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SOVEREIGN IMMUNITY

THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS

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PREFACE

The doctrine of sovereign immunity, and the extension of that doctrine to public officials, has been embroiled in controversy throughout the history of this nation. In spite of the fact that among jurists and legal scholars the defenders of the doctrine are far outnumbered by its critics, sovereign immunity continues to be the rule rather than the exception in most jurisdictions.

The first part of this report will trace the history, development, and evolution of sovereign immunity in the United States, survey its current status in light of case and statutory law, and discuss the policy questions at issue in its invocation and operation. The second part of the report will analyze the specific question of the liability of public officials and its effect on the office of Attorney General and the public treasury.

Several aspects of the liability of public officials have been considered in earlier COAG publications. These include: "Prison Officials' Liability For Damages In Inmate Suits", May, 1973, and "Legal Issues Concerning the Role of the National Guard in Civil Disorders", December, 1973.

This report considers the broader issues of sovereign immunity and public official liability, as well as the particular problems of particular officials in light of more recent case and statutory law.

Ben A. Rich, staff attorney, had primary responsibility for this report.

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1. HISTORICAL BASIS OF THE DOCTRINE OF SOVEREIGN IMMUNITY

Sovereign immunity is an outgrowth of the English monarchical tradition epitomized by the adage "the King can do no wrong". Legal historians point out, however, that the true meaning of that principle is that the Kings' courts had no jurisdiction over the King because they were created by him and subject to him. Therefore, the statement should be interpreted as one of jurisdiction rather than literal fact.[1] One could bring suit against the King through a petition of right in the Court of Exchequer.[2] Even in a strong monarchy, there was no absolute immunity.

The great mystery is how this absolutist, monarchical notion came to be an accepted legal principle in a new democracy like the United States of the early nineteenth century.[3] One can scarcely imagine any idea more antithetical to the basic tenents of democratic government than that which holds that the people, at whose pleasure and for whose benefit the government exists, cannot sue their representatives when they have been wronged by them. One commentator, in an effort to solve the riddle, observed: "Only out of the sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state."[4]

Chisholm v. Georgia, one of the earliest Supreme Court cases on the subject, held that Article III of the Constitution[5] gave the federal courts jurisdiction over suits against a state by citizens of another state, whether or not the state had consented to suit.[6] This decision caused a great deal of turmoil among the states, who feared that this would open the door to innumerable suits based on debts accrued during the Revolutionary War, and eventually bankrupt the fledgling state treasuries. In response to this economic fact of life, Congress passed the Eleventh Amendment in 1798, which provided that:

> The juridical power of the United States shall not be construed to the extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

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1. 1 Pollock and Maitland, THE HISTORY OF ENGLISH LAW 518 (1909 ed.)

2. Holdsworth, The History of Remedies Against the Crown, 38 L.Q. REV. 141.

3. Borchard, Governmental Responsibility in Tort, 34 YALE L.J. 1,4 (1924).

4. Watkins, THE STATE AS PARTY LITIGANT 12 [Johns Hopkins U. Studies in the History of Political Science, Series XLV, No. 1 (1927)].

5. Article III of the U. S. Constitution provides: "The judicial power of the United States shall extend to all cases, in law and equity... between a state and the citizens of another state."

6. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

Although the language of the Amendment would appear to allow suits against a state by citizens of that state, even when the state has not consented, Hans v. Louisiana has held that such suits cannot be maintained unless the state has consented thereto.[7]

Not until 1834, in the case of U.S. v. Clarke, was the Supreme Court asked to determine the applicability of sovereign immunity to the federal government.[8] Even then the statement of the Court that the doctrine of sovereign immunity applied to the federal, as well as state governments, was obiter dictum and came in the form of an ex cathedra pronouncement unaccompanied by support in reason or authority.

In a somewhat later case, U.S. v. McLemore, the Court held that "the government is not liable to be sued, except with its own consent, given by law."[9] The very next opinion of the Court on that issue, four years later states:

> ...no maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign, or a government representing a sovereign, cannot ex delicto be amenable to its own creatures or agents employed under its authority for the fulfillment of its own legitimate ends.[10]

The Court made this pronouncement without any policy justification, and citing as the only authority for the declaration the McLemore case.[11]

Thus within fifty years after the birth of the Republic, sovereign immunity--the king's prerogative--had become a fundamental principle of American jurisprudence. Indeed, in the cases which formed the legal bedrock of the doctrine, the courts felt no obligation to justify or explain their adoption of thie rule by logic, deduction or legal authority.

The early cases in which state courts invoked the doctrine of sovereign immunity for state and local governments exhibit a similar absence of justification.[12]

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

8. U.S. v. Clarke, 33 U.S. (8 Pet.) 436 (1834).

9. U.S. v. McLemore, 45 U.S. (4 How.) 286, 287-88 (1846).

10. Hill v. U.S., 50 U.S. (9 How.) 385 (1850).

11. Id. at 389.

12. Black v. Republican, 1 Yeates 139 (Pa. 1792); Commonwealth v. Colquhouns, 2 Hen. & M. 213 (Va. 1808). See also D. Kramer, The Governmental Tort Immunity Doctrine in the United States, 1790-1955, 1966 U. ILL. L.F. 801.

The common law tort immunity of municipalities is based upon an early misinterpretation of the English case of Russell v. Men of Devon,[13] and the doctrine of stare decisis. The precise holding of the Russell case is that an action will not lie against an unnamed group of men residing together. The rationale of the decision is readily apparent from the language of the opinion.

> The defendants are the men of Devon...the inhabitants of that county at the time of...the writ: but the inhabitants of a county are a fluctuating body and before judgment...other persons may... reside in the county, when the whole damages may be levied on such innocent persons...
>
> All civil suits...must either be brought against individuals... particularly named, or against corporation...This mode of bringing actions against large bodies of men would render nugatory the privileges of the crown of creating corporations, and would destroy the mode of suing corporations in their corporate capacity.[14]

The clear implication of the opinion is that a different result would have been reached if the suit had been brought against an incorporated town. Indeed, the opinion goes on to state: "The question here is, whether this body of men, who are sued in the present action, are a corporation against whom such an action may be maintained."[15]

In a later English case,[16] the court held that a political subdivision is liable for the damages generated through its own negligence. Yet another case in that jurisdiction observed:

> ...it has been held that no such action on the case would lie against the inhabitants of a county for a special injury sustained by a plaintiff by reason of their neglect to repair a county bridge, Russell v. The Men of Devon. We think it clear, on the full consideration of that case, that the only reason why the action would not lie was because the inhabitants of the county were not a corporation, and could not be sued.[17]

13. Russell v. Men of Devon, 100 Eng. Rep. 359 (1788).

14. Id. at 360.

15. Id. at 362.

16. Mayor and Burgesses of Tyme Regis v. Henley, 110 Eng. Rep. 29 (K.B. 1832).

17. M'Kinnon v. Penson, 155 Eng. Rep. 1369 (Ex. 1853).

In the first recorded case in the United States of a similar nature, a Massachusetts court applied a statute so as to find the municipality liable.[18] Nevertheless, only eight years later, on identical facts, the same court, applying the same statute, held that a municipality was not liable.[19] This decision failed to consider the language in Russell, suggesting a different result for incorporated towns, the later English cases finding liability, and its own decision eight years earlier. Through reliance by other courts, this decision became the rationale for municipal tort immunity.[20]

As towns proliferated and developed into cities and the range of municipal activities grew, the impact of the common law principle of municipal immunity against claims for damages resulting from its acts became more apparent. In 1842, a New York court[21] first enunciated what has come to be known as the governmental-proprietary distinction. In that decision the court noted that when local governments execute policies and functions delegated to them by the state, they are in fact acting as involuntary agents of the state, and therfore, they are inbued with the state sovereign immunity for tort. However, when a local government voluntarily undertakes a function which does not directly relate to its governmental obligations, and from which it may even receive benefits or profits, then it is acting more as a private corporation and from a public policy standpoint ought not to be able to continue to invoke sovereign immunity.[22]

Problems in applying the distinction quickly developed, and are readily apparent in reading the cases. For example, the same jurisdiction has held the maintenance of a public park to be both a governmental and a proprietary function.[23] The author of one of the basic treatises note: "in the present condition of this special branch of the law, the liability or non-liability rests not so much on principle as on the degree of development of the law of municipal corporations which, as frequently appears, is more or less illogical, complex and abstruse."[24]

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18. Lobdell v. Inhabitants of New Bedford, 1 Mass. 153 (1804).

19. Mower v. Inhabitants of Leicester, 9 Mass. 246 (1812).

20. See Note, Municipal Tort Immunity: The Need For Legislative Reform, 22 CATHOLIC L. REV. 200 (1972); Note, Assault On The Citadel: De-Immunizing Municipal Corporations, 4 SUFFOLK L. REV. 832 (1970).

21. Bailey v. Mayor of New York, 3 Hill 531, 38 Am Dec. 699 (N.Y. 1842).

22. The doctrine exempting municipalities from private actions for torts resulting from the performance of governmental functions has been steadily adhered to by most courts. See Defender v. McLaughlin, 228 F. Supp. 615 (S.D.N.D. 1964); Mitchell v. Mendes, 217 A.2d 487; Irvine v. Montgomery, 239 Md. 113, 210 A.2d 359 (1965); Gossler v. Manchester, 107 N.H. 310, 221 A.2d 242 (1966).

23. Compare Claitor v. City of Commanch, 271 S.W.2d 465 (Tex. Civ. App. 1954) holding maintenance of parks proprietary function with Vanderford v. City of Houston, 286 S.W. 568 (Tex. Civ. App. 1926) holding maintenance of a park to be a governmental function.

24. Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS, Vol. 18 at 107 (1963).

Despite the difficulties that courts have encountered in applying this distinction, it is still used to limit liability because municipalities are charged by law with the duty to engage in a large number of inherently dangerous and/or unpopular actions which nevertheless must be performed for the general welfare and which cannot or will not be performed by anyone else, but which forces the municipality - without sovereign immunity - to risk liability.

The Civil War left no facet of American life unaffected, including sovereign immunity. As in the Revolutionary War, the states were burdened by large post-war debts which threatened to bankrupt even the most prosperous. This financial vulnerability caused the Supreme Court to reevaluate the one area where sovereign immunity did not yet reign supreme--federal question jurisdiction. Even after the passage of the Eleventh Amendment, the Supreme Court held in Cohens v. Virginia[25] that a citizen could sue his state in federal court on a federal question despite the objection of the state.

Following the Civil War, the Supreme Court began to offer policy reasons for sovereign immunity. In Nichols v. U.S.[26], the Court said the "principle is fundamental, applies to every sovereign power, and but for the protection it affords, the government would be unable to perform the varied duties for which it was created.[27] In The Siren[28] the doctrine was said to rest on reasons of public policy, and that inconvenience and danger would follow from any different rule.[29]

In the case of Hans v. Louisiana,[30] the Court seemed to depart from the decision by barring even federal question suits against one's own state. However, the Court did not rest its decision on the Eleventh Amendment, but on some supposedly fundamental principle of immunity.[31]

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25. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821).

26. Nichols v. U.S., 74 U.S. (7 Wall.) 122 (1869).

27. Id. at 126.

28. The Siren, 74 U.S. (7 Wall.) 152 (1869).

29. Id. at 154.

30. Supra note 7.

31. For a thorough analysis of the trend of court opinions in this area see D. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 COLO. L. REV. 1 (1972).

2. EXTENSION OF IMMUNITY TO GOVERNMENTAL OFFICIALS

Certain government officials have been granted immunity in the form of a privilege attached to their position. Examples of this type of immunity include federal[1] and state legislators[2] and all members of the judiciary.[3] This privilege is absolute and unqualified, even for acts done with malice or in bad faith, and regardless of whether the alleged wrong is based on tort law or the Civil Rights Act.

Courts have been much less willing to find an unqualified privilege necessary or justifiable for executive officials. Perhaps the strongest argument ever made for one is found in the often quoted passage from the opinion of Judge Hand in Gregoire v. Biddle:

> It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, innocent as well as guilty to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for actions which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties, but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between evils inevitable in either alternative. 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 threat of retaliation ...[4]

Judge Hand, in this opinion, goes on to address the contention that an officer's conduct which does not serve the public good must necessarily go beyond the scope of authority. He replies that the occasion need only be such as would justify the act if the exercise of power were for a proper purpose.

1. U.S. CONST. art. I, § 6, cl. 1; Kilbourn v. Thompson, 103 U.S. 168 (1880).

2. Tenney v. Brandhove, 341 U.S. 367 (1951).

3. Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1869); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

4. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

The guiding principle under federal law in regard to public officials in the executive branch is that they are not liable for torts which result from the exercise of discretion in the conduct of affairs within their authority. State courts generally follow the federal rationale and grant immunity to state officers whose discretionary acts, done within the scope of their employment, result in tortious injury to others. Among the officials who have been granted such immunity are: state health officers,[5] park district employees,[6] city managers,[7] prison guards on the wards,[8] and the superintendent of a home for the mentally retarded.[9]

The historical rationale for official immunity is that since a government can only act through its officials and employees, and since at least one reason for sovereign immunity is to protect the operations of government, then reason dictates that those who carry out governmental operations must also be immune. Also, as a matter of fairness, it would be unjust to hold a governmental officer or employee liable for performing his duty.

When an official is sued, the threshold question to be determined is whether the suit is in fact against the official in his individual capacity, or against the government. In Osborn v. The Bank of the United States,[10] Chief Justice Marshall enunciated the "party of record rule", which states that for purposes of federal jurisdiction, a suit will be deemed to be against the state rather than an individual official, and therefore barred by the Eleventh Amendment, only when the state is formally a party of record.

Others have argued that even when the government is not a party of record, if the result of individual liability would affect the government, then the suit should be barred as one against the government. In 1887[11] the Supreme Court modified its decision in Osborn by finding that a suit against an official is not barred where the act of the official was wrong aside from any justification claimed by virtue of the authority of the individual. But if the act of the official was not an individual wrong, but something only the government could do, the suit is in substance against the state.[12]

5. James v. Czapkay, 182 Cal. App. 2d 192, 6 Cal. Rptr. 182 (1960).

6. List v. O'Connor, 19 Ill. 2d 337, 167 N.E.2d 188 (1960).

7. West v. Budd, 186 Kan. 249, 349 P.2d 912 (1960).

8. Carder v. Steiner, 255 Md. 271, 170 A.2d 220 (1961).

9. Jarrett v. Wills, 235 Ore. 51, 383 P.2d 995 (1963).

10. Osborn v. The Bank of the United States, (9 Wheat.) 738 (1824).

11. In re Ayers, 123 U.S. 443 (1887).

12. Cases subsequent to Ayers suggest that commencing a suit to enforce an unconstitutional statute would be considered an actionable wrong, similar to trepass. See Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362 (1894); Prout v. Stass, 188 U.S. 537 (1903); McNeill v. Southern R. Co., 202 U.S. 543 (1906).

In 1908 the Supreme Court decided the landmark case of Ex parte Young.[13] The previous year the State of Minnesota had passed a law reducing railroad rates and creating severe penalties for noncompliance. Stockholders of nine railroads brought suit in federal court seeking an injunction to prevent the railroads from complying with the new law on the grounds that the rates were unjust, unreasonable, confiscatory, and deprived the railroads of property without due process of law, but that the penalties for noncompliance were such that the railroads would comply unless restrained.

One of the defendants in the case was the Attorney General of Minnesota. The plaintiffs were successful in their argument that the Attorney General should be restrained from enforcing the law. Even though the court issued first a temporary restraining order and then a preliminary injunction, the Attorney General sued in state court for a writ of mandamus against the railroads to compel their compliance with the law. As a result of this action, the Attorney General was found to be in contempt of the federal court, and was fined $100 and ordered to jail until such time as he dismissed the state mandamus proceeding. Attorney General Young then applied to the Supreme Court for a writ of habeas corpus.

The Court, in what has come to be viewed as a unique and anomalous opinion, held that the injunction against the Attorney General was proper. The rule adopted by the Court is to the effect that if the act to be enforced is unconstitutional, the use of the name of the state to enforce such an unconstitutional act to the injury of the plaintiffs is a proceeding without the authority of, and one which cannot affect, the state in its sovereign or governmental capacity. Rather, it is an illegal act on the part of a state official, since he is attempting, by the name of the state, to enforce a legislative enactment which is void because unconstitutional.[14]

In this case, the act which the Attorney General sought to enforce violated the federal Constitution. As a result, the Attorney General was stripped of his official character and is subject personally to the consequences of his individual conduct.

In order to reach this decision, the Court regarded the suit as against the State of Minnesota. The result was that the enforcement of a Minnesota statute is state action for the purpose of finding a Fourteenth Amendment violation, but merely an individual wrong of an Attorney General for the purpose of avoiding the Eleventh Amendment bar of suits against a state.

Ex parte Young has been the foundation upon which state utliity regulations and welfare legislation have been attacked, and has served as the basis for desegregation and reapportionment suits.[15]

13. Ex parte Young, 209 U.S. 123 (1908).

14. Id. at 159-60.

15. C. Wright, LAW OF FEDERAL COURTS 186 (2d ed. 1970).

In Ford Motor Co. v. Dept. of Treasury, the Supreme Court held that when an action "is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."[16]

Most recently, the Supreme Court ruled in Edelman v. Jordan that the Eleventh Amendment bars a federal district court from awarding retroactive benefits under a federal-state public aid program that are utlimately payable from the general revenues of the state rather than from the state officials administering the program who are the named defendants.[17] In so doing, the majority declared that it was following the well established precedents that (1) even though the Eleventh Amendment does not so state, it has been interpreted to apply to suits brought in federal court by a state's own citizens as well;[18] and (2) even though a state is not a named party to the action, the suit may nevertheless be barred by the Eleventh Amendment.[19]

The opinion went on to state that the participation of the state in the federal public aid program does not constitute a waiver of Eleventh Amendment immunity or consent to suit in federal court.

Dissenting Justices Douglas and Brennan could find no basis in law or reason why a state could be found to have waived immunity from suit for injunctions but not for compensatory awards.[20]

Justices Marshall and Blackman went further and urged that the court should find that a state waives any immunity it might otherwise have by participating in such a program.[21]

The issue of federal jurisdiction over constitutionally challenged state action was raised again in Sterling v. Constantin.[22] The plaintiffs, owners of oil and gas leases, sought an injunction against the enforcement of a Texas Railroad Commission order limiting the production of oil. The district judge issued a temporary restraining order against the Rail-

16. Ford Motor Company v. Department of the Treasury, 323 U.S. 459 (19/5).

17. Edelman v. Jordan, 42 L.W. 4419 (March 25, 1974).

18. Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal R. Co., 377 U.S. 184 (1967); Hans v. Louisiana, 134 U.S. 1 (1890).

19. Supra note 16. See also Great Northern Life Insurance Co. v. Reed, 321 U.S. 74 (1945).

20. Supra note 17 at 4429. Justice Douglas cites State Department v. Zarate, 407 U.S. 918 (1971); Sterrett v. Mother's Rights Organization, 409 U.S. 809 (1972); Shapiro v. Thompson, 349 U.S. 618 (1968).

21. Id. at 4430. Justice Marshall cites as authority Porter v. Warner Holding Co., 328 U.S. 345 (1946).

22. Sterling v. Constantin, 287 U.S. 378 (1932).

road Commission and the state Attorney General, whereupon the Governor used the militia to enforce the Railroad Commission order.

After reviewing the background of the case, the Court found that there had never been a riot nor other disruption warranting a declaration of martial law. The Court responded to the state's argument that the Governor's issuance of the proclamation was legally beyond question by stating that when a Governor calls out troops he does so as a civilian, not as a military officer, so his actions are always subject to judicial review. The court went on to hold that (1) when state officials, purporting to act under state authority, invade rights secured by the federal Constitution, they are subject to the process of the federal courts in order that persons injured may have appropriate relief;[23] and (2) when there is a substantial showing that the exertion of state power has over-ridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry.[24]

In dictum the court discussed further the discretions exercised by the Governor in calling out the military, and noted that it does not follow from the grant of discretionary power that every action by the Governor, no matter how unjustified, is conclusively supported by mere executive fiat. The determination of the allowable limits of discretion and whether or not it may have been overstepped in a particular case, are judicial questions.[25]

Recently, the Supreme Court decided the companion cases of Scheuer v. Rhodes and Krause v. Rhodes,[26] which grew out of the shootings at Kent State University when the Ohio National Guard was sent to the campus in response to student demonstrations against U. S. raids in Cambodia.

The personal representatives of two of the students brought these actions for damages under the Civil Rights Act[27] against the Governor, the Adjutant General of the Ohio National Guard, certain other Guard officers, and enlisted members, and the president of the University, alleging that the defendants, acting under color of state law, "intentionally, recklessly, willfully, and wantonly" caused an unnecessary call up of the Guard and then ordered Guard troops to perform illegal acts which caused the deaths of the students.[28]

The district court dismissed the complaints before the defendants answered the charges and before taking any evidence except the proclamations of the Governor and the affadavits of the Adjutant General. The

23. Id. at 393.

24. Id. at 398.

25. Id. at 400-401.

26. Scheuer v. Rhodes, 416 U.S. 232 (1974).

27. 42 U.S.C. § 1983.

28. Supra note 26 at 235.

court based its dismissal on lack of jurisdiction, holding that since the defendants were being sued in their official capacities, the actions were in reality against the state and barred by the Eleventh Amendment.

The Court of Appeals affirmed the decision, and offered as another basis for the decision the proposition that the common law doctrine of executive immunity is unqualified and absolute.

Upon appeal to the Supreme Court, Chief Justice Berger, writing for a unanimous court, noted that Ex parte Young and Sterling v. Constantin involved the power of the federal courts to enjoin state officials, whereas the instant case was a claim for money damages. Nevertheless, "damages against individual defendants are a permissible remedy--notwithstanding the fact that they hold public office".[29] As a result, reading the plaintiff's complaints in the most favorable light as required by the Federal Rules of Civil Procedure, they are not barred by the Eleventh Amendment, and the district court erred in so holding.

The Court then addressed the alternative ground offered by the Court of Appeals, that the immunity of a member of the Executive Branch is absolute and comprehensive as to all acts allegedly performed within the scope of official duty. In reviewing the history of the doctrine, the opinion states:

> The concept of immunity of government officers from personal liability springs from the same root consideration that generated the doctrine of sovereign immunity...This official immunity apparently rested, in its genesis, on two mutually dependent rationales; (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good.[30]

The opinion concludes with a determination that only a qualified immunity is available to officers of the executive branch of government, and that the extent of that immunity varies according to the scope of the discretion, the responsibilities of the office, and the circumstances as they reasonably appeared at the time of the action in question. In the case at bar, the premature dismissal denied the plaintiffs the opportunity to present evidence on the merits of their claims that the actions of defendant were such as to render them liable for damages.[31]

29. Id. at 238.

30. Id. at 239.

31. Id. at 250.

Judge Hand's reasoning in Gregorie was heavily relied upon by the majority opinion in Barr v. Matteo.[32] In that case the acting Director of the Office of Rent Stabilization issued a press release indicating his intention to suspend two subordinate officers who had participated in a particular agency activity which had received strong criticism in Congress. The subordinate officials sued the Director for libel. The Court held that the acting Director's defense of absolute privilege should be sustained. This was an extension of the holding in Spalding v. Vilas,[33] which granted absolute immunity to statements of executive officials at the level of the Postmaster General.

The four dissenters contended that the Spalding holding should not be extended to lesser officials. Only a qualified privilege should be granted executive officers, which could be negated by defamatory, untrue and malicious statements.

The vitality of Barr and Spalding cases would seem to be in doubt in light of the Court's opinion in Scheuer v. Rhodes, since the theory of an absolute executive privilege was rejected by the Court. The former cases were cited with approval, however, and the Court may well distinguish those cases because they were based on tort actions for defamation, whereas Scheuer v. Rhodes is based on § 1983. Indeed, the Court states that:

> Under the criteria developed by precedents of this Court, 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has the quality of a supreme and unchangeable edict, over-riding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.[34]

32. Barr v. Matteo, 360 U.S. 564 (1959).

33. Spalding v. Vilas, 161 U.S. 483 (1896).

34. Supra note 26; citing Sterling v. Constantin, supra note 22 at 397-398.

3. THE DISCRETIONARY - MINISTERIAL DICHOTOMY

For non-governmental employees, the Restatement of Agency provides that: "[A]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of a principal or on account of the principal, except where he exercised the privilege held by him for the protection of the principal's interest, or where the principal owes no duty or less than the normal duty of care to the person harmed."[1]

However, as discussed in more detail in Chapter 3, some state tort acts, such as California, have altered the common law doctrine and place the liability for employee torts within the scope of their employment on the public entity.[2] The ultimate liability falls on the employee only for "actual fraud, corruption or actual malice".[3]

One method by which courts have attempted to deal with the problem of executive immunity is the discretionary-ministerial dichotomy. The rationale behind the distinction is that discretionary functions require risk taking and the exercise of judgment--often on short notice and without adequate information. If persons were to be held liable for mistakes in judgment under such circumstances, they would hesitate to make necessary decisions at the appropriate moment.

The discretionary-ministerial distinction has been critized by law review commentators on several grounds. First, only when the government official or employee is held liable, rather than the government under the doctrine of respondeat superior, is the decision-maker hesitant to act. If he were granted immunity, and the government accepted the responsibility, under common agency principles for the acts of its employees, there would be no interference with the performance of duty.

Second, there is no adequate way of separating discretionary from ministerial duties. Distinctions have been made on the rank in the government hierarchy of the individual, whether the decision made in the job required expertise and judgment, the number of persons affected by the decisions, and whether or not the statute creating the office or position uses the term discretion or some equivalent.[4]

The problem in the application of this distinction is evident in the cases holding that police officers do not qualify for discretionary immunity. Although a policeman does exercise discretion in making arrest, and potential liability for arrests might reasonably deter vigorous and unwavering performance of his duties, courts have generally held that

1. RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

2. CAL. GOV'T. CODE § 815.2.

3. Id. at §§ 825.4 and 825.6.

4. Note, 66 HARV. L. REV. 488, 491-98 (1953).

policemen are not immune from suit in tort[5] and for deprivation of civil rights.[6] Some courts have gone so far as to hold supervisory officers liable for the tortious and unconstitutional acts of policemen.[7]

As a practical matter, however, police officers seldom express concern over false imprisonment actions. Their lack of concern is explained by empirical studies which indicate that such actions are extremely rare.[8] The reasons generally given for their infrequency are:

(1) Conflicts in various jurisdictions as to whether a subsequent conviction provides a conclusive presumption of probable cause for the arrest.[9]

(2) The absence of a source for monetary recovery for damages, either because of immunity, lack of assets by the police officer, or limited bonding requirements.[10]

(3) Public sympathy toward police causing juries to sympathize with the plight of the officer, particularly if the plaintiff has a record.[11]

(4) Inducements not to litigate complaints, such as fear of police harassment or the willingness by some municipalities to pay damages for the police officer.[12]

In tort actions, though probably not in civil rights actions, the viable principle is still that where an officer has discretion, he is not liable in damages even though in the case at hand he made a choice that was beyond his power, or indeed had no valid choice open to him at all.[13]

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5. Sherbutte v. Marine City, 374 Mich. 48, 130 N.W.2d 920 (1964).

6. Bivens v. Six Unknown Agents, 456 F.2d 1339 (1972); Pierson v. Ray, 386 U.S. 547 (1966); Monroe v. Pape, 365 U.S. 167 (1961).

7. Sostre v. McGinnes, 422 F.2d 178 (2d Cir. 1971); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971); Builders of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971).

8. Wayne LaFave, ARREST 412 (1965).

9. Id. at 413.

10. Id. at 421.

11. Id. at 423.

12. Id. at 424.

13. Representative federal cases which have followed the Barr rationale include: Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960), immunity of a prison warden; DeLevay v. Richmond County School Board, 284 284 F.2d 340 (11th Cir. 1960), immunity of a divisional school superintendent; Babylon Milk and Cream Co. v. Rosenbush, 233 F. Supp. 735 (E.D.N.Y. 1964), immunity of an Internal Revenue Service official.

The discretionary-ministerial distinction, if nothing else, is a convenient device for extending the area of nonliability without making the reasons explicit. An official has discretion in all but a few areas in which damage to a citizen may result.[14] The notable exceptions, as discussed above, are the actions against police officers. Here, official immunity is limited to reasonable actions.

According to Professor Jaffe, if sense is to be made of the discretionary exception, it is necessary to found it on a different basis than the ministerial-discretionary distinction. Immunity must result from a balancing of the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of the court or jury to evaluate the propriety of the officer's actions, and the effect of liability--whether of the official or the treasury--on effective administration of the law.[15]

Most state courts have not gone so far on the issue of immunity as the Supreme Court did in Barr v. Matteo,[16] which held that in a damage action for defamation, a lower executive officer was immune even if malice or a lack of good faith could be shown. Rather, state courts generally hold that if an official does not act honestly, or in good faith, but maliciously or for an improper purpose, he is liable for the injuries which may result.[17]

The argument in the cases is that a qualified privilege is sufficient to protect the honest official. Official immunity ought not to be a cloak for malicious, corrupt, or otherwise outrageous conduct by those guilty of intentional abuse of the power entrusted to them by the people. The burden and inconvenience to an official of an inquiry into his motives is far outweighed by the possible evil of deliberate misconduct. In considering such cases over a period of many years, courts have not found any tangible evidence of a serious restraint of official conduct, or a deterrance of good men from seeking office in the states which do not recognize an absolute immunity for lower governmental officials.[18]

Dean Prosser notes that neither justice nor the public interest are served by holding a lower public official who honestly obeys orders liable for mistakes, while at the same time exonerating completely those who

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14. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209, 218 (1963).

15. Id. at 219.

16. Barr v. Matteo, 360 U.S. 564 (1959).

17. See Kelley v. Durne, 344 F.2d 129 (1st Cir. 1965); Vickers v. Motte, 137 S.E.2d 77 (1964).

18. But see Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938); Laughlin v. Rosennan, 163 F.2d 838 (U.S. Ct. App. D.C. 1947); Nadeau v. Mac Chessault, 24 A.2d 352 (1942).

make the decision. There is even less reason for a further distinction made by a minority of courts between misfeasance and nonfeasance. Arguably, if there is a clear duty to act, liability can also be based on nonaction.[19]

Some courts have abandoned the discretionary-ministerial distinction in regard to administrative officials. They favor as a test whether the official acted with proper motives and due care and diligence in performing official duties. He should neither suffer for honest and reasonable mistakes resulting from an effort to carry out responsibilities owed to the public, nor should he escape liability for negligence simply because he was charged with that responsibility.[20]

At the other extreme is the proposal that a public official should never be liable, but that the government which employs him and thereby, in effect, turns him loose on the public with the cloak of governmental authority should be prepared to accept liability for all his torts. Such a notion may well be in accord with modern theories of respondent superior and the distribution of risk, but it is extremely unlikely to find much favor with state legislatures.[21]

Sovereign immunity and the limited liability of public officials are well-established principles in Anglo-American jurisprudence. This is not to say, however, that changes have been nonexistent. In the next chapter, the most fundamental aspects of that evolutionary process are discussed.

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19. Prosser, TORTS 990 (4th ed. 1971).

20. See Tyrell v. Burke, 110 N.J. 2251, 164 A. 586 (1933); Wallace v. Freehan, 181 N.E. 862 (Ind. App. 1932).

21. Supra note 64 at 991.

4. SOVEREIGN IMMUNITY AND ITS CRITICS

Although the most dramatic alterations in the immunity doctrine are relatively recent, they are the result of a long-term evolutionary process. As early as the 1920's, Professor Borchard presented detailed analyses of the problems posed by governmental immunity.[1] Through succeeding years, other commentators and courts continued the evaluation and reevaluation of the immunity doctrine and the effects of its application.

The invocation of immunity by governments to insulate themselves and their employees from liability has been consistently and vociferously criticized by legal scholars and commentators. Perhaps the best known and most outspoken among the critics is Professor Kenneth Davis, author of a multi-volume treatise on administrative law:

> Sovereign immunity often produces an uncivilized result, because what counts...is not reason but force, not law but power, not orderly adjudication but physical taking by the strongest party, not refinements the sum of which we call civilization but crudities that are sometimes characteristic of primitive men. The argument against sovereign immunity is on such an elementary plane that stating it is almost insulting to one's intelligence: resolving controversies by adjudication before a qualified tribunal which tries to be impartial is better than the use of force because a just result is more likely.[2]

Professor Davis notes that the following policy grounds are usually offered for immunity: a need to prevent the diversion of public funds to compensate for private purposes; a need to avoid disruption of public service and safety; a need to prevent governmental involvement in endless embarrassments, difficulties and losses subversive to the public interest; and the nonprofit nature of government should be reflected in nonliability. Balanced against these policy grounds, according to Davis, are the following considerations which tend to support governmental liability: since the public purpose involves injury-producing activity, injuries should be viewed as an activity cost which must be met in the furtherance of public enterprise; there is no control of government activity involved in the typical law suit; it is better to distribute the cost of government caused injuries among the beneficiaries of government than entirely on the hapless victims; although the government does not profit from its activities, the taxpayers do, so the taxpayers should bear the cost of governmental tort liability.[3]

Professor Davis says prevailing judicial practice eliminates this justification for immunity because: the scope of review is limited to the

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1. Borchard, Governmental Responsibility in Tort, 34 YALE L.J. 1 (1924); Borchard, Theories of Governmental Responsibility in Tort, 28 COLUM. L. REV. 734 (1928).

2. K. Davis, ADMINISTRATIVE LAW 497 (1972).

3. 12 S. CAL. L. REV. 283 (1939).

kind of questions that judges are equipped to decide; courts are successful is staying out of cases into which they should not intrude; the substantive law generally allows courts to balance the interests of opposing parties as equity requires.[4]

The courts have not been silent on the subject of immunity in the midst of the scholarly commentary. The Supreme Court, in an 1882 opinion noted:

> ...while the exemption of the United States and the several states from being subjected as defendants to ordinary actions in the courts has...been repeatedly asserted...the principle has never been discussed or the reasons for it given, but it has always been treated as established doctrine.[5]

And in a more recent case, the Court observed:

> A comparative study of the cases in the...states [concerning immunity] will disclose an irreconcilable conflict. More than that, the decisions in each of the states are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.[6]

This lingering judicial antagonism, coupled with the steady stream of scholarly criticism, ultimately received legislative recognition in 1946, with the passage of the Federal Tort Claims Act, which is discussed in the next chapter.

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4. Supra note 2 at 499.

5. U.S. v. Lee, 106 U.S. 196, 207 (1882).

6. Indian Towing Co. v. U.S., 350 U.S. 61, 65 (1955).

5. FEDERAL LEGISLATION

Two federal statutes have had the most significant impact upon the liability of public officials. The first is the Federal Tort Claims Act, which governs federal tort liability and has served as the prototype for a number of state tort claims acts. The second is the Federal Civil Rights Act, and in particular § 1983, which subjects state officials to liability at law and in equity.

The legislative history of the Federal Tort Claims Act[1] indicates that the doctrine of absolute sovereign immunity has not been accepted wholeheartedly by the United States. The Act's statement of purpose includes the following reasons:

1) a desire on the part of the federal government in the interests of justice and fair play to permit a private litigant to satisfy his legal claims for injury or damage suffered at the hands of a United States employee acting in the scope of his employment;

2) the need of the Congress to be relieved of the burden imposed by multitudinous bills for private relief arising from tort claims against government employees;

3) the advantage of an impartial judicial forum for both the complainant and the Government in which to discover the facts in the same manner as private law suits;

4) a desire of Congress to expedite the payment of just claims.[2]

The key section of the Act in terms of sovereign immunity provides:

> ...the district courts...shall have exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence of wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, or a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurs...[3]

The Act does not limit the damages which may be recovered, nor does it prohibit pain and suffering as a basis for recovery.

The important litigation concerning the Act has involved § 2680, which provides exceptions to the liability of the United States. The first exception states:

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1. 28 U.S.C. § 1346 et seq.

2. See Muniz v. U.S., 374 U.S. 150 (1963) for a detailed analysis of the legislative history of the Act.

3. 28 U.S.C. § 1346(b).

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulations be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[4]

The first case to construe this section of the Act was U. S. v. Dalehite.[5] The case arose from the explosion of ammonium nitrate fertilizer which caught fire when being loaded onto ships destined for France in a federal foreign aid program. The accident killed 560 persons and injured another 3000. The claims brought under the Act in 300 suits totaled over $200 million. The Court denied all claims on the ground that they came within the discretionary exception.

The reasoning of the Court was that the alleged negligent acts and omissions - failure to adequately investigate the hazards of the operation, bagging the fertilizer at high temperatures, the use of paper bagging material and the failure to label properly - all amounted to discretionary policy-level decisions.[6]

In responding to the plaintiffs' contention that some of the acts which directly led to the accident were carried out at the operational, rather than the planning level and therefore did not constitute acts of discretion, the Court said: "Where there is room for policy judgment and decisions, there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."[7]

The dissent argued that the majority was extending the discretionary exception far beyond its intended limits.

> The common sense of this matter is that a policy adopted in the exercise of an inmune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.[8]

In the next case dealing with the discretionary exception,[9] the Coast Guard was held liable for damages to a ship resulting from the inoperative

4. 28 U.S.C. § 2680(a).

5. U.S. v. Dalehite, 346 U.S. 15 (1953).

6. Id.

7. Id. at 35-36.

8. Id. at 58.

9. Indian Towing Co. v. U.S., 350 U.S. 61 (1955).

condition of a lighthouse. The Court ruled that once the Coast Guard exercised its discretion to operate the lighthouse and engender reliance on it, there was thereby created an obligation to use due care to maintain the light in working order. In failing to exercise this duty, the Coast Guard rendered itself liable to a plaintiff injured thereby.[10]

Subsequent cases have made the following distinctions between discretionary and nondiscretionary acts: the planning of grade and culverts to improve a highway was not on an operational level, but called for the exercise of judgment and discretion;[11] allowing a mental patient freedom of hospital grounds resulting in his committing suicide was not an exercise of discretion exempting the United States from tort liability;[12] the alleged failure of the Small Business Administration to properly deposit chattels was within discretionary exception.[13]

The other exception to liability in the Federal Tort Claims Act which has generated discussion is for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[14]

In a suit filed against certain employees of the Internal Revenue Service for defamation of character, abuse of process, malicious prosecution, deprivation of constitutional rights, and negligence, the Court stated: "It is well established that public officers are immune from civil suits for money damages for negligent, nonministerial acts committed by them while acting within the scope of their authority and in discharge of their official duties."[15]

Considering the question of whether the act in question was ministerial or discretionary, the Court stated the following test:

> The test of whether a challenged action is ministerial or non-ministerial is not the office per se or its height, but whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned. Thus, while the actions of a low ranking administrative official are more likely

10. Id.

11. Sisley v. U.S., 202 F. Supp. 273 (D.C. Alaska 1962).

12. White v. U.S., 317 F.2d 13 (C.A. Va. 1963).

13. U.S. v. Delta Industries, Inc., 275 F. Supp. 934 (D.C. Ohio 1966).

14. 28 U.S.C. § 2680(h).

15. David v. Cohen, 407 F.2d 1268 (1969).

> to be ministerial, the privilege has been extended to administrative as well as judicial officials and to personnel whose position is low as well as to those whose rank is high.[16]

After applying these principles to the case at bar, the Court ruled that because the acts were discretionary, no liability would attach.

While the other provisions of the Act have proven to be relatively straightforward, the discretionary exception continues to defy general legal principles, and requires a continuing and precise case by case analysis.

The Federal Civil Rights Act is, along with tort liability, the major source of litigation concerning governmental officials and employees. Because its effects will be discussed extensively in the latter chapters of this report, a brief history and analysis of the act is appropriate at this point.

The Act was passed in an effort to correct the lawless situation existing in the reconstruction South, in particular the abuse of newly freed slaves. The section of the Act which is most utilized today, however is codified as 28 U.S.C. § 1983 and provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the State or Territory, subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 was intended to override state laws discriminating against United States citizens, provide a remedy for abuses when state law was inadequate, and to provide a federal remedy where the state remedy, although adequate in theory, was not enforced uniformly.[17]

The phrase "under color of state law" was interpreted by the Supreme Court in United States v. Classic: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law."[18]

The word "person" in the language of the act has also been the subject of judicial interpretation. In Monroe v. Pape, the Supreme Court determined from the legislative history of the Act that "person" did not include local government entities.[19] This interpretation was based primarily on

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16. Id. at 1272.

17. See Monroe v. Pape, 365 U.S. 167, 174 (1961).

18. U.S. v. Classic, 313 U.S. 299, 326 (1941); Reaffirmed in Screws v. U.S., 325 U.S. 91 (1944).

19. Supra note 17.

the rejection by Congress of the proposed Sherman Amendment to the Klan Act, which would have imposed damage liability upon any city or county in which citizens were subjected to racial violence, even though the offenders might not be employees of a public entity.[20]

As a result of this interpretation, all section 1983 suits must be brought against state officials or employees for neither state governmental entities nor the federal government are proper parties to such a suit.

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20. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871); see also Don Kates and Anthony Kouba, Liability of Public Entities Under § 1983 of the Civil Rights Act, 45 S. CAL. L. REV. 131 (1972) for a critique of this interpretation.

6. ABROGATION OF IMMUNITY BY STATE COURTS

Many arguments against sovereign immunity are found in state supreme court opinions. As noted previously, the general rule for over 150 years has been that the states are not liable for the torts of their officers, employees, or agents.[1] Then, beginning in the decade of the 1950's, one state supreme court after another departed from the long-standing doctrine and ruled that the doctrine had outlived whatever public policy validity it may have once had.

A number of the opinions follow a similar format. A tort action against a state employee or agency is dismissed by a trial court after the invocation of sovereign immunity. The case reaches the state supreme court, which traces the checkered history of sovereign immunity, notes the injustice and unfairness it creates, and then prospectively abolishes the doctrine, usually with the observation that the legislature, if it deems necessary, may reinstate the doctrine in whole or in part. Despite the uniformity of the decisions, a brief reference to the language of a few of these decisions is in order to convey the strength of the courts' conviction that the immunity doctrine ought to be a thing of the past.

The Supreme Court of Minnesota, quoting from the works of Justice Holmes, states in reference to the immunity doctrine:

> . . . it is revolting to have no better reasons for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[2]

The Supreme Court of Wisconsin observed:

> There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine. This court, and the highest courts of numerous other states have been unusually articulate in castigating the existing rule; test writers and law reviews have joined the chorus of denunciators.
>
> . . . the abrogation of the doctrine applies to all public bodies within the state . . . by reason of the rule of respondeat superior a public body shall be liable for damages for the torts of its officers, agents, and employees occuring in the courts of business of such public body.[3]

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1. D. Kramer, The Governmental Tort Immunity Doctrine In The United States 1790-1955, 1966 U. ILL. L.F. 801 (1966).

2. Spanel v. Mounds View School Dist., No. 621, 188 N.W.2d 795, 801 (Minn. 1962).

3. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 155 N.W.2d 618, 621-625 (1962).

The California Supreme Court, in suggesting that the effect of the decision is not revolutionary, notes:

> The rule of governmental immunity for tort is an anachronism without rational basis, and has existed only by the force of inertia.
>
> For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for the 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.[4]

Table 1, on the following page, lists the state court decisions which have limited sovereign immunity, and where appropriate, the governmental entities affected. Although the opinions are quite similar in language, and quote one another freely in their criticism of the immunity doctrine generally, the governmental entities affected, as the table indicated, do vary widely, and the cases should be read carefully before being cited as authority for the abrogation of the immunity of any particular governmental unit. Also, as discussed, in the next chapter, most state legislators have acted to limit the court decisions.

State courts which have abrogated the doctrine of sovereign immunity have done so to varying degrees. The Supreme Court of Wisconsin,[5] for example, in a case against a municipality for injuries received from a defect in public playground equipment, abolished the doctrine as it applied to all public bodies of the state—the state itself, counties, cities, towns, school districts, and all other political subdivisions of the state, incorporated and unincorporated.[6] However, the court carefully noted that the decision did not affect the sovereign right of the state under the Constitution to be sued only when it has consented thereto.[7]

Similarly, the Supreme Court of Colorado, in a tort action brought against a county for allowing the courthouse steps to deteriorate so as to constitute a dangerous hazard, observed that the effect of its opinion was to remove the defense of sovereign immunity from the state and its subdivisions. "If the General Assembly of Colorado wishes to reinstate the doctrine, in whole or in part, it is free to do so."[8]

4. Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457, 463 (1961).

5. Supra note 3.

6. Id.

7. Id. at 625.

8. Evans v. Board of County Commissioners of the County of El Paso, 482 P.2d 968 (1971).

TABLE 1. STATE DECISIONS LIMITING SOVEREIGN IMMUNITY

Decision	Governmental Units Affected
City of Fairbanks v. Schaible, 375 P. 2d 201 (Alaska 1962).	
Stone v. Arizona Highway Commission, 93 Airz. 384, 381 P.2d 107 (1963).	
Parish v. Pitts, 244 Ark. 1239, 429 S.W. 2d 45 (1968).	
Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P. 2d 457 (1961).	
Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971).	
Spencer v. General Hospital of District of Columbia, 138 U.S. App.D.C. 48, 425 F.2d 479 (1969).	
Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).	
Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970).	Proprietary and governmental distinction retained.
Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).	
Campbell v. State, 284 N.E. 2d 733 Ind. 1972).	State
Klepinger v. Board of Commissioners, 143 Ind. App. 155, 239 N.E. 2d 160 (1968).	Counties
Brinkman v. City of Indianapolis, 141 Ind. App. 622, 231 N.E. 2d 169 (1967).	Municipalities
Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969).	Proprietary and governmental distinction retained.
Haney v. City of Lexington, 386 S.W. 2d 738 (Ky. 1964).	Municipal corporations
Board of Commissioners of Port of New Orleans v. Splendour Shipping & Enterprises, 273 So.2d 19 (La. 1973).	Governmental boards and agencies

TABLE 1. (cont'd) STATE DECISIONS LIMITING SOVEREIGN IMMUNITY

Decisions	Governmental Units Affected
Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2d 1 (1961).	
Spanel v. Mounds View School District No. 621, 264 Minn. 279, 118 N.W. 2d 795 (1962).	School districts, municipal corporations, and other political subdivisions.
Johnson v. Municipal University of Omaha, 184 Ne-. 512, 169 N.W. 2d 286 (1969).	Cities, counties, other governmental subdivisions and local public entities--for conditions on premises.
Brown v. City of Omaha, 183 Neb. 430, 160 N.W. 2d 805 (1968).	Governmental subdivisions--motor vehicles.
Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963).	Counties--negligent operation of roads.
Willis v. Department of Conservation and Econ. Dev., 55 N.J. 534, 264 A. 2d 34 (1970).	State
Ayala v. Philadelphia Board of Public Education, 305 A.2d 877 (Pa.1973).	Local governmental units, municipal corporations and quasi corporations.
Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970).	Municipal and quasi municipal corporations.
Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).	

Other decisions limit their abrogation of sovereign immunity to local governments and their agencies.[9] These decisions will be discussed in the section dealing with the liability of local governments and their officials.

In addition, a number of other state courts, including Maine, New Mexico, New Hampshire, Oklahoma, and South Dakota have voiced disapproval of the effect of the doctrine, but have not gone so far as abrogation.[10]

9. See Table 1.

10. Generally these decisions suggest that abrogation is a legislative, rather than a judicial responsibility.

7. STATE LEGISLATIVE RESPONSE

Almost without exception, state legislatures have responded quickly to state court decisions regarding sovereign immunity. When an Arkansas court abrogated the doctrine of sovereign immunity, the legislature immediately reinstated the doctrine, finding the vitality of the principle essential to the fiscal integrity of the state.[1]

A second group of states (see Table 2.) responded by limiting their liability through tort claims acts, a number of which were modeled after the Federal Tort Claims Act. These acts have the effect of reinstating immunity except where the act provides for liability. Twenty states have tort claims acts. Although they differ in a number of particulars, there are significant similarities. For example, there is commonly a requirement that all claims be presented to the relevant state department or agency,[2] which has a specified period of time in which to review the claim and either pay it or deny it. In some states, as soon as the claim is denied by the department, the claimant may seek redress in the courts.[3] In others,[4] a special hearing or appeal board must have reviewed and affirmed the denial of the claim before the jurisdiction of a court may be invoked.

Each act has specific exceptions to liability. These include: discretionary acts within the scope of employment,[5] intentional torts by employees,[6] false imprisonment, malicious prosecution, and invasion of privacy.[7]

A citizen with a claim arising out of governmental activities would, under general legal principles, have a cause of action against both the employee who was the proximate cause of the injury or damage, and against the governmental entity employing him under the doctrine of respondeat superior. However, as the common law developed, the doctrine of respondeat superior did not apply in the case of a governmental employer. The effect of many tort claims acts is to reinstate the doctrine. For example, the California Act provides that in the absence of fraud, malice, or corruption, the state will represent and indemnify a state employee against whom a claim is brought.[8]

1. ARK. STAT. ANN. § 12-2901 (Supp. 1969).
2. TENN. CODE ANN. § 23-3314.
3. UTAH CODE ANN. § 63-30-12.
4. IOWA CODE ANN. ch. 25A3.
5. CAL. GOV'T. CODE § 820.2.
6. VT. STAT. ANN. § 5602.
7. IOWA CODE ANN. ch. 25A14.
8. CAL. GOV'T. CODE § 815.2.

TABLE 2. STATE LIABILITY LEGISLATION

State	Statutory Provision	Coverage
Alabama	Tit. 35, § 199	Defense of state militia.
Alaska	Tit. 26, Ch.05 § 140	A.G. defend militia.
Arizona	§ 26-159C	A.G. defend militia.
	§ 41-192.02	A.G. has discretion to represent state employees.
Arkansas	§ 11-1008	A.G. or appointed counsel defend militia.
	§ 12-2901	Immunity doctrine asserted.
California	Gov't.Code § 810 et.seq.	Tort Claims Act.
Colorado	§ 94-11-46	Defense of state militia
	§ 72-16-2	Authorizes insurance for officers, employees.
Connecticut	§ 4-165	Immunity for state officers and employees in line of duty except for wanton or willful acts.
	§ 3-125	A.G. appears when state is a party to suits against state officials.
Delaware	No statutory provision	
Florida	§ 111.07	State agencies may authorize defense of officers or employees sued for acts within the scope of employment in absence of wanton or willful misconduct.
	§ 250.31	Defense of state militia.
Georgia	§ 89-920	Defense by A.G. of public officer sued for acts pursuant to his duties.
	§ 86-11-1	A.G. defend state militia.
Hawaii	Ch. 662	Tort Claims Act.
Idaho	Tit. 6, Ch. 9	Tort Claims Act.
Illinois	Ch. 85	Tort Claims Act.
	Ch. 129 § 220.90	Defense of state militia.
Indiana	§ 49-1902a	A.G. defend official or employee for suits arising within scope of employment.
	§ 45-2104	A.G. defend militia.
Iowa	§ 25A.1 et. seq.	Tort Claims Act.
	§ 29A.51	A.G. defend state militia.
Kansas	§ 75-3217	State defend law enforcement and corrections personnel in suits arising from acts within scope of employment.
Kentucky	No statutory provision	
Louisiana	49:461	A.G. may defend civil actions against state ministerial officers in their official capacity.
	29.70	A.G. defend state militia.

TABLE 2. (Cont'd.) STATE LIABILITY LEGISLATION

State	Statutory Provision	Coverage
Maine	Tit. 37A, § 211	A.G. defend state militia.
Maryland	Art. 32A	A.G. on request may defend action against officer or employee within scope of employment.
Massachusetts	Ch. 12 § 3	A.G. must appear on behalf of officers whose official acts are challenged.
	Ch. 12 § 3b	A.G. on request may defend correctional and health officials sued for acts in scope of employment.
Michigan	§ 691.1408	State agency may provide for representation of officer or employee sued for acts in scope of employment.
	§ 4.678(179)(d)	A.G. required to defend militia.
Minnesota	§ 15.181	State provides defense of non-elected state employees for actions arising from employment.
	§ 192.29	A.G. may recommend representation of militia.
Mississippi	No statutory provision re state	
	§ 25-1-47	Municipalities may provide for defense of their employees.
Missouri	§ 105.710	Tort Defense Fund to pay judgments against officers or employees of militia, health and corrections divisions.
Montana	§ 82-4301 et seq.	Tort Claims Act.
Nebraska	§ 81-857 et seq.	Tort Claims Act.
Nevada	§ 228.140	A.G. defend official sued in official capacity.
	§ 41.031	State waives immunity for torts.
	§ 41.038	State or subdivisions may insure employees.
New Hampshire	§ 412:3	State may procure liability insurance.
New Jersey	Tit. 59-1	Tort Claims Act.
New Mexico	§ 4-3-16	A.G. on request defend officers or employees when acting within scope of employment.
	§ 5-6-19	State authorized to insure employees against tort liability.

TABLE 2. (Cont'd.) STATE LIABILITY LEGISLATION

State	Statutory Provision	Coverage
New York	§ 17 Public Officers Law	Tort Claims Act.
North Carolina	§ 143-291 et seq.	Tort Claims Act.
North Dakota	§ 54-12-01	A.G. must defend actions against state officers in official capacity.
Ohio	§ 2743.01 et seq.	Tort Claims Act.
Oklahoma	Tit. 74 § 18c	A.G. must defend on request state officer sued in official capacity.
	Tit. 11 § 1175 et seq.	Municipal Tort Liability Act.
Oregon	§ 243.510	A.G. must represent on request officer or employee for torts committed within scope of employment.
Pennsylvania	No statutory provision	A.G. defends state officials as matter of policy.
Rhode Island	§ 42-9-6	A.G. must defend state officials sued in official capacity.
	Tit. 9 Ch. 31	Abolishes governmental tort immunity.
South Carolina	§§ 10-2621-10-2625	Motor Vehicle Tort Claims Act.
	§ 1-234	A.G. on request defend officer or employee for acts done in scope of employment.
South Dakota	§ 3-19-1	When officer or employee sued, state may (1) pay or indemnify for cost of defense, (2) pay or indemnify for judgment or settlement.
	§ 33-6-4	State defend militia.
Tennessee	§ 23-3301 et seq.	Tort Claims Act.
	§ 7-143	State defend militia.
Texas	Tit. 110A, Art. 6252-19	Tort Claims Act.
Utah	§ 63-30-3	Governmental Immunity Act.
	§ 67-5-1	A.G. must defend suits to which state or officer in official capacity in party.
Vermont	Tit. 12, § 5601-5605	State allow tort claims up to $300,000.
	Tit. 3, § 1101	State must provide counsel for employee sued for acts within scope of employment.
Virginia	§ 21-121	A.G. represent state officials in all civil litigation to which they are parties.
	§ 44-100	A.G. approve counsel to defend militia.

TABLE 2. (Cont'd.) STATE LIABILITY LEGISLATION

State	Statutory Provision	Coverage
Washington	§ 4.92.060	State officer or employee may request state to defend him in actions arising out of official duties.
West Virginia	§ 5-3-2	A.G. must defend all actions against state officers in his official capacity, as well as actions against the militia.
Wisconsin	§ 165.25(6)	A.G. upon request of department, represent employee charged with enforcing the law or a tort action.
Wyoming	§ 9-125(a)	A.G. must defend state officer sued in their official capacity.

In the states with tort claims acts, the role of the Attorney General is clearly spelled out. When the claim is against the state, the Attorney General provides representation. When the claim is against an officer or employee, the Attorney General will provide representation upon request when he has determined that the case comes within the provisions of the Act.

In the remaining group of states (see Table 2.) which do not have a tort claims act as such, the Attorney General's role differs markedly from state to state. Generally, however, the statutes provide the Attorney General with the authority to represent all state officials and employees who are the subject of civil litigation resulting from activities within the scope of their employment when the employee so requests. A few states (North Dakota, Oklahoma, Rhode Island, Virginia, and West Virginia) distinguish between state officials and employees, and authorize representation only for officials.

Only six states (Illinois, Kansas, New York, North Carolina, Ohio, and Tennessee) have chosen to establish special tribunals to hear claims. This trend confirms the findings of the California Law Review Commission Report, which stated:

> The principal arguments in favor of a special court are . . . relieving the courts from the burden of governmental tort litigation, providing assurance that tort claims against governmental entities will be decided from a uniform point of view divorced from local prejudices and attitudes, and developing a degree of expertise in adjudicating such claims which may be expected to come through specialization. . . . careful studies have disclosed no basis for believing that, with minor procedural modification, the judiciary would not be fully capable of handling the burden of whatever litigation an expansion of governmental tort liability might generate.[9]

Indeed, tort claims litigation may eventually reach the regular court system even in states with special tribunals. For example, in Tennessee appeals may be taken from the Board of Claims (in North Carolina from the Industrial Commission) to the courts of general jurisdiction. The New York Court of Claims can only hear claims against the state, so claims against state employees must be brought in the regular court system.

The largest group of states are the twenty-three which have legislation concerning the liability and representation of state officials and employees. Although generalizations are difficult and sometimes misleading, these statutes basically provide for representation by the Attorney General when a state official or employee is sued for damages or injury resulting from an act within the scope of his employment. Immunity is not characteristic of such statutory provisions, except when the act can be characterized as discretionary. However, states do generally carry insurance to protect their employees; this is discussed in the final chapter of this report.

9. Cal. L. Rev. Comm'n., A Study Relating to Sovereign Immunity, (1963).

8. LIABILITY OF HOSPITAL ADMINISTRATORS AND EMPLOYEES

Historically, the hospital as an institution was shielded from liability by two doctrines. The first was sovereign immunity, in so far as the hospital was operated by federal or state government and therefore was imbued with that sovereign's immunity, or by a municipality as a governmental rather than a proprietary function.[1] The other basis for nonliability was charitable immunity.

Ironically, just as with sovereign immunity, the immunity of charitable hospitals in the United States was based on the misapplication of English case law. The case relied upon involved an action for wrongful exclusion from the benefits of a charity, not for any personal injuries resulting from the operation of a charitable organization.[2] The language from this case which is frequently quoted by American courts is dictum to the effect that "to give damages out of a trust fund would not be to apply it to those objectives which the author of the fund had in view, but would be to divert it to a completely different purpose."[3]

Although subsequently overruled,[4] the Supreme Court of Massachusetts applied the rationale of Ross in 1875 as though it were still good law.[5] So it was that the general rule developed in the United States that no cause of action existed against a charitable institution for damages negligently or intentionally inflicted on patients or wards by the staff.

In recent years trust fund doctrine has been abandoned by plaintiffs in suits against hospitals in favor of other remedies, so that there is no longer any consistent application by the states. Some relieve hospitals of liability to strangers as well as patients; some bar patients from suit, but not strangers; others require proof of negligence in the selection of the employee,[6] while a number find no liability even if there was negligence in the selection. Some permit a judgment in favor of paying patients; others restrict the recovery of damages by paying patients to income earned from the patients; others allow recovery out of liability insurance.[7]

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1. The weight of authority holds the establishment and maintenance of a hospital to be a governmental activity. 63 C.J.S. 311 § 905, 25 AM. JUR. 594 § 13. Contra City of Okmulgee v. Carlton, 71 P.2d 722 (Ok. 1937); City of Miami v. Oates, 10 So.2d 725 (Fla. 1942).

2. Lord Tottenham in the Feoffees of Heriots Hospital v. Ross, 12 Clark and Fin. 507 (1846).

3. Id. at 513.

4. Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93 (1871); Foreman v. Mayor of Canterbury, 6 Q.B. 214 (1866).

5. Taylor v. Flower Deaconess Hospital, 104 Ohio St. 61, 135 N.E. 287 (1946).

6. Emanuel Hoyt, LAW OF HOSPITAL, PHYSICIAN AND PATIENT 286-7 (1972).

7. 373 F.2d 451 (D.C. Cir. 1967).

Much of the recent litigation concerning hospitals and staff has involved the specific area of mental patients in state hospitals. The landmark case on the subject is Rouse v. Cameron.[8] The petitioner in this case was charged with carrying a gun without a license and acquitted by reason of insanity. A District of Columbia statute[9] makes commitment automatic after a judgment of not guilty by reason of insanity. At the time the action was brought, the petitioner had been confined in Saint Elizabeth's Hospital eleven years, four times the maximum penalty for the offense with which he was charged. In response to a habeas corpus petition, the court found that indefinite confinement without treatment constitutes cruel and unusual punishment and a denial of due process of law. The court specifically refused to hold, however, that there is a constitutional right to treatment.

Nevertheless, in a later case,[10] a federal district court stated that patients involuntarily committed through a non-criminal process, which often lacks the constitutional safeguards provided defendants in criminal actions, have a constitutional right to receive " . . . such individual treatment as will give each . . . a realistic opportunity to be cured or to improve . . . because, absent treatment, the hospital is transformed into a penitentiary."[11]

Wyatt was a class action by patients seeking a preliminary injunction and an order of reference to a master to determine the adequacy of psychiatric treatment. The defendants in the action included the Commissioner of the Alabama Department of Mental Health. The court found that the programs for treatment were scientifically and medically inadequate, and ordered the defendants to develop within ninety days and implement within six months a program to provide each treatable patient with a realistic opportunity to be cured or to improve his or her mental condition.[12]

However, in another recent federal class action[13] a group of patients asserted violations of their civil rights. The court granted the defendants' motion to dismiss for lack of jurisdiction for four reasons: (1)

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8. D.C. CODE ANN. § 24-301(d) (1961).

9. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). See also Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973).

10. Burnham v. Dept. of Public Health of Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972).

11. Id. at 784.

12. Id. at 785.

13. 42 U.S.C. § 1983.

there is no constitutional right to treatment. The court distinguished Rouse and disagreed with Wyatt. (2) A right to treatment contention based on the Georgia statute[14] is barred by the Eleventh Amendment. (3) The right to treatment is incapable of judicial definition and resolution. It is, rather, a political question best left to the legislature. (4) What constitutes inadequate treatment differs with each patient, so this type of suit is not a proper class action.[15]

Yet other federal courts have permitted class actions asserting that the conditions and practices in state institutions constituted a violation of the plaintiff's constitutional rights.[16] One court went so far as to state that it is well established that the failure to provide adequate treatment is a denial of the patients' constitutional right to due process.[17]

Most recently the fifth circuit ruled in favor of the right to treatment. The case was initiated as a § 1983 action against several state mental health officials by a patient who had been involuntarily committed. The plaintiff alleged that he had a constitutional right to receive treatment or to be released; a jury returned judgments amounting to $28,500 in compensatory damages, and $10,00 in punitive damages against the superintendent of the hospital and the attending physician.

The court of appeals issued a forty-two page opinion affirming the lower court judgment and held "that a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition."[18]

Relying on due process, the court based its holding essentially on two theories:

> (1) that persons committed under a parens patriae ground for commitment must be given treatment lest the involuntary commitment amount to an arbitrary exercise of government power proscribed by the due process clause; and

14. GA. CODE ANN. § 88-502.2 (1969).

15. Supra note 10, at 785.

16. Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R. 1 1972); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973).

17. Martarella v. Kelley, 349 F. Supp. 575 (S.D. N.Y. 1972).

18. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974).

> (2) that when the three central limitations on the government's power to detain--that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed--are absent, there must be a quid pro quo extended by government to justify confinement, in this instance the quid pro quo is deemed to be rehabilitative or minimally adequate treatment.[19]

The questions presented in the Petition for Writ of Certiorari include:

> (1) Whether there is a constitutional right to treatment for persons involuntarily committed to a state mental hospital.
>
> (2) Whether, assuming there is a constitutional right to treatment, staff members at a state mental hospital are liable for monetary damages in a suit under the civil rights act.
>
> (3) Whether, assuming there is a constitutional right to treatment, the patient in this case waived this right.

The Supreme Court granted this petition for certiorari,[20] and has just heard oral arguments in the case. The Attorney General of Florida is representing the petitioner in the case. In oral argument the counsel for petitioners pointed out that the State of Florida has recently enacted a law which will prevent patients from being involuntarily hospitalized unless they are receiving treatment.

The defendants in the right to treatment suits are usually state officials at the policy-making level of the mental health program. As the cases indicate, their liability under the Civil Rights Act for the affects on patients of such policy determinations is in an evolutionary stage, with the courts in open conflict as to their liability. But, in cases based on tort theories, the same officials would be protected by discretionary immunity, unless their conduct was demonstrably malicious, corrupt, or beyond the scope of their authority.

19. Id.

20. The Supreme Court has until now sought to avoid settling the issue. When presented with the question of the right to treatment of the mentally ill, the Court had refused certiorari four times in regard to one patient. Donaldson v. O'Connor, 400 U.S. 869 (1970), 390 U.S. 971 (1968); Donaldson v. Florida, 371 U.S. 806 (1963); In re Donaldson, 364 U.S. 808 (1960), as well as three other occasions: People ex rel. Anonymous v. La Burt, 385 U.S. 936 (1966); United States ex rel. Stephens v. La Burt, 373 U.S. 928 (1963); People ex rel. Anonymous v. La Burt, 369 U.S. 428 (1962).

Ministerial employees of state and municipal hospitals are governed by the common law rules of liability unless a state statute specifically covers them.[21]

The State of California, in its Governmental Liability Act, has made special provision for such litigation. Basically the Act renders state employees (including doctors) engaged in medical, hospital and public health activities, and the state through respondeat superior, liable for ordinary negligence within the scope of employment. The employee is entitled to representation and indemnification.[22]

There is no liability for the consequences of discretionary decisions or for diagnosis and related decisions as to treatment and care of patients.[23]

The New York Act[24] has been interpreted so as to render the state liable for the malpractice of its medical personnel except in cases where the exercise of professional judgment is involved.[25] Liability for injuries caused by mental patients is predicated on notice of the dangerous tendencies and an ability to respond to foreseeable injury.[26]

21. For an excellent discussion of the subject of liability in the hospital area, see Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

22. CAL. GOV'T. CODE § 815.2(a).

23. Id. at § 855.8.

24. N.Y. CT. CL. ACT § 8.

25. Kaplan v. State, 277 App. Div. 1065, 100 N.Y.S.2d 693 (1950).

26. Mobley v. State, 1 App. Div. 2d 731, 147 N.Y.S.2d 414 (1955).

9. LIABILITY OF EDUCATIONAL INSTITUTIONS AND PERSONNEL

During the last decade education-related litigation has increased significantly. Much of the increase can be attributed to a developing consciousness on the part of students--particularly secondary and college level--that they have civil rights which may be infringed by the administrative policies of their schools. The full panoply of actions is beyond the scope of this report. The purpose of this chapter is to discuss the basic principles of liability in the educational field.

The common law doctrine of sovereign immunity has historically been applied so as to insulate school districts from any liability for torts committed by the district, its officers, agents, or employees. The rationale offered for the application of the immunity doctrine is that school districts are nothing more than arms of the state through which it carries out the function of education. Therefore, the states' immunity extends to its instrumentalities so that the integrity of all its functions may be maintained.[1]

Various state courts have offered other reasons why school districts should not be held liable in tort. One such reason is that school funds are collected from the public and held in trust by state educational institutions for the sole purpose of education. Expenditure of these funds for any other purpose, such as compensating the victims of torts, would constitute a misuse of public funds and a violation of a public trust.[2] A second and related reason offered is that since school districts are agents of the government and do not exist for profit but for the public benefit, no fund exists out of which to pay damages.[3]

Two other reasons sometimes offered for school district non-liability is that any tort is by definition ultra vires of a school districts' authority and that there is no master-servant relationship between a school district and its employees on which to base liability.[4]

Generally, to hold a school district liable in tort, there must be a statute expressly creating such liability, and a statute providing that a district may sue and be sued does not constitute an abrogation of common law immunity. Abrogation must be done by the legislature in clear and express terms.[5]

1. E. Reuther and R. Hamilton, THE LAW OF PUBLIC EDUCATION 274 (1970).

2. Cochran v. Wilson, 287 Mo. 210, 229 S.W. 1050.

3. Redfield v. School District No. 3, 48 Wash. 85, 42 P. 770.

4. Supra note 1.

5. N. Edwards, THE COURTS AND THE PUBLIC SCHOOLS 393-4 (1971).

The state courts are divided on the question of whether immunity should be extended to the proprietary functions of school districts,[6] and on whether districts should be liable for maintaining a nuisance.[7] Most courts do agree, however, that the purchase of insurance does not constitute a direct waiver of the districts' immunity, even though that may be the effect bo permitting recovery.[8]

California is an example of the states which have legislatively abrogated the immunity of school districts. School districts in California are now liable under the following circumstances:

(1) when a defective or dangerous condition of a building, grounds, work or property which has not been remedied after reasonable notice results in injury;

(2) when the negligent operation of a motor vehicle owned by a school district causes injury;

(3) when the negligent actions of the district, its officers or its employees causes injury to a person or his property.[9]

Other states have judicially abrogated school district immunity. Among these states are Colorado, Illinois, Minnesota, Nebraska, and Rhode Island.[10]

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6. Compare Sawaya v. Tucson High School District, 78 Ariz. 389, 281 P.2d 105 (1955) and Morris v. School District of the Township of Mount Lebanon, 343 Pa. 633, 144 A.2d 737 (1958) holding school districts liable for injuries resulting from leasing a school stadium with Richards v. School District of the City of Birmingham, 348 Mich. 490, 83 N.W.2d 643 (1957) and Kellam v. School Board of the City of Norfolk, 202 Va. 252, 117 S.E.2d 96 (1960) finding no liability under similar circumstances.

7. Compare Sestero v. Town of Glastonburg, 19 Conn. Sup. 156, 110 A.2d 629 (1954), holding that the defense of governmental immunity is not available against a cause of action founded on a nuisance created by a positive act of a government body, with Bingham v. Board of Education of Ogden City, 118 Utah 582, 223 P.2d 432 (1950) and Barnett v. City of Memphis, 196 Tenn. 590, 269 S.W.2d 906 (1954).

8. Taylor v. Knox County Board of Education, 292 Ky. 767, 167 S.W.2d 700 (1942); Hummer v. School District of the City of Hartford City, 124 Ind. App. 30, 112 N.E.2d 891 (1953).

9. Supra note 1, at 281.

10. Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969); Flournig v. School District No. 1, 482 P.2d 966 (1971).

The general rule is that school district officials and school board officers are not personally liable for negligent acts or mistakes made in the performance of discretionary duties within the scope of their authority. Immunity is lost, however, if the act or omission is corrupt, malicious, or beyond the scope of authority.[11]

The major conflict and confusion in the state courts is in the determination of whether an act is discretionary or ministerial. For example, in cases where school districts ordered repairs to school property which resulted in injury, a court in Indiana[12] ruled that the act of ordering the repairs was ministerial, while a court in North Carolina[13] held that such action was discretionary.

Most cases dealing with teacher liability are the result of injuries which result from a teacher's improper supervision of students. The failure of a teacher to provide proper supervision constitutes actionable negligence. However, the mere absence of a teacher from a room is not a basis for liability. Rather, the test is whether the presence of the teacher would have been likely to prevent the injury. Thus, the length of absence is a critical factor.[14]

In a representative case,[15] a school principal was held liable for injury to a pupil struck by paper clips shot by another student before class. Liability was based on finding that the principal had failed to announce rules regarding student conduct before class, nor had he assigned teachers to supervise the students. In another case a teacher was held liable for not supervising students during the lunch period, when a student was struck by another student causing injuries culminating in the student's death. The fact that another student's misconduct was the immediate precipitating cause of the injury did not mean that the teacher's failure to provide proper supervision was not the proximate cause of the injury.[16]

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11. Supra note 1, at 282. See also Briegel v. City of Philadelphia, 135 Pa. St. 451 and Griswold v. Town School District of the Town of Weathersfield, 88 A.2d 829. But see Bingham v. Board of Education of Ogden City, 223 P.2d 432, and Board of Education v. Volk, 72 Ohio St. 469, 74 N.E. 640.

12. Adams v. Schneider, 71 Ind. App. 249, 124 N.E. 718 (1919).

13. Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952).

14. Supra note 1, at 284-5.

15. Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967).

16. Dailey v. Los Angeles Unified School District, 2 Cal. 3d 741, 87 Cal. Rptr. 376, 470 P.2d 360 (1970). See also Sheehan v. St. Peters Catholic School, 291 Minn. 1, 188 N.W.2d 868 (1971).

New York, New Jersey, Connecticut, Massachusetts, and Illinois have enacted new "save harmless" laws, which require that if a judgment is rendered against a school district employeee for injuries resulting from his negligence, the district must reimburse him.[17]

The question of liability of school officials often arises in disputes over dismissals of teaching personnel. The recent case of Smith v. Lossee[18] is characteristic of such litigation. In this case an instructor sued the dean and president of a college for depriving him of his civil rights in dismissing him without good cause. The defendants first argument was that they were entitled to absolute immunity for this discretionary act within the scope of their duties. The court disagreed, holding that the immunity of such executive officials is only a qualified one, and without a valid defense to the plaintiffs' charges, they could be found liable.[19] The defendants next argued that the plaintiffs' dismissal was made with good cause and without malice. The court found, however, that in dismissing the plaintiff, the defendants had been motivated by malice. The actual reason for the dismissal was to punish the plaintiff for his assertion of his First Amendment rights in criticizing administration policy.[20]

In their final argument, the defendants argued that as state officials, state law should be controlling, and under state law they are entitled to immunity for their actions. The circuit court disagreed, noting that federal actions cannot be limited by state laws or rules regarding sovereign immunity or official privilege without emasculating § 1983. Therefore, in all federal actions under § 1983, public officials are entitled to only a qualified immunity.[21] As noted elsewhere in this report, this review of § 1983 was affirmed by the Supreme Court.

17. Supra note 1, at 619.

18. 485 F.2d 334 (10th Cir. 1973).

19. Id.

20. Id.

21. Id.

10. LIABILITY OF CORRECTIONAL OFFICIALS

Prison administrators are named defendants more often than other state officials largely as a result of what might be termed the "prisoners rights movement".

For many years, the activities of prison systems were seldom the subject of attention by the courts. So consistently did the courts defer to administrative discretion that in time this legal fact of life was elevated to a doctrine - the "Hands Off Doctrine". The doctrine, when finally acknowledged by the courts, was justified on three grounds: (1) the fundamental political principle of separation of powers - prison administration being an executive function; (2) the admitted lack of judicial expertise in penology; (3) the fear that judicial intervention might tend to subvert prison discipline.[1]

Largely through the impetus of recent federal court decisions applying the Civil Rights Act, 28 U.S.C. § 1983, the vitality of the Hands Off Doctrine has been seriously weakened. Nevertheless, even as late as 1960 a federal district court stated that the Civil Rights Act must be interpreted:

> ... so as to respect the proper balance between the states and the federal government in law enforcement... The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.[2]

Generally prison officials are deemed to owe a duty to the prisoners in their custody to provide the necessities of life: food, clothing, shelter, medical care. Failure to provide these has been held to render an official personally liable in damages.[3] There are a few courts, however, which have held that even the provision of necessities to an inmate may be a discretionary act for which an official has immunity.[4] The judicial sentiment behind the decisions upholding official discretion was succinctly stated by the Eighth Circuit Court of Appeals:

> Supervision of inmates of ... institutions rests with the proper administrative authorities and ... courts have no power to supervise the management and disciplinary rules of such institutions.[5]

1. John Palmer, CONSTITUTIONAL RIGHTS OF PRISONERS 137 (1973).

2. Swansen v. McGuire, 188 F. Supp. 112, 115-116 (N.D. Ill. 1960).

3. Smith v. Slack, 125 W. Va. 812, 26 S.E.2d 387 (1943); Farmer v. State, 224 Miss. 96, 79 So.2d 528 (1955).

4. Bush v. Babb, 23 Ill. App. 2d 285, 162 N.E.2d 594 (1959); St. Louis ex rel. Forest v. Nickolas, 374 S.W.2d 547 (Mo. App. 1964).

5. Sutton v. Seattle, 302 F.2d 286, 288 (8th Cir. 1962).

Prison officials have been found to have a duty to protect inmates from physical harm inflicted by other inmates.[6] As with other administration matters, however, if the injury inflicted upon one inmate by another is the result of a discretionary decision by an official, courts are reluctant to find liability.

Prison officials may also be found liable for injuries inflicted on inmates by the prison staff, but only when it is unreasonable or unjustified. For many years, the Hand's Off Doctrine was used by federal courts to deny relief under § 1983 for inmates who received corporal punishment,[7] and by state courts to permit the administration of corporal punishment.[8] Reasonable force by prison officials to maintain prison discipline is permitted.[9]

The new trend in judicial supervision of prison administration was marked by the decision in Cooper v. Pate,[10] in which the Supreme Court held that an inmate in a state prison can sue under § 1983 for deprivation of civil rights by state officials. From that point, federal courts began to intervene in prison discipline cases when a denial of constitutional rights was alleged.[11]

The next issue presented was whether an inmate must exhaust his state remedies before taking his § 1983 case to the federal forum. The court held in Wilwording v. Swenson[12] that exhaustion of state remedies was not required by § 1983. However, it is still not clear whether a federal court would act in a case where adequate state procedures for the redress of grievances exist but have not been used by the prisoner. Thus, a second circuit justice stated in a concurring opinion:

> I do not agree that recent decisions of the Supreme Court mandate ... action by federal courts in all cases involving treatment of prisoners in state institutions, without a suitable period of abstention where state courts are empowered to hear a case and where there is reason to believe the state would grant relief if the complaint is well-founded ...[13]

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6. Bartlett v. Commonwealth, 418 S.W.2d 255 (Ky. 1967).

7. State v. Jones, 108 F. Supp. 266 (S.D. Fla. 1952), rev's. on other grounds, 207 F.2d 785 (5th Cir. 1953).

8. State v. Cannon, 55 Del. 587, 190 A.2d 514 (1963).

9. Stephens v. Carley, 48 Mont. 352, 138 P. 789 (1914).

10. Cooper v. Pate, 378 U.S. 546 (1964).

11. Johnson v. Avery, 393 U.S. 483 (1969); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

12. Wilwording v. Swenson, 404 U.S. 249 (1971).

13. Wright, supra note 11, at 528.

Suits against prison officials under § 1983 have sought: an injunction against certain conduct of the official; a writ of mandamus to compel conduct by an official; money damages; a declaratory judgment to determine a disputed legal issue; or appointment of a monitor to supervise conduct of the parties on behalf of the court. In Jones v. Wittenberg,[14] the court found that the prison conditions constituted cruel and unusual punishment. Another prisoner successfully challenged the conditions of his confinement by way of a § 1983 declaratory judgment action. In that case, Holt v. Sarver[15], the court stated that the conditions in two Arkansas prison farms were such as to render incarceration cruel and unusual punishment.

A more recent and far-reaching decision against a prison official came in the case of Landman v. Royster.[16] This case was brought under § 1983 to attack the disciplinary procedures of the correctional system. The defendants were the Director of the Department of Welfare and Institutions, Director of the Division of Corrections, Superintendent of the State Farm, and Superintendent of the Virginia State Penitentiary. The court found that the disciplinary procedures of the Virginia penal system evidenced such a disregard of constitutional rights as to violate due process, and enjoined the procedures in question which included bread and water diet; arbitrary use of tear gas; taping, chaining, or hand-cuffing inmates to cell bars; confinement for a period of a year without exercise or bathing.

Minimum due process requirements were imposed for disciplinary proceedings, including: a hearing with opportunity to confront adverse witnesses and offer evidence, determinations based on evidence presented at the hearing and rendered by an impartial tribunal; and lay representation for inmates who require it. The defendants were also ordered to prepare and distribute to the court and all inmates a list of rules and regulations on standards of behavior, and to notify all custodial staff members of the penal system of the terms of the injunction. At a subsequent hearing, the court determined that the defendants had failed to comply with the injunction, held them in contempt of court, and fined them jointly and severally $25,000, imposition of which was suspended on condition that defendants implement the order immediately.

The Landman case is most significant in that the court found that the Director of the Division of Corrections had actually knowledge of and encouraged the acts in question. As a result, he was liable for the money damages which the court determined the plaintiffs had suffered. These compensatory damages for pain and suffering, reasonable medical costs, and lost prison wages totaled over $20,000 for the three plaintiffs. The money judgment against the Director was personal, and at the time of the decision there was no state insurance to protect correctional officers. Presently, however, Virginia provides liability insurance for such officials. Five other states (Arizona, Colorado, Massachusetts, Missouri and Vermont) have

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14. Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971). See also Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970).

15. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

16. Landman v. Royster (USDC-E. Va., No. 170-69-R).

provisions by which a prison official can be reimbursed for damages recovered by inmates.[17]

Section 1983 suits have become so numerous, and have proven to be such a threat to correctional officials, that a number of judges have began to question whether recent decisions have not carried the statute beyond all reasonable interpretation. Judge Lumbard, in a dissenting opinion, stated the case for state control:

> The resolution of differences between inmates and jailers in state prisons is peculiarly a matter of state interest and concern. These matters can better be determined by the state court which is nearby and available for immediate resolution of such disputes ... It could hardly have been the intention of the Congress in enacting § 1983 that it would be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons ...
>
> It is quite clear that state prisoners are turning more and more to the Civil Rights Act to redress their grievances and for therapeutic relief, rather than to habeas corpus ... Unless the district courts can in the exercise of discretion, stay their hands pending determination of the suit in those state courts which will hear the cases, the federal courts will find themselves in the business of running and regulating state prisons.[18]

At the present time suits under § 1983 pose the greatest single source of potential liability for corrections officials. As the cases demonstrate, § 1983 liability threatens an official's finances and his professional judgments. The only protection offered an official are his own good faith and adequate liability insurance.

A prison official also faces potential liability under a number of other causes of action, including habeas corpus.

Originally federal habeas corpus was a remedy strictly limited to challenging the legality of confinement. Except in a few states (Texas, Minnesota, New York and California) which have paralled developments in the federal system, state habeas corpus is limited to challenging the legality of confinement.[19] Recent decisions in the federal courts, and in the courts of the states just mentioned, have expanded the habeas corpus remedy to include challenges to the conditions of confinement.

The decision in Coffin v. Reichard was an early enunciation of the expanded habeas corpus remedy:

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17. ABA-ACA, LEGAL RESPONSIBILITY AND AUTHORITY OF CORRECTIONAL OFFICERS 10 (1974).

18. Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972).

19. McNally v. Hill, 293 U.S. 131 (1934).

> A prisoner is entitled to a writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits.[20]

The expanded habeas corpus has become another serious challenge to the authority of state prison officials over the administration and management of prisons. Whereas the legality of confinement only indirectly affected correctional personnel, since they were merely carrying out the directives of the prosecutorial and judicial arms of government, challenges of the conditions of confinement go directly to the duties of prison officials.

The major reason why habeas corpus is much less frequently used by prisoners than § 1983 is that courts have consistently interpreted the law to be that all alternative remedies must be exhausted before a prisoner may seek the writ,[21] unless it can be demonstrated that such exhaustion would be a futile gesture.[22]

However, the decision by the Court in Prieser v. Rodriguez held that a prisoners suit for restoration of good conduct time credits must be treated as a petition for a writ of habeas corpus, and could not be sought under § 1983. In a footnote, the court explained:

> If a prisoner seeks to attack both the conditions of confinement and the length of that confinement, the latter claim, under our decision, is cognizable only in federal habeas corpus... But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his claim relating to the conditions of his confinement.[23]

The effect of this decision will be to force more actions against prison officials through the state procedures and delay, if not limit, the occasions in which corrections officials must defend their actions in federal court.

Landman v. Royster is also an example of the use of contempt proceedings against prison officials. Prison officials are technically officers of the court, in that they are responsible for executing the sentences imposed by the court. This is true for inmates sentenced by state and fed-

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20. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

21. 28 U.S.C. § 2254(6) (1970).

22. Patton v. N. C., 381 F.2d 636 (4th Cir. 1967); Davis v. Sigler, 415 F.2d 1159 (8th Cir. 1969).

23. Preiser v. Rodriguez, 411 U.S. 475, 499, n. 14 (1973).

eral courts.[24] By virtue of this fact, a number of courts have used their contempt power to enforce reasonable treatment of prisoners sentenced by them. For example, the Supreme Court of Rhode Island in State v. Brant[25] ruled that a petition to adjudge a warden or custodial officer in contempt of the court's order of commitment is a proper means of correcting prison abuses.

Although prison officials may be criminally liable for unjustified and illegal abuse of inmates, such prosecutions are rare. This is due to a number of factors, including the concern and judgment used by most officials in discharging their correctional duties, as well as the kindred relationship shared by prison officials, prosecutors, and the judiciary. Nevertheless, the statutory provisions for such prosecutions exist in both the federal government and a number of states.

The federal criminal provision is 18 U.S.C. § 242, which is the criminal part of the Civil Rights Act. The elements of an offense under the statute are (1) deprivation of a constitutional right; (2) under color of law; (3) with specific intent.[26] This provision has been used against state prison officials only when flagrant abuses have occurred and the appropriate state officials have failed to act.[27]

The California statute regulating this area provides: any injury to a prisoner not authorized by law is punishable in the same manner as if he were not convicted or sentenced.[28] The statute also makes unlawful: any punishment not authorized by the Director of Corrections and ordered by the Warden; and cruel, corporal or unusual punishment, treatment of lack of care resulting in injury or damage to health is unlawful. States with similar statutory provisions include Arizona, Nevada, and Texas. However, only in North Carolina are there reported cases of prosecutions of prison employees for crimes against prisoners.[29]

With the increased use of the federal courts by prisoners seeking a redress of grievances, the incidence of tort actions against prison officials has decreased. Tort suits generally, however, have not been used frequently by prisoners because of a presumed sympathy for prison officials on the part of judges and jurors, the difficulty in persuading other inmate witnesses to testify against prison officials, and because some states, such as New York, New Jersey and California, deny prisoners the right to sue during confinement except to challenge the original conviction. Similarly, inmates suing under the Federal Tort Claims Act are seldom

24. In re Birdsong, 39 F. 599 (S.D. Ga. 1889); U.S. v. Shipp, 203 U.S. 563 (1906).

25. State v. Brant, 99 R.I. 583, 209 A.2d 455 (1965).

26. U.S. v. Senak, 477 F.2d 304, 306 (7th Cir. 1973).

27. Screws v. U.S., 325 U.S. 1 (1945).

28. CAL. PENAL CODE § 2650 (1970).

29. State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713 (1949); State v. Mincher, 172 N.C. 895, 90 S.E. 429 (1916).

successful.[30] An exception to the general lack of success is Cohen v. United States, a case in which an inmate recovered $110,000 for injuries received when another inmate, classified as psychotic and dangerous, assaulted him. The court found that the prison officials were negligent in not properly controlling the assaulting inmate.

The last two years have seen dramatic changes and unprecedented activity in the law of corrections. Since the vehicle for these changes has been the courts, prison officials have been named parties in these lawsuits. Because prison disciplinary and administrative procedures were the issue in most cases, prison officials were sued in their official capacity, as representatives of state departments and agencies. As a result representation was provided by the Attorney General.[31] A few examples indicate the scope of judicial involvement in prison administration. In Wolff v. McDonnell[32], the court stated the due process requirements in prison disciplinary proceedings and the permissible limitations on prisoners' mail and visitations. Procunier v. Martinez[33] restricted the extent to which prison officials may censor prisoner's mail. Other recent cases have affected such areas of correctional administration as restrictions on legal services,[34] prison transfers,[35] classification of inmates,[36] adequacy of medical and other forms of treatment,[37] the practice of religion by inmates,[38] and parole procedures and regulations.[39]

30. Johnson v. U.S. Government, 258 F. Supp. 372 (E.D. Va. 1966); Fleishour v. U.S. Government, 244 F. Supp. 762 (N.D. Ill. 1965), aff'd, 365 F.2d 126 (7th Cir. 1966).

31. Cohen v. U.S., 252 F. Supp. 679 (N.D. Ga. 1966).

32. Wolf v. McDonnell, 3 Prison L. Rptr. 189 (1974).

33. Procunier v. Martinez, 3 Prison L. Rptr. 129 (1974).

34. Johnson v. Anderson, 370 F. Supp. 1373 (D. Del. 1974).

35. Thomas v. Rundle, 371 F. Supp. 252 (E.D. Penn. 1974).

36. Cousins v. Oliver, 369 F. Supp. 553 (E.D. Va. 1974).

37. Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974).

38. Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).

39. Mahr v. Johnson, 370 F. Supp. 1149 (D. Md. 1974).

11. LIABILITY OF NATIONAL GUARDSMEN

The role of the National Guard has come under increasing public scrutiny during the last decade as a result of its use in civil disturbances in major cities and on college campuses. As with corrections personnel, the issues concerning the liability of Guardsmen had until then received only scant consideration by the courts. As a result, there is only a small body of statutory and common law upon which to rely in considering the subject of liability.

Article 1, Section 8 of the United States Constitution authorizes Congress to provide for the training of the militia. Pursuant to this mandate, the National Defense Act[1] subjects the National Guard to the same discipline as the regular Army. However, the Constitution also reserves to the states the responsibility for appointing officers and training the militia.

The question then arises whether the National Guard is in fact a federal or state entity. The answer would appear to be both, but not simultaneously.

Under Title 10 of the U.S. Code, the President has the power to "federalize" the militia if a state requests such assistance to control insurrection or domestic violence.[2] However, the overriding purpose of the National Guard is to bolster the active military forces in wartime. This is reflected in the fact that the major financial support for the Guard comes from the federal government. Nevertheless, when the Guard has not been federalized the primary responsibility for the training, and the most frequent use of the Guard, is at the state level. States have the authority to use the National Guard against public disorder or danger, and to assist state and local law enforcement officers.[3]

The National Guard is thus characterized as having a bifurcated role. According to one familiar with this situation:

> The National Guard has a dual status which produces continued confusion. Originally, the militia existed in each of the colonies before the United States had been formed. The National Guard is a state military force, responding at the call of the Governor to civil and natural emergencies of all kinds. It is also a reserve component of the Armed Forces of the United States which supplies the arms and equipment and directs the training so that the Guard may respond in a state of readiness to a national emergency as a part of national defense. Since the Guard therefore responds to both national and local needs more or less at the same time, the confusion is understandable. . . .
>
> Three principal legal means are available to the Governors of the various States in dealing with dire emergencies. These are "martial rule," civil disaster emergency laws," and the traditional "aid to civil or local authorities." These concepts exist and are applied in all of the States, but great confusion reigns as to their legal difinitions and limitations.[4]

1. 32 U.S.C.A. § 61.

2. 10 U.S.C. § 331-2.

3. McKittrick ex rel. Donaldson v. Brown, 337 Mo. 281, 85 S.W.2d 385; State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

The dual nature of the Guard has placed the individual Guardsman in a difficult situation in regard to liability. Unless his unit has been federalized, he is not considered a federal employee and therefore does not come under the jurisdiction of the Federal Tort Claims Act.[5] However, if a state through its National Guard has committed a tort for which the state has made no compensatory provision, there is an administrative remedy available to the claimant if the Guardsman committing the tort was on a federally-funded training exercise. This remedy, the National Guard Claims Act,[6] is only available when the state has failed to provide such a remedy. This Act is also available when the state remedy does not fully compensate the claimant. The balance of the claim may be received under the federal provisions.

There is nothing to prohibit a claimant from disregarding available administrative remedies and proceeding directly through the judicial process. Indeed, if the claim arises from wholly state activity in a state asserting sovereign immunity, the claimant has no alternative but to invoke the judicial process against the individual Guardsman. As a result the bulk of this chapter must be devoted to the nature and extent of the liability of Guardsmen during state service.

The governor of each state is both the chief executive and the commander-in-chief of the state military forces. In most states the governor, as commander-in-chief, has the authority to call out the guard in time of emergency or civil disturbance. In a few states, the legislature must declare the emergency.

The situations which justify the call-up of the Guard are fairly uniform throughout the states. Generally, they include invasion, disaster, civil disorders, or the imminent threat of any of these. The civil disorder category is the one which has created the most difficulty for Guardsmen, since their activities under such circumstances are more likely to cause damage or injuries to citizens and/or their property. Nevertheless, the case law on the liability of Guardsmen under such circumstances is sparse indeed. Many of the cases, although quite old, are still good law, and must be looked to for guidance on the status of liability.

4. Col. Willard A. Shank, Legal Problems of the National Guard (1972).

5. 32 U.S.C. 715.

6. Bishop v. Vandercook, 200 N.W. 278 (1924).

The thread which runs through the liability cases is that when the guard is called out by the governor, it is subordinate to the civil authority unless a state of martial law has been declared. Most state constitutions so provide. The effect is to give the Guardsman the status of a peace officer, when he has been called upon to assist in time of emergency. For example, in Bishop v. Vandercook,[7] the Michigan National Guard had been called out to assist in curtailing the transportation of liquor into the state from Ohio. Pursuant to this task, guardsmen used a log to block traffic which did not stop for inspection. A cab driver was injured when he did not see the roadblock, and a jury awarded him $2000 against the Guardsmen.

On appeal, the Guardsmen based their immunity defense on a state statute which provided:

> Whenever the Michigan National Guard or any portion thereof shall be ordered into actual service . . . troops shall always be amenable to civil authorities as represented by the Governor and shall be privileged from prosecution by civil authorities, except by direct order of the Governor, for any acts or offenses alleged to have been committed while on such service.[8]

The court ruled that the act in question could not be interpreted so as to grant Guardsmen immunity for civil wrongs committed in peacetime while assisting state or local law enforcement officers. Finding no immunity, the court went on to uphold the lower court decision that the use of the log as a roadblock was an "unlawful, wanton, and willful disregard of human life, open to no justification, and to no defense of contributory negligence."[9]

Franks v. Smith is another early case which still stands as an accurate statement of the law in that jurisdiction and in others which have cited the case with approval. The facts of the case were that the Guard had been called out to assist in controlling scattered violence in a county. The Guardsmen in question were ordered to interrogate travelers and to arrest anyone in groups of more than two carrying a weapon. The plaintiff, who was traveling with several other persons and who did have a gun on his person, was arrested by the Guardsman. The defense of obedience to superior orders was rejected by the court on the following grounds:

> . . . any military order, whether given by the Governor of a state or an officer of the militia or a civil officer of a city or county, that attempts to invest either an officer or private with authority in excess of that which

7. MICH. PUB. ACT No. 53, § 41 (1917).

8. Id. at 281.

9. 134 S.W. 484 (1911).

> may be exercised by peace officers of the state is unreasonable and unlawful, and if it is obeyed, the officer or private giving obedience subjects himself to such punishment and liability as the penal and civil laws of the state might inflict against a private individual. . . .
>
> . . . we . . . hold as a matter of law that the orders a soldier is justified in executing are confined to such as a peace officer in discharge of his duty might execute. In respect to these orders, the powers of military and local officers of the state are identical.[10]

The court went on to rule that the conduct of the defendant in arresting the plaintiff was unreasonable, in that he had not committed any act which could justify his detention.

The statements by these two courts on the liability of Guardsmen called into state service have been supported by subsequent decisions by courts in other jurisdictions. Among these decisions are Orr v. Burleson, Allen v. Gardner, Seaney v. State, and State v. McPhail.[11]

The rationale of these decisions is that because the Guardsmen are called out to assist peace officers in their responsibility to enforce the law, their liability ought to be coextensive. Another group of decisions, however, stands for the proposition that since the Guard is only mobilized to meet extraordinary circumstances, Guardsmen must be granted greater authority to meet their task. In O'Connor v. District Court,[12] for example, the court stated that Guardsmen responding to civil disorders could not be held liable in tort without proof of malice or wanton conduct not related to a proper command.

The decisions discussed thus far have related to actions by Guardsmen when civil law was still in force. Martial law suggests a much different situation. A definition of martial law seems to defy the authorities. The Supreme Court observed:

> The term "martial law' carries no precise meaning. The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some, it has been identified as 'military law' limited to members of, and those connected with, the armed forces. Others have said that the law does not imply a system of established rules but denotes simply

10. Id. at 492.

11. Orr v. Burleson, 214 Ala. 257, 107 So. 825 (1926); Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921); Seaney v. State, 188 Miss. 367, 194 So. 913 (1940); State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

12. O'Conner v. District Court, 219 Iowa 1165, 260 N.W. 23 (1935).

> some kind of day-to-day expression of a General's will dictated by what he considers the imperious necessity of the moment. In 1857, the confusion as to the meaning of the phrase was so great that the Attorney General in an official opinion has this to say about it: 'The common law authorities and commentators afford no clue to what martial law, as understood in England, really is . . . in this country, it is still worse.' What was true in 1857 remains true today.[13]

Several important points must be made initially about martial law. First, it does not come into existence every time the Guard is activated. In the Franks case, for example, the Guard had been mobilized, but the court noted that much more was required before martial law could be in force. The term denotes the breakdown of civil order to such a degree that all constitutional rights could conceivably be abolished, including the basic freedoms of speech, press, and assembly.[14]

Neither is martial law military law. In fact, some authorities contend that it should more properly be called martial rule, so as to more adequately distinguish one from the other.[15] Military law governs the operations of the military in peace and war, but only rarely governs civilians. Martial rule, on the contrary, suggests the enforcement of orderly conduct and emergency regulations by the military upon civilians.

The crux of the matter is that during times of martial rule, courts indicate that the Guard requires and receives greater latitude in their conduct, and a more restricted personal liability.[16]

Most states have statutes purporting to grant Guardsmen some type of immunity for acts done in the line of duty. However, each statute varies in scope and terminology. For example, Utah grants immunity only for acts "in the line of duty in pursuance of orders from a superior authority,"[17] while Kansas requires for immunity that the act be without malice or the use of excessive and unreasonable force.[18]

The existence of a statute and a fact situation which appears to come under it does not assure immunity. Besides the Franks case, immunity was also denied an Adjutant General in O'Shea v. Stafford[19] under a statute

13. Duncan v. Kahanamoka, 327 U.S. 304, 315 (1946).

14. Wilson v. Freeman, 179 F. Supp. 520 (U.S.D.C. Minn. 1959).

15. C. Fairman, THE LAW OF MARTIAL RULE (2d ed. 1943).

16. In re Moyer, 35 Colo. 159, 85 P. 190 (1904).

17. UTAH CODE ANN. § 39-1-11.

18. KAN. STAT. ANN. § 48-1805.

19. O'Shee v. Stafford, 122 La. 144, 47 So. 764 (1908).

which provided for immunity for members of the militia ordered into active service by any proper authority. The court stated that if the statute did in fact purport to exempt officers from civil responsibility for torts, it was in violation of the state constitution.

The recent revitalization of the Civil Rights Act has added a new dimension to the liability of the National Guard. As noted earlier, the Guard during most of its activities is a state entity, so that Guardsmen would come within the purview of the Act. Furthermore, under the supremacy clause of the U.S. Constitution, the Civil Rights Act would transcend any immunity which the state might have granted the Guard.

The disturbances at Kent State University which caused the deaths of four students and injuries to a number of others have focused attention on both the liability of the National Guard and the training of Guardsmen so as to minimize the potential for liability-creating situations.

The litigation growing out of Kent State has been in three stages. First a civil suit was instituted by representatives of the deceased students against the State of Ohio. The court of general jurisdiction dismissed the action because the state had not consented to the suit. That decision was reversed by the Court of Appeals, which held that the state's effort to shield itself from liability for the tortious acts of its agents violated the Due Process and Equal Protection clauses of the Fourteenth Amendment of the U.S. Constitution.[20] The appeal to the Supreme Court of Ohio resulted in the reinstatement of the trial court decision on the ground that the state had properly invoked sovereign immunity, which was not violative of the Constitution.[21] The plaintiff's petition for a discretionary writ of certiorari from the U.S. Supreme Court was denied. Interestingly, no individual Guardsmen were party of any of these proceedings.

Several suits under § 1983 were consolidated for trial in the U.S. District Court for the Northern District of Ohio. These suits sought civil damages against the Governor of Ohio, the Adjutant General of Ohio, a commander of the Ohio National Guard, thirty-five known Guard officers and enlisted men, and two hundred unknown persons. The cases were dismissed without trial when the judge ruled that the defendants had absolute immunity for acts done in their official capacities. The Sixth Circuit Court of Appeals affirmed the district court's ruling.[22] The Supreme Court reversed holding that the defendants were entitled to only a qualified immunity, and that the lower court had erred in dismissing the case before the plaintiffs had an opportunity to present their evidence. More specifically, the court stated:

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20. Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971).

21. Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).

22. Scheuer v. Rhodes, 471 F.2d 430 (1972).

> . . . in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords [the] basis for qualfied immunity of executive officers for acts performed in the course of official conduct.[23]

The court also discussed its prior decisions concerning the liability of police officers, which would certainly relate to lower ranking Guard officers and enlisted men. Quoting from its opinion in Pierson v. Ray, the court reiterated: "When a court evaluates police conduct relating to an arrest its guideline is good faith and probable cause."[24]

In summarizing the information which must be obtained or remanded, the court further elaborated the basis for reversal:

> This case, in its present posture, presents no occasion for a definitive exploration of the scope of immunity available to state executive officials, nor, because of the absence of a factual record, does it permit a determination as to the applicability of the foregoing principles to the respondents here. The District Court acted before an answer was filed and without any evidence other than the copies of the proclamations issued by respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the Court from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed.[25]

This case is presently moving toward trial in federal district court.

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23. Scheuer v. Rhodes, 416 U.S. 232 (1974).

24. Pierson v. Ray, 386 U.S. 547, 557 (1967).

25. Supra note 23.

The third phase of the litigation began with the indictment of eight Guardsmen by a federal grand jury for violation of the criminal provisions of the federal Civil Rights Act.[26] This section makes it an offense to intentionally deprive, under color of state law, an inhabitant of the United States of a right secured or protected by the Constitution or laws of the United States.

The Guardsmen challenged the constitutionality fo the statute they were charged with violating, but the court ruled against their motion to dismiss, noting that the Supreme Court in Screws v. U.S.[27] and Williams v. U.S.[28] expressly upheld the constitutionality of the statute.

The court passed on a number of other pre-trial motions relating to publicity, separation of trials, and testimony by the defendants to authorize investigating the shootings prior to the indictment. However, the crucial ruling by the court was the judgment of acquittal entered after presentation of the prosecution's case. The court stated that the government had failed to prove beyond a reasonable doubt a necessary element of the offense, namely, that the Guardsmen had the specific intent to deprive the deceased students of their constitutional rights. The Court noted:

> Even the specific intent to injure, or the reckless use of excessive force, without more, does not satisfy the requirements of § 242 as construed in Screws. There must exist an intention to punish or to prevent the exercise of constitutionally guaranteed rights, such as the right to vote, or to obtain equal protection of the law.[29]

The Court concluded its decision with a very precise explanation of the ruling, stating exactly what conclusions might, and might not be reasonably drawn by way of reference in future cases. Because of its significance, it is quoted in its entirety.

The Court concluded its decision with a very precise explanation of the ruling, stating exactly what conclusions might, and might not be reasonably drawn by way of reference in future cases. Because of its significance, it is quoted in its entirety.

> This opinion holds only that, based upon the evidence offered to the court, reasonable jurors must find that there is a reasonable doubt as to whether these eight defendants were possessed of a specific intention to deprive the students of Kent State University set forth in the indictment of their constitutional and federal rights, at the time they discharged their weapons.

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26. 18 U.S.C. § 242.

27. Screws v. U.S., 325 U.S. 1 (1945).

28. Williams v. U.S., 341 U.S. 97 (1950).

29. 16 Crim. L. Rptr. 2169 (November 27, 1974).

This opinion does not hold that any of the defendants, or other guardsmen, were justified in discharging their weapons on May 4, 1970 at Kent State University. "Justification" is irrelevant to a proceeding under 18 U.S.C. Sec. 242. That section is concerned with the intentions of the defendants, and not with possible justification of their actions.

Very different considerations would obtain if this were a trial of these eight guardsmen in state court on charges, for example, of shooting with intent to injure or maim. In that situation, the issues of justification, of the possible excessiveness of the force used, of provocation, of self defense - might be relevant to the offense charged.

In particular, it must be clearly understood that the conduct both of the guardsmen who fired, and of the guard and state officials who places these guardsmen in the situation noted above is neither approved nor vindicated by this opinion.

It is entirely possible that state officials may yet wish to pursue criminal prosecutions against various persons responsible for the events at Kent State. This opinion does not pass on the propriety of such prosecutions, if any.

The events at Kent State University were made up of a series of tragic blunders and mistakes of judgment. It is vital that state and national guard officials not regard this decision as authorizing or approving the use of force against unarmed demonstrators, whatever the occasion or the issues involved. Such use of force is, and was, deplorable.

> The evidence in this case does not satisfy the requirements of 18 U.S.C. Sec. 242. This statute is highly specialized, and restricted even further by court interpretation. It does not replace the functioning of the criminal codes of the states, even when state officials fail to enforce the law.[30]

Although Kent State took place nearly five years ago, the status of the litigation still makes the drawing of any firm conclusions about liability under the Civil Rights Act premature. The most that can be said is that Guardsmen cannot invoke immunity to protect themselves, but must be prepared to defend the reasonableness and propriety of their actions under the circumstances in federal court. For further guidance on the question of liability, one must look to the Civil Rights cases against other law enforcement officers.

The case law in § 1983 actions relates to three categories: false arrest, search and seizure, and personal injury. Guardsmen sued under § 1983 for activities in assistance to state law enforcement officers would most likely be subject to the same immunities and liabilities.

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30. Supra note 29.

The previously mentioned case of Pierson v. Ray[31] establishes the defense to an action for false arrest to be good faith and probable cause. Joseph v. Rowlen[32] interprets Pierson to require both. In other words, there can be no defense of good faith if there was no probable cause for the arrest.

In order to establish a defense to an action for unreasonable search and seizure, it must be incident to a valid arrest or under extraordinary circumstances which obviates the warrant requirement.[33]

Excessive force resulting in personal injury to a citizen constitutes summary punishment and subjects a law enforcement officer or Guardsman similarly situated to § 1983 liability.[34] Recent cases suggest that any unnecessary force used either negligently, wantonly or willfully will render an officer liable for compensatory and even punitive damages.[35] The only additional protection afforded a Guardsman is that the question of whether the force used was excessive is to be determined by the jury.[36] Because the Guard is only called out when regular law enforcement procedures prove inadequate, the jury may be inclined to posit a need for greater use of force under such circumstances than in the general law enforcement situation.

The recent deaths which have resulted from the use of the National Guard to control civil disturbances have brought into question the adequacy of Guard training programs. For example, commission studies following the Detroit riots of 1967 and the Kent State shooting in 1970 came to the conclusion that the training and rules of engagement for the Guard are such as to increase the likelihood of serious injury to citizens.[37] To the extent that this may be correct, then there is also a correlation between those same factors and the potential liability of a Guardsman who responds to situations according to his training and the relevant rules of engagement.

Critics of past Guard actions contend that incidents like Kent State indicate the need for uniform rules of engagement to govern all Guard units, rather than the present situation of different rules for each state. A crucial issue upon which rules of engagement differ is when wespons will

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31. Pierson v. Ray, 386 U.S. 547 (1967).

32. Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968).

33. Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

34. U.S. v. Guest, 383 U.S. 745 (1966).

35. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968).

36. Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966).

37. REPORT OF THE NATIONAL ADVISORY COUNCIL ON CIVIL DISORDERS 505, 506 (1968).

be loaded and ready to fire. The Ohio Guard, for example, was deployed initially with loaded weapons. But under the Rhode Island rules of engagement, which are typical of those in a number of states, there is a strict hierarchy fo force, and only under proper orders can a Guardsman move from one state to another.

a. Show of force.

b. Delivery of proclamation

c. Riot control formation.

d. Riot control agents--smoke grenades and pots.

e. Employment of water.

f. Use of rifles and bayonets.

1. unloaded and sheathed

2. unloaded and unsheathed.

3. loaded and unsheathed, round not chambered.

4. Loaded and unsheathed, round chambered.

g. Firepower

Use of weapons to conduct area-type firing is not tolerated. The progressive steps in employing firepower are:

1. Selective fire by special marksmen in a defensive manner when overt acts endanger the lives of troops.

2. Increased firepower only under extreme necessity and as a last resort. There is no recorded instance where armed forces have been required to use volume fire to suppress a riot or disorder.[38]

Critics argue that had such rules of engagement controlled the Ohio National Guard, no one would have died at Kent State.[39]

Table 2 on page 29 indicates that most states have specific statutory provisions for representation of Guardsmen by the Attorney General or state-appointed counsel. Usually the only stipulation in civil actions is that the injury-causing act have been in the line of duty and without malice or wanton and willful disregard of human life. This determination is made

38. Rhode Island National Guard, Rules of Engagement, OPLAN 10, Annex C, App. 1 (May, 1968).

39. Albert Brien, The Case for Uniform Regulation of the National Guard, 50 B.U. L. REV. 172 (1970).

by the Attorney General prior to representation, and the results of such an investigation, should they call for refusal of representation, cannot be used as evidence against the Guardsmen.[40]

Defense of Guardsmen in criminal cases poses a potential conflict of interest for the Attorney General, who may also be responsible for enforcing laws under which Guardsmen are charged. States responding to the liability questionnaire indicated generally that representation could only be considered on a case by case basis, depending upon the facts of the situation.

The exposure of Guardsmen to personal liability for actions in the line of duty has troubled those involved for some time. The adverse effects of such liability arise not only from Guard activities in times of emergency and civil disturbance, but also accidents and injuries resulting from routine training sessions and operations. In states without tort claims acts (see Table 2.) which include Guardsmen in their coverage, a state-funded insurance program has been suggested as the most readily available method of protecting Guardsmen from the harsh effect of personal liability.

Such coverage is particularly important for the enlisted men who rarely, if ever, can come within the discretionary exception to liability, and therefore must follow potentially illegal superior orders at their own peril.[41]

40. MD. CODE ANN. art. 32A, §§ 12 A-H (1973).

41. Telephone conversation with Robert Strudwick, Strudwick & Associates, Baltimore, Maryland, November 8, 1974.

12. LIABILITY OF POLICE OFFICERS

The police officer is the potential subject of many different types of legal actions because of the very nature of his official duties. This chapter will discuss those different causes of action, and note particular areas where litigation is most frequent.

Certainly one of the oldest forms of action to which police are subject is tort--both negligence and the intentional variety. A typical cause of action would be for excessive use of force or detention without probable cause. Those who have studied the subject empirically, however, report that police officers are very rarely forced to defend against civil tort actions, and they do not regard tort liability as a serious threat.[1] There are several reasons suggested for the infrequency of tort actions against police. Where arrest without probable cause is the issue, many jurisdictions hold that a subsequent conviction creates a conclusive presumption of probable cause for the arrest. As a result, even though an arrest may in fact have been improper, if the accused is found guilty, there is no opportunity to challenge the arrest.

Second, there is no adequate source for monetary recovery. Law enforcement is a governmental activity for which a government entity is provided immunity. Bonding requirements for police officers, when they exist at all, are usually quite limited. The individual police officer is rarely in a financial situation which would permit adequate recovery for tort damage awards. The issue of police liability for tort damage awards is still largely theoretical because of the paucity of suits. The debate continues, nevertheless, as whether the individual officer should remain personally liable as a means of deterring unlawful conduct, or whether the employing entity should indemnify the officer, thereby sacrificing deterrence in order to provide an adequate monetary reserve to compensate the victims of police torts.

Another reason for the small number of tort suits is the feeling among the potential plaintiffs that judges and juries are so strongly prejudiced in favor of police that a lawsuit, even on solid facts, is futile. A related problem is the difficulty of finding corroborating witnesses to testify on behalf of the plaintiff. Such persons are likely to be either bystanders who wish to remain uninvolved, or other accused individuals, who do not wish to further antagonize the authorities or call attention to themselves.

For all of these reasons, the tort liability of police constitutes neither a serious threat to an officer nor a viable mechanism for potential plaintiffs. The result is that the other forms of action to be discussed in this chapter are relied upon almost exclusively to redress grievances against the police.

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1. See Wayne LaFave, ARREST 412-424 (1965), for the results of a study of police tort liability in the states of Kansas, Michigan, and Wisconsin.

Most common law tort causes of action also constitute violations of the criminal law, ranging from assault and battery to first degree murder. The difference is that the victim is dependent upon the state to prosecute its own officers. The fact that such prosecutions take place in only the most egregious circumstances is understandable. Not only would a systematic imposition of criminal penalties seriously undermine law enforcement, but the very decision to charge a policeman presents a conflict of interest, since the prosecutor is likely to be presenting the case which resulted from the arrest of the individual by the officer. Criminal violations are more difficult to prove bacause of the "beyond a reasonable doubt" standard. Also, state courts often require a finding of malice or bad faith in an action against a police officer.[2]

As with the other law enforcement officials considered in this report, the most frequent action is for deprivation of constitutional rights under 28 U.S.C. § 1983. The statute subjects the individual officer to liability in damages for misconduct. There is no liability on the part of the state, the local government entity, nor the police department, since none are "persons" within the meaning of the act. Section 1983 requires no specific intent. Rather it is based on the general common law tort principle that an individual is responsible for the natural consequences of his actions. Thus, even gross negligence can result in liability.[3] Among the acts for which police have most frequently been held liable under § 1983 are: arrests without warrant or probable cause;[4] use of excessive force;[5] unreasonable search and seizure;[6] brutality to prisoners;[7] obtaining coerced confessions;[8] unequal enforcement of the law;[9] and obstructing or harassing individuals seeking to exercise their first amendment rights.[10] Although federal law enforcement officers are not liable under § 1983, they have been held liable for depriving persons of their constitutional rights under the federal common law.[11]

The discussion of 18 U.S.C. § 242 in the National Guard chapter makes clear why this remedy is viable only in extraordinary circumstances. The

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2. State v. Dunning, 177 N.C. 559, 98 S.E. 530 (1919).

3. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970).

4. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

5. Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970).

6. Lankford v. Geltson, 364 F.2d 197 (4th Cir. 1966).

7. Bargainer v. Michal, 233 F. Supp. 270 (N.D. Ohio 1964).

8. Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961).

9. Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964).

10. Williams v. Wallace, 240 F. Supp. 100 (N.D. Ala. 1965).

11. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (1972).

interpretation given the statute in Screws v. United States[12] requiring proof of specific intent by necessity confines relief to cases of the most outrageous brutality.[13]

A developing procedure for preventing police misconduct is the injunction. This remedy is only effective to prevent continuing or threatened harm or damage. The basic requirements for an injunction are a showing of irreparable injury and the threat of imminent harm. Unless these can be demonstrated, most courts refuse to issue an injunction. One court expressed the requirements in these words:

> In order for a court to grant an injunction, there should be a showing that there is a substantial risk that future violations will occur.
>
> In order to show a substantial likelihood of future misconduct, a clear pattern of harassment must be shown.[14]

At least one court, however, did not require a showing of imminent threat of harm. In Lankford v. Gelston,[15] the plaintiffs sought to prevent the use of a police "turn-up" squad, which made warrantless searches of their homes based on anonymous tips that murder suspects were being sheltered. The district court had expressed satisfaction that the police would make a good faith effort to comply with due process in the future. The Fourth Circuit Court of Appeals rejected this supposition, and issued an injunction to prevent future searches without a warrant.

In another case seven named police officers were accused of having systematically harassed and beaten black persons on their patrols. The injunction prohibited the officers from:

> [S]topping, arresting, or imprisoning the planintiffs and other black residents of or visitors to . . . Pittsburg without adequate cause while they are conducting themselves in a lawful or proper manner.[16]

The police officer must clearly understand the nature and scope of an injunction, whether it applies to him in particular or the officers in general, since he may be held in contempt of court for violating the command of the injunction.

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12. Screws v. U.S., 325 U.S. 91 (1944).

13. See, e.g., Williams v. U.S., 341 U.S. 97 (1951); Miller v. U.S., 404 F.2d 611 (5th Cir. 1968); Lynch v. U.S., 189 F.2d 476 (5th Cir.) cert. denied, 342 U.S. 831 (1951).

14. Long v. District of Columbia, 469 F.2d 927 (D.C. Cir. 1972).

15. Supra note 6.

16. Hariston v. Hutzler, 344 F. Supp. 251, 254 (W.D. Pa. 1971), aff'd. per curiam, 468 F.2d 621 (3d Cir. 1972).

The exclusionary rule, which prohibits the use of unconstitutionally or illegally obtained evidence against a defendant at trial was justified initially as a means of deterring illegal police conduct.[17] This rationale has subsequently received much criticism. The criticism is based upon the view taken by courts and legal scholars that the police are not concerned enough about the ultimate disposition of the case to be deterred by the rule. One author suggests that "[t]he patrolman's role is defined more by his responsibility for maintaining order than by his responsibility for enforcing the law."[18] If this is correct, the arrest takes on more importance than the ultimate conviction, and the rule no longer serves a deterrent function. This point is also made by Professors La Fave and Remington, who note that:

> The exclusionary rule does not itself prohibit improper police conduct; it only makes unlikely the conviction of the person against whom such conduct is directed, obviously, such a rule can have an impact only in those cases in which the police desire a conviction, which is not true with regard to many offenses today.[19]

The situation today may well be that the only public official deterred by the exclusionary rule is the prosecutor, who may choose not to go to trial if his evidence is likely to be excluded.

The final form of liability which exists to regulate police misconduct is the review board. There are basically two types: the internal review board operated by the police department, and a citizens' review board conducted by the local government entity. These boards process complaints filed by citizens and other officers in regard to the conduct of individual officers. The police officer found guilty of misconduct by such a board is subject to reprimand, or even temporary or permanent dismissal.

Because of the rapid increase in litigation involving police, local government entities are looking toward insurance as a means of protecting their officers from serious financial loss. Such policies generally protect officers for false arrest or the use of undue force.[20]

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17. See Mapp v. Ohio, 367 U.S. 643 (1961). See also Chimel v. California, 395 U.S. 752 (1696).

18. J. Wilson, VARIETIES OF POLICE BEHAVIOR 16 (1968).

19. Wayne LaFave and Frank Remington, Controlling The Police: The Judges Role in Making and Receiving Law Enforcement Decisions, 63 MICH. L. REV. 987, 1009 (1965).

20. Telephone conversation with Ms. Joyce Blalock, staff attorney with the International Association of Chiefs of Police, January 24, 1975. See also Joyce Blalock, CIVIL LIABILITY OF LAW ENFORCEMENT OFFICERS (1974).

13. REPRESENTATION AND INDEMNIFICATION OF STATE PERSONNEL

The Attorney General is the attorney for the state in each jurisdiction. However, the extent to which this function is specified with particularity or left to the Attorney General's discretion and common law power varies from state to state. In an effort to determine the nature and extent of this variation, COAG distributed a questionnaire on this subject in August, 1974 to all Attorneys General's offices. Twenty-seven states returned the questionnaire in time for inclusion in this report. The information contained in this chapter is based upon these responses. For further discussion on the statutory and common law powers of the Attorney General in litigation, reference can be made to the COAG Report on the Office of Attorney General at page 137.

Almost without exception, Attorneys General have the authority, as attorney for the state, to represent state officials and employees in tort and civil rights litigation resulting from acts done within the scope of their employment. Fifteen Attorneys General report that their representation of public officials and employees is mandatory; twelve report that representation is discretionary. Among the officers which may exercise discretion, the following factors are commonly listed as considerations in deciding whether or not the Attorney General will provide counsel: (1) whether the defendant employee has requested representation by the Attorney General; (2) whether the defendant employee's injury-causing conduct is covered by an insurance policy under which the insurance company has agreed to provide representation; and (3) whether the facts suggest that the defendant employee's conduct may have been the product of malice, bad faith or corrupt motive.

Ten states indicated that under no circumstances would they nor could they represent a state official or employee charged with a criminal offense. States such as Texas and Minnesota report no authority to represent employees charged with criminal violations, while Nevada is expressly prohibited by law. Other states consider each case on its own merits. Wisconsin responds that such representation raises the issue of "whether a state officer or employee can be acting within the scope of ... employment when committing a criminal act." Maryland applies the same criteria as in tort cases, but outside counsel is appointed to avoid conflict with representation of prosecutors. Massachusetts recommends that the employee retain private counsel, but will defend with reservation when requested. South Carolina, however, indicates that it is statutorily required to defend all officials who request representation in writing.

Ohio was recently faced with an unusual situation as an outgrowth of the Kent State incident. When eight of the Ohio National Guardsmen were indicted by a federal grand jury, the Ohio Attorney General administratively construed the relevant statute to preclude representation by the Attorney General beyond the indictment stage. Nevertheless, the Governor of Ohio ordered the Attorney General, pursuant to that statute, to provide the guardsmen with representation.

Nine states did not completely rule out the possibility that under a given set of facts representation might be provided. Pennsylvania, for example, indicated that "where it appears as a matter of law that there is no legal basis for the prosecution, representation [is provided] up to the point of indictment, including attack on the indictment's validity."

Fifteen of the responding states indicated the existence of special claims legislation - either a tort claims or a court of claims act. The State of Ohio, for example, has just passed a Court of Claims Act, which provides:

> The state hereby waives its immunity from liability and consents to be sued and have its liability determined in the Court of Claims created in this chapter in accordance with the same rules of law applicable to suits between private parties ... .[1]

The State of Tennessee has created a Board of Claims composed of the commissioner of highways and public works, the commissioner of finance and taxation, the state treasurer, the comptroller of the treasury, the secretary of state and the Attorney General.[2] The Board has the authority "... to hear and determine all claims against the state for personal injuries or property damages caused by negligence in the construction and/or maintenance of state highways or other state buildings and properties and/or by negligence of state officials and employees of all departments of divisions in the operation of state-owned motor vehicles or other state-owned equipment while in the line of duty ....[3]

In those states which have enacted tort or court of claims acts the Attorney General represents the state and/or its employees in claims which qualify under the act. Generally, state courts have held that if a state has not consented to suit in a claims act or by some similar legislative expression of intent, the state is not liable for injuries or damages. Except in cases of discretionary acts by state officials, recourse for the injured citizens shifts to the individual state employee. Although most states provide representation through the Attorney General for such employees upon written request, judgements obtained against them are not necessarily paid by the state. The next section considers protection that may be provided.

Most states (twenty-two of those reporting) or subdivisions thereof carry one of more types of insurance to cover their activities and/or employees. The most common coverage is liability insurance for state-owned vehicles. Other types of insurance, which appear with less frequency, include highway defects (Louisiana), state police (Wyoming, Maryland, and Iowa), medical malpractice (Wyoming, Tennessee, and Hawaii).

Several states have much more comprehensive insurance coverage. For example, the Idaho Department of Insurance provides a comprehensive insurance plan for the state. The Commonwealth of Pennsylvania, in addition to providing general liability coverage, has included insurance for certain intentional torts and Federal Civil Rights Act violations.

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1. OHIO REV. CODE § 2743.02.

2. TENN. CODE ANN. § 9-801.

3. Id. at § 9-812.

The majority of states which purchase insurance limit their liability to the coverage of the policy. A few (Wyoming, New York, Louisiana, Minnesota, Hawaii and Arizona), indicate no limit on liability. Eleven states indemnify officials and employees against judgments resulting from the good faith discharge of their duties. Nevertheless, many state employees, whose actions within the scope of employment are neither insured nor indemnified, must bear the burden and risk of liability if their state still invokes immunity either totally or in regard to their specific activities.

The standard procedure for allocating funds for tort claims is an annual legislative appropriation. Protection against catastrophic occurrences is provided by special insurance coverage. Processing tort claims becomes significantly more expensive, however, when a state chooses to establish a special Court of Claims, rather than using the courts of general jurisdiction. The State of New Jersey, for example, considered the New York Court of Claims and the California Governmental Liability Act in an effort to determine how to provide for state liability. The decision was to follow the California example, which utilizes the regular court system.

The experience of the states which have eliminated absolute sovereign immunity indicates that, through a combination of legislative appropriation and insurance, limited tort liability can be assumed without serious damage to state finances.

CONCLUSION

The recent history of sovereign immunity and public official liability is characterized by two basic themes: the caustic and continued criticism of immunity by courts and commentators, and the steadfast unwillingness of legislators to subject the state (though not necessarily its officials and employees) to liability similar to that of a private corporation or individual. In every instance in which a state court has abolished immunity, the state legislature has either completely reinstated it or limited the liability statutorily.

When viewing both judicial action and legislative reaction, the net effect appears to be something less than the complete elimination of the non-liability of public entities for their torts. Rather, there is a restructuring of the rules which determine when a tort resulting from an act of government will be compensated.

One commentator describes the evolution of liability as the creation of five fundamental approaches to governmental tort liability.[1] The first is a modified common law form of immunity and liability based on a case-by-case judicial definition of public tort liability. Arizona, Florida, and Kentucky are given as examples.[2]

The second form, typified by Michigan and Utah, is a general immunity with specific statutory exceptions. This not only narrowly limits the instances in which the state may be a proper party defendant, but also permits a fairly accurate prediction of the yearly cost of liability.[3]

A third alternative, found in Minnesota and Wisconsin, is a general tort liability within statutory damage limitations. Such an approach permits the state to anticipate its ultimate yearly liability without unduly limiting the province of the judiciary in dealing with emerging tort doctrine.[4]

The fourth type is described as general liability with specific statutory exceptions, e.g.: (1) discretionary decision making responsibilities; (2) activities creating a slight risk of substantial injury; (3) functions of significant social value, but only marginal budgetary support which would be substantially impeded to the detriment of the general welfare by tort liability; and (4) activities which entail risks for which alternative institutional loss distribution arrangements are generally available and reasonably adequate.[5]

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1. A. Van Alstyne, Government Tort Liability: A Decade of Change, 1966 U. ILL. L.F. 919.
2. Id. at 969.
3. Id. at 970.
4. Id. at 971.
5. Id. at 972.

The final category is specifically defined liability and immunity, such as is established by the California Tort Claims Act, which makes all phases of governmental liability and immunity a matter of statutory re-regulation, thereby precluding the judicial development of new common law approaches to emerging problems.[6]

The relative merits of the above approaches may be strongly debated, but on the one primary issue at the heart of the entire controversy - whether states should accept an ever-increasing responsibility for the injuries and damages caused by their activities and employees - the courts and commentators are singularly unanimous in their agreement that the only equitable answer - with regard to both injured or damaged citizens and state employees - is yes. In what has not become a jurisprudential litany the immunity doctrine is declared historically unsound, imbued with a vitality based almost entirely upon stare decisis rather than logic or experience, fraught with exceptions so numerous and diverse as to regularly produce injustice and discrimination among claimants, and bolstered by exaggerated and unfounded claims of irrepairable damage to public funds which are unjustifiable in the light of modern insurance coverage and the experience of large corporations which manage to thrive and prosper in spite of their lack of immunity.[7]

We appear to be approaching the watershed of public and professional opinion. Modern notions of sound public policy reject the view that the burden of loss should fall either on the person injured by tortious acts or omissions of public servants, or, for that matter, on the public servants themselves, rather than on the government enterprise which ought to bear the utlimate responsibility for its own injury-causing activities.

Judges and professors argue that the better rule is to distribute the cost of government torts over the public at large, the true beneficiary of that enterprise. This would not encourage negligent or malevolent conduct on the part of governmental officials and employees, for the possibility of reprimand or dismissal for wrongful conduct remains.

Finally, the point should be emphatically made that the issue is a limited one - tort liability. Liability for purely governmental functions such as legislative, executive and judicial decision-making, licensing and regulating, are not within the purview of the discussion. As has been stated so often, "It is not a tort to govern." Nor does the debate encompass liability under Civil Rights legislation, for it has been repeatedly held that public entities are not "persons" for purposes of damage actions under section 1983 of the Civil Rights Act. The arguments in favor of governmental liability involve only such activities as would render an

6. Van Alstyne, supra note 6, at 973.

7. Id. at 921.

individual liable under basic tort law or a corporation under the doctrine of respondeat superior.

In the final analysis, however, the responsiblity for reforming the prevailing doctrine in a state lies with the citizens who elect the legislators and ratify the constitution and its amendments. The role of the Attorney General is to represent the state according to the law, and to offer such recommendations and opinions on existing or proposed laws as may from time-to-time be requested. It is in the furtherance of that role that this report is provided.

END