p. 433 (1922).

⁴⁶ Borchard remarks that "That remnant of absolutism by a curious turn of legal history and political theory finds its most vigorous support in the United States." 36 "Yale L. Jour." 757, at p. 805 (1927). Thus, for example, New York in its 1939 act provided in section 8 not only for the waiver of immunity from suit but also for waiver of immunity from liability.

⁴⁷ See e.g. *Keifer and Keifer v. R.F.C.*, 306 U.S. 381, at pp. 390-1 (1938).

⁴⁸ 60 Stat. 842, c. 753, sec. 421 (h).

⁴⁹ *Dalehite Case*, 346 U.S. 15 (1953).

III

Turning from the federal government to those of the various states and municipalities of the United States, we find at least three positions defended.

First, the position that the state has complete immunity from responsibility in tort which it may waive by legislative act either in particular cases or by general waiver. This position may be illustrated by decisions of the highest courts in South Carolina⁵⁰ and Louisiana. A more detailed examination of the Louisiana doctrine may be justified since it is surprising to find Louisiana, a state whose private law is drawn from European sources, adopting an absolutist position with regard to immunity declaring that no exceptions exist to the rule that the state cannot be sued without its consent.⁵¹ As Judge Fenner put it: "The immunity of the State of Louisiana from suit in her own courts means absolute immunity from judicial compulsion, directly or indirectly, so far as the performance of her own contracts or obligations are concerned."⁵² Article 3, section 35 of the Louisiana Constitution states that the legislature may authorize suit to be filed against the State and that when it does it shall provide a method of procedure and the effect of the judgments which may be rendered therein.⁵³ However, in *Duree v. Maryland Casualty Company*⁵⁴ where the plaintiff procured from the legislature authorization to sue the State of Louisiana with respect to injuries received due to the negligence of the State's agents, the Supreme Court of Louisiana drew a distinction between "the traditional immunity of the state from suit and its long recognized immunity from liability *vel non* as respects actions based on torts committed by agents engaged in the performance of governmental functions",⁵⁵ *rex non potest peccare*,⁵⁶ and dismissed the plaintiff's claim because the state had not waived its immunity from liability, but only its immunity from suit. Thereafter, the Constitution of Louisiana was amended to permit the Legislature to waive immunity from suit *and* from liability of the State.⁵⁷

⁵⁰ *Irvine v. Greenwood*, 89 So. Car. 511, 72 S.E. 228 (1911).

⁵¹ *Cobb v. La. Board of Institutions*, 85 So. 2d 10 (S. Ct. La. 1956).

⁵² *State ex rel. Hart v. Burke, Treasurer et al.*, 33 La. Ann. 498, at p. 516 (1881).

⁵³ Louisiana Constitution of 1921 as amended.

⁵⁴ 114 So. 2d 594 (1959).

⁵⁵ *Id.* at p. 596.

⁵⁶ *Bass v. State*, 34 La. Ann. 494, at p. 501 (1882). "The consent to be sued does not at all imply an admission or a confession of liability. It is a mere act of grace which does not relieve the plaintiff from the obligation of making out his case, both in fact and in law."

⁵⁷ Adopted 8 November 1960. See also Acts of 1960: N^o 27. LSA-RS 13-5101 to 13-5110.

The second position is found primarily in cases involving municipalities and consists in drawing a distinction between those functions which are governmental (to which immunity attaches) and those which are proprietary or corporate (to which immunity in tort does not attach). The pressure to draw such a distinction arose from the fact that the modern municipality performs tasks and engages in activities which in earlier days were carried on by private corporations, for example, transportation, housing, utilities and recreational facilities, and hence by undertaking the function the municipality is held to accept the responsibility in tort for damage caused. The difficulty in this position lies in the setting up of a satisfactory test by which to make the distinction.⁵⁸

The third position, now taken by a growing number of courts, is a repudiation of the doctrine of immunity for torts "for which its agents are liable". The California Supreme Court has called the immunity doctrine "an anachronism without rational basis" which "has existed only by force of inertia".⁵⁹ But in repudiating the doctrine the California court was careful to point out that its decision did not affect the settled rules of immunity of governmental officials for acts within the scope of their authority.⁶⁰ Two years earlier, the Supreme Court of Illinois had before it the question whether a school district was immune from liability for tortiously inflicted personal injury to a pupil arising out of the operation of a school bus owned and operated by the district.⁶¹ Overruling fifty years of jurisprudence, the Supreme Court found that none of the reasons advanced in support of the immunity had any true validity today⁶² and that it was "unjust, unsupported by any valid reason, and has no rightful place in modern day society".⁶³ The Supreme Court of Wisconsin abrogated the doctrine as it "applies to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state—whether they be incorporated or not".⁶⁴ But the court was quick to point out that its decision did not broaden the government's obligation so as to make it responsible for *all* harms to others: "it is only as to those harms which are torts, that governmental bodies are to be liable by reason

⁵⁸ See Borchard, *Government Liability in Tort: Municipal Corporations*, 34 "Yale L. Jour." 129 (1924).

⁵⁹ *Muskopf v. Corning Hospital District*, 359 Pac. 2d 457, at p. 460 (1961).

⁶⁰ "Governmental officers are liable for the negligent performance of their ministerial duties . . . but are not liable for their discretionary acts within the scope of their authority even if it is alleged that they acted maliciously." *Muskopf v. Corning Hospital District*, 359 Pac. 2d 457 at p. 462 (1961). Note that the California legislature thereafter declared a moratorium on such claims. *Corning Hospital District v. Superior Court*, 370 Pac. 2d 325 (1962).

⁶¹ *Molitor v. Kaneland Community Unit Dist.* No. 302, 163 N.E. 2d 89, at p. 90. (Illinois, 1959).

⁶² *Id.* at p. 95.

⁶³ *Id.* at p. 96.

⁶⁴ *Holytz v. City of Milwaukee*, 115 N.W. 2d 618, at p. 625. (Wisconsin, 1962).

of this decision".⁶⁵ (*Italics added*). As early as 1957 the Supreme Court of Florida had overruled its prior jurisprudence and held that "a municipal corporation may be held liable for the torts of police officers under the doctrine of *respondet superior*", but that its decision would not "impose liability on a municipality in the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions".⁶⁶ Minnesota, while not abolishing sovereign immunity of the state itself, did express its intention "to overrule the doctrine of sovereign immunity as a defense with respect to tort claims against school districts, municipal corporations and other subdivisions of government on whom immunity has been conferred by judicial decision arising after the next Minnesota Legislature adjourns".⁶⁷ But again Minnesota did not wish to "suggest that discretionary as distinguished from ministerial activities or judicial, quasi-judicial, legislative or quasi-legislative functions may not continue to have the benefit of the rule".⁶⁸ Arizona has abolished "the substantive defense of governmental immunity" so that liability may attach only to those individual employees who actually were guilty of some tortious conductor or, as in (the instant) case, to those individual employees who were in sufficient control of the highway or the particular job as to be in fact responsible therefor. Under the theory of *respondet superior*, the State itself as employer would also be liable.⁶⁹ The Supreme Court of Michigan noting that "the rules of governmental immunity have no legal defense, only the argument that age has lent weight to the unjust whim of long-dead kings", and that "it is hard to say why the courts of America have adhered to this relic of absolutism so long a time after America overthrew monarchy itself!" concluded that "from that date forward the judicial doctrine of *governmental* immunity from *ordinary* torts no longer exists in Michigan".⁷⁰ (*Italics added*).

IV

The decline of the doctrine has set in earnest. One can not ignore the fact that the highest courts in such important jurisdictions as New York,⁷¹

⁶⁵ *Ibid.* But Wisconsin distinguished between "governmental immunity from torts" and "sovereign immunity of the state from suit" and held that their decision "removes the state's defense of non-liability, but it has no effect upon the state's sovereign right under the Constitution to be sued only upon its consent", pp. 625-6.

⁶⁶ *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, at p. 133 (Florida, 1957). But see the partial retreat in *Buck v. McLean*, 115 So. 2d 764, at p. 768. (Fla. App. 1959).

⁶⁷ *Spanel v. Mounds View School District No 621*, 118 N.W. 2d 795, at p. 803 (Minnesota, 1962).

⁶⁸ *Ibid.*

⁶⁹ *Stone v. Arizona Highway Commission*, 381 Pac. 2d 107, at p. 113. (Arizona, 1963).

⁷⁰ *Williams v. City of Detroit*, 111 N.W. 2d 1, at pp. 20, 24. (Michigan, 1961).

⁷¹ New York has achieved this position by legislative act.

Michigan, Illinois, Wisconsin, California, Arizona and Florida have acted to repudiate the doctrine to the extent that it is a judicial creation. Colorado, while its highest court attacks the doctrine yet considers that any reform must be made by the legislature and not by the court.⁷² At all events the roots of the doctrine are now exposed and criticised, but it will take long before they die.

Meanwhile certain observations can be drawn from our study. First, the attack upon the doctrine of governmental immunity in tort has come from courts (traditionally thought to be the most conservative arm of government) rather than from legislatures. It is true that legislatures in such states as Illinois, Michigan and New York⁷³ have created special courts of claims in such matters, but such action has been exceptional. It is also true that state legislatures have in some carefully circumscribed areas of activity consented to be sued in tort.⁷⁴ But on the other side, one can point to the fact that no sooner had the highest court in California decided that the doctrine of governmental immunity could no longer be used "to shield an entity of government from liability for torts for which its agents were liable",⁷⁵ than the California legislature passed a statute providing that "the doctrine of governmental immunity from tort liability is hereby reenacted as a rule of decision in the courts of this state". However, the statute itself was given a limited duration and so has been held to create merely a moratorium in order to give the legislature time in which to review the problem and the need for legislation on the matter.⁷⁶ It is obvious that the court caught the legislature by surprise.

Secondly, the recent decisions illustrate how difficult it is to draft a rule which will apply to the state the principle of *respondet superior* applicable to other corporations and individuals as to tort responsibility, and yet preserve the traditional immunity of those who exercise judicial, quasi-judicial, legislative and quasi-legislative functions from responsibility in tort while they are engaged in these functions. The pedestrian run down by the negligent postal truck driver is to be compensated: the citizen defamed by the legislator on the floor of the legislature is to be left to "redress" his injury at the ballot box. Thus we have seen the various courts groping for a formula. We have seen the reluctance of the United States to place itself on the same footing as other corporations with

⁷² *Tesone v. School District N^o RE-2 in the County of Boulder*, 384 Pac. 2d 82, at p. 84. (Colorado, 1963).

⁷³ See: Shumate, *Tort Claims against State Governments*, 9 Law and Contemporary Problems 242, at p. 254. (1942).

⁷⁴ Shumate, *loc. cit. supra* n. 73.

⁷⁵ *Muskopf v. Corning Hosp. Dist.*, *loc. cit. supra* n. 59.

⁷⁶ *Corning Hosp. Dist. v. Superior Court of Tehama County*, 370 Pac. 2d 325 (1962).

regard to tort, excepting from the operation of the consent statute the whole field of intentional harms. The United States is at the moment testing the extent to which the chief executive of a state may be held in contempt of an order of the federal Supreme Court, a question not without difficulty.⁷⁷

Thirdly, we can note among the commentators a division of opinion: some consider that the proper course of action would be to place the state in the same position as a citizen with respect to responsibility in tort: others would go further and urge the adoption of state responsibility in tort based on a "risk" principal⁷⁸ rather than on "fault", and so would require the state to respond in damages regardless of fault if in fact it had caused the injury. The latter position would in effect place the state in the role of an insurer.

Fourthly, the act of repudiating a doctrine previously held and applied raises the following questions for the courts: is the new rule to be limited to the case before the court? is it to be limited to future cases with or without the present case?⁷⁹ or is it to operate retrospectively so as to validate old claims barred under the previous rule? The choice of one or the other of these possibilities may well determine the economic survival of some agencies of government, may well increase the cost of premiums on insurance coverage, may well raise the tax requirements of a particular government.

Fifthly, the opinions in some of the recent cases present very interesting essays on such important questions of legal theory as *stare decisis* and the growth of the common law, and the respective roles of the judge and legislator in the accomplishment of change and reform in the legal order.

Finally, we may note that in the matter of surrendering immunity in tort and contract by general statutory consent, the federal government has been far more active than the states. The hope expressed in 1946 by some commentators that the states would follow the lead of the federal government's Tort Claims Act has not been realised. Some explanation of this reluctance may be found in the fact that in recent years, particularly in such matters as the protection of civil rights, the federal government has been increasingly active in the protection of citizens against their respective states, a climate of opinion which is not likely to encourage states to abandon any of their traditional immunities either with regard

⁷⁷ In the troubles of Mississippi and the Supreme Court.

⁷⁸ See: Street, *Government Liability*. (1953). at p. 78.

⁷⁹ See: *Molitor v. Kaneland Community Unit District No 302*, 163 N.E. 2d 89 (Illinois, 1959).

to their citizens or to the federal government. As in the field of public international law, sovereign immunities are apt to be surrendered only in times when they are not seriously challenged, or when an acceptably adequate substitute is available.

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