North Dakota Law Review

Volume 51 | Number 4 Article 9

1974

# Municipal Corporations - Governmental Immunity - Political Subdivisions Liable for Non-Discretionary Tortious Conduct

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find themselves in the position of losing the goods they strenuously endeavored to acquire. We must recognize that these people are often unaware of their rights, and lack the means to insure that they are protected. Yet, if the creditor's remedies are excessively restricted, we run the risk of depriving creditors of their rights.

WAYNE STENEHJEM

MUNICIPAL CORPORATIONS—GOVERNMENTAL IMMUNITY—POLITICAL SUBDIVISIONS LIABLE FOR NON-DISCRETIONARY TORTIOUS CONDUCT.

Plaintiff brought an action against the Minot Park District for the death of her twelve year old son who drowned in an unfenced, unguarded duck pond. The trial court granted defendant's motion for summary judgment on the basis of governmental immunity. On appeal, the Supreme Court of North Dakota reversed and *held* that the immunity afforded local governmental entities from tort liability would no longer be retained. Therefore, political subdivisions could be, within certain limits, liable for negligence.[1] *Kitto v. Minot Park District,* 224 N.W.2d 795 (N.D. 1974).

Governmental immunity is the protection from liability for tortious conduct afforded local governmental units.[2] Generally, it is agreed that the doctrine originated in a 1788 Kings Bench decision, *Russell v. Men of Devon.*[3] Subsequently, the doctrine in *Russell* was adopted in the United States,[4] and the concept of governmental immunity became the general rule in this country.[5] Although immunity previously was a convenient alternative to imposing burdensome judgments on budding municipalities,[6] this fact does not

1. Judge Johnson, speaking for a unanimous bench, wrote the opinion of the court.

2. Governmental immunity, then, should be distinguished from the concept of sovereign immunity which is the immunity possessed by the state government. It might be more appropriate to term the concept state immunity since sovereignty has other connotations in that sovereignty inheres in the people. *See* State ex. rel. Miller v. Taylor, 22 N.D. 362, 133 N.W. 1046 (1911).

3. 2 T.R. 667, 100 Eng. Rep. 359 (1788). This case, involving a tort action against an unincorporated county, established immunity from liability on two grounds. First, there was no fund out of which a judgment could be satisfied. Secondly, the court thought it better that an individual sustain a loss rather than the public suffer an inconvenience.

4. Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812) *Mower* was dissimilar, however, since unlike Russell it involved a county that was incorporated, could sue and be sued, and had a corporate fund out of which a judgment could be satisfied. Thus, the doctrine was adopted but the reasoning was not.

5. W. PROSSER, LAW OF TORTS 970-87 (4th ed. 1971).

6. *See* Vail v. Town of Armenia, 4 N.D. 239, 59 N.W. 1092 (1894). For example, in

explain the doctrine's continued existence. Where legislatures have acted in this area, the effect has been to create exceptions rather than rules.[7] As a consequence, courts have been compelled to diminish the harshness of the concept by striking down illogical and unjust distinctions created by the exceptions.[8] With *Kitto*, North Dakota joined the steadily increasing number of jurisdictions that have abrogated governmental immunity.[9]

In the past, however, local governmental units have not en-

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*Vail*, the first case in which governmental immunity was applied in North Dakota, the court observed:

> One judgment against the town in a case of the character and seriousness disclosed in the complaint in this case would involve the town in financial distress from which it could not be extricated for years, and would greatly retard its further settlement and progress.

*Id.* at 1095.

7. *E.g.*, N.D. CENT. CODE 40-43-07 (1960). This statute provides what is commonly called the insurance waiver theory, whereby political subdivisions are deemed to have waived their immunity to the extent of liability insurance purchased. It should be noted that the park district in Kitto did not carry any insurance.

8. As one court has stated:

> The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only for the force inertia . . . [It is] riddled with exceptions, . . . and the exceptions operate so illogically as to cause serious inequality. Some injured by the government can recover and others cannot . . .

Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).

9. Jurisdictions which have judicially abrogated governmental immunity include: District of Columbia, Spencer v. General Hosp. of Dist. of Columbia, 425 F.2d 479 (D.C. Cir. 1969); Alaska, City of Fairbanks v. Schaible, 375 P.2d 201 (Alas. 1962); Arizona, Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967); California, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Colorado, Evans v. Bd. of County Comm'rs, 174 Colo. 197, 482 P.2d 968 (1971); Florida, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Idaho, Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970) (governmental and proprietary distinction retained); Illinois, Moliter v. Kaneland Union Community Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Indiana, Campbell v. State, 284 N.E.2d 733 (Ind. 1972); Kentucky, Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Louisiana, Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529 (1965); Board of Comm'rs v. Splendour Shipping and Enterprises, ——La.——, 273 So. 2d 19 (1973); Michigan, Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Minnesota, Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Nebraska, Johnson v. Municipal Univ. of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969); Nevada, Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); New Jersey, Willis. Department of Conserv. & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970); Pennsylvania, Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973); Rhode Island, Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970); Wisconsin, Holytz v. City of Milwaukee, 17 Wis. 26, 115 N.W.2d 618 (1962).

Legislative action abolishing governmental immunity is as follows: HAWAII REV. STAT. (Supp. 1974); IOWA CODE ANN. ch. 25A (Supp. 1974); In New York, statute construed to abolish in Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); OKLA. STAT. ANN. tit. 11, ch. 41 (Supp. 1974); ORE. REV. STAT. §§ 30.260-.300 (1974); UTAH CODE ANN. ch. 30 (Supp. 1973).

THE RESTATEMENT (SECOND) OF TORTS § 895A, at 12-20 (Tent. Draft No. 19, 1973) has classified the following jurisdictions as maintaining the insurance waiver theory (note: Because of the *Kitto* decision, North Dakota has been omitted): Georgia, 122 Ga. App. 665, 178 S.E.2d 557 (1970); Kansas, 196 Kan. 148, 410 P.2d 347 (1966); Mississippi, 227 So. 2d 475 (Miss. 1969). *See also* MISS. CODE ANN. §§ 21-37-37, 21-21-11, 21-25-11, 41-13-11 (1972); Missouri, MO. ANN. STAT. § 71.185 (Supp. 1972); some minor statutes in Montana, *e.g.*, MONT. REV. CODES ANN. §§ 11-1305, 11-1503 (1968); New Hampshire, Gossler v. City of Manchester, 107 N.H. 310, 221 A.2d 242 (1966); New Mexico, N.M. STAT. ANN. §§ 5-6-18 to -22 (1966); North Carolina, N.C. GEN. STAT. § 160A-485 (1972); Ohio, OHIO REV. CODE ANN. § 9.83 (Page, Supp. 1972); Tennessee, Ballew v. City of Chattanooga, 205 Tenn. 289, 326 S.W.2d 466 (1959); Vermont, VT. STAT. ANN., tit. 12, §§ 5601 et seq. (Supp. 1972), tit. 29, §§ 1401, 1403 (1970); West Virginia, W. VA. CODE ANN. § 8-12-7 (1969) authorizes insurance but does not affect liability; Cunningham v. County Court, 148 W. Va. 303, 134 S.E.2d 725 (1964); Wyoming, WYO. STAT. ANN. § 15.1-4 (1965).

The RESTATEMENT (SECOND) OF TORTS § 895A at 12-20 (Tent. Draft No. 19, 1973)

joyed total immunity. In North Dakota, municipal corporations have long been held liable for failure to keep streets and sidewalks in a reasonably safe condition.[10] This function has, for one reason or another, been regarded as proprietary.[11] The effect of such classification is to create a sphere in which governmental immunity is not applicable. The theory seems to be that a city is a corporate body which, when it acts in the interest of a special group, performs functions similar to that of a private corporation and, therefore, should be subject to the same liability in tort.[12] However, when the subdivision engages in activities that benefit all people in the community, it acts in its governmental, as opposed to its corporate, capacity and is immune from suit.[13] In *Kitto*, the court declared that this distinction would no longer be maintained in North Dakota for governmental units other than the state.[14]

The doctrine of governmental immunity, is a concept which recognizes several other exceptions besides liability for proprietary functions. It has been acknowledged that there is no immunity for the maintenance of a public nuisance.[15] Moreover, a local govern-

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has classified the following jurisdictions as adhering to the traditional common law position. (Note: Because of a recent decision, Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973), Pennsylvania abrogated governmental immunity and therefore has been omitted): Alabama, ALA. CODE tit. 37, § 502 (1959); Arkansas, judicially abolished in Parish v. Pitts 244 Ark. 1239, 429 S.W.2d 45 (1968) (restored by ARK. STAT. ANN. § 12-2901 (Supp. 1971); Delaware, Wilmington Housing Auth. v. Williamson, 228 A.2d 782 (Del. 1967); Maryland; Massachusetts; South Dakota, Conway v. Humbert, 82 S.D. 317, 143 N.W.2d 524 (1966); Virginia, Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960).

The RESTATEMENT (SECOND) OF TORTS § 895A at 12-20 (Tent. Draft No. 19, 1973) has classified the following jurisdictions as maintaining a modified approach to governmental immunity: Connecticut, CONN. GEN. STAT. REV. § 7-465 (Noncum. Supp. 1971); South Carolina, S.C. CODE ANN. §§ 10-2621 *et seq.* (Supp. 1971), 47-70, 47-379 (1962); Texas, TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970).

10. Larson v. City of Grand Forks, 3 Dak. 307, 19 N.W. 414 (1884); Ludlow v. City of Fargo, 3 N.D. 485, 57 N.W. 506 (1893). More recently, Maloney v. City of Grand Forks, 15 N.W.2d 769 (N.D. 1944).

For the claims procedure against municipal corporations for injury from defective sidewalks, streets and bridges, see N.D. CENT. CODE §§ 40-42-01 to -03 (1960).

11. W. PROSSER, *supra* note 5, at 982.

12. S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 1103 (1970).

13. *See* Montain v. City of Fargo, 38 N.D. 432, 166 N.W. 416 (1917). A municipally owned and operated public utility plant is a classic example of a proprietary function, while police protection is typically regarded as governmental in nature. W. PROSSER, *supra* note 5, at 979-81.

14. The court overruled what seemed to be a well established principle of governmental immunity in North Dakota. Previously, the court had been quite emphatic when called upon to consider the question. As recently as 1965, in a suit against the same park district that was involved in *Kitto*, the court commented:

> The courts cannot legislate regardless of how much we might desire to do so. Therefore, regardless of how worthy a claim agaist a municipal corporation might be, we cannot assume the functions of the Legislative Assembly. Our power is limited to passing on laws enacted by the Legislature, and if the Legislature fails to act, we cannot change the law by judicial decision.

Fetzer v. Minot Park Dist., 138 N.W.2d 601, 604 (N.D. 1965). The court reiterated its sentiments later: "If it is desirable to change this rule of [governmental immunity], which is well settled in this State, the request for change should be addressed to the Legislative Assembly." Kaczor v. City of Minot, 138 N.W.2d 784, 785 (N.D. 1965).

15. Moulton v. City of Fargo, 39 N.D. 502, 167 N.W. 717, 719 (1918).

mental unit has not been found immune from liability for property damage.[16] A further limitation on the scope of governmental immunity as applied in North Dakota involved the insurance waiver. A political subdivision was deemed to have waived its immunity to the extent that it carried liability insurance.[17] The court in *Kitto* acknowledged this trend of restriction of the doctrine and took the final step consummating its abrogation. This overturn of governmental immunity seems to be consistent with the abolition or nonrecognition of similar concepts in the state.[18]

Although the doctrine of governmental immunity was abolished as it existed, the court conceded that there were limits as to what would constitute actionable negligence. Counties, townships, park districts, school districts and other units of local government are now liable in tort in all but their discretionary functions.[19] Although discretionary activity cannot be described by specific rules, it does involve an evaluation of several competing factors.[20] Chief among these considerations is the extent to which the threat of liability to government officers would impair their decision-making when confronted with valid alternatives.[21] When acting in its administrative capacity in executing policy decisions, the government

16. Donaldson v. City of Bismarck, 3 N.W.2d 808 (N.D. 1942); Thorson v. City of Minot, 153 N.W.2d 764 (N.D. 1967).

17. Shermoen v. Lindsey, 163 N.W.2d 738 (N.D. 1968). The future of governmental immunity was foreshadowed when the court acknowledged that:

> We are inclined to agree that it is manifestly unfair that an innocent victim of tort should be without recourse when the tort is perpetuated by a governmental agency, employee or agents. Although inroads have been piece-meal [such inroads] have resulted in diminishing the consequences of this doctrine.

*Id.* at 743.

18. Both charitable immunity, Granger v. Deaconess Hosp., 138 N.W.2d 443 (N.D. 1965), and intra family immunity, Nuell v. Wells, 154 N.W.2d 364 (N.D. 1967), have been looked upon disfavorably by North Dakota courts.

19. As the Court in *Kitto* stated: "The exercise of discretion carries with it the right to be wrong. It is for torts committed in the execution of the activity decided upon that liability attaches, not for the decision itself." Kitto v. Minot Park Dist., 224 N.W.2d 795, 804 (N.D. 1974).

20. THE RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 19, 1973) described the factors that will determine a discretionary function and its consequences:

> (1) The nature and importance of the function which the officer is performing.
>
> (2) The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government.
>
> (3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer.
>
> (4) The extent to which the ultimate financial responsibility will fall on the officer.
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> (5) The likelihood that harm will result to members of the public if action is taken.
>
> (6) The nature and seriousness of the type of harm which may be produced.
>
> (7) The availability to the injured party of other remedies and other forms of relief.

*Id.* § 895D, comment f at 43-44.

21. *See* Lipman v. Brishane Elementary School Dist., 55 Cal. 2d 224, 229, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961). In this case the court determined that even when an act was dishonest, it was better to let the injury go unredressed than to subject honest officials to constant fear of retaliation.

and its agents must not be subject to second-guessing by the courts.[22]

Acts which traditionally have been regarded as legislative,[23] quasi-legislative, judicial[24] or quasi-judicial[25] are yet immune from private redress and unaffected by *Kitto*. In fact, it may be found that even if the discretionary act performed is dishonest or malicious, no liability attaches so long as the officer is within the scope of his authority.[26] Discretionary immunity is not completely without limitations, however. If there is a special duty running to a particular individual, liability may be imposed.[27] Also, the exercise of discretion is limited by a superior right guaranteeing every person immunity from invasion of his private rights without due process of law.[28] While neither total immunity nor absolute liability in governmental tort is desirable,[29] *Kitto* offers a welcome alternative.

The court was confronted with several options in *Kitto*. Besides deciding as they did or reaffirming prior decisions,[30] the court could have decided the case on the basis of N.D. CENT. CODE § 40-49-04, which authorizes that park districts can "sue and be sued." Evidently, the purpose of the statute is to insure against the usurpation of a park district's governmental powers.[31] However, some courts have construed identical language to constitute a waiv-

22. The following are examples of activities that have been construed to be either discretionary or ministerial subsequent to abrogation of governmental immunity. A city was not immune from liability for injury sustained by a bystander when a police officer shot at a burglary suspect. Laughlin v. City of Pittsburg, 226 Pa. Super. 431, 310 A.2d 289 (Pa. Super. Ct. 1973); No liability for injury to child since teacher's decision to leave the classroom was discretionary. Miller v. Greisel, 297 N.E.3d 463 (Ind. App. 1973).

23. This legislative immunity is applicable at least where the activity entertained is legitimate. *See* Tenny v. Brandhove, 341 U.S. 367 (1951); Dombrowski v. Eastland, 389 U.S. 802 (1967).

24. Judicial immunity is based on considerations of public policy and is applied even when the judge is accused of acting maliciously and corruptly. Judges must be at liberty to exercise their functions independently and without fear of consequences. *See* Landseidel v. Culeman, 47 N.D. 275, 181 N.W. 593 (1921).

25. Corrao v. Mortier, 7 Wis. 2d 494, 96 N.W.2d 851 (1959) (power to grant permit or license); Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968) (parole board members); *But cf.* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (parole officer).

26. *See* Gregoire v. Biddle, 177 F.2d 579, 580 (2d Cir. 1949).

27. There seems to be no duty for a city to provide police protection on request. Silver v. City of Minneapolis, 284 Minn. 266, 170 N.W.2d 206 (1969). However, a duty may be found when police authorities undertake responsibilities to particular members of the public and expose them without adequate protection to risks which turn into losses. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

28. *See* Neer v. State Live Stock Sanitary Bd., 40 N.D. 340, 168 N.W. 601 (1918). It was therein determined that property declared to be a nuisance through discretion of the sanitary board could be destroyed without a hearing so long as an action for damages remained in the event the determination was erroneous.

29. Absolute liability was actually suggested in a case holding a municipality liable for tort. Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919). (concurring opinion). On the other hand at one time in South Carolina, total immunity was the rule except where liability was provided for by statute. Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).

30. Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965); Kaczor v. City of Minot, 138 N.W.2d 784 (N.D. 1965).

31. When a park district is located within a city, the city will be estopped from exer-

er of immunity.[32] Seemingly, the court could have resolved *Kitto* on this basis, but instead it found that the statute only provided evidence of legislative intent to restrict rather than sustain governmental immunity.[33]

Another alternative to *Kitto* would have been to abrogate both governmental and sovereign immunity.[34] However, the court felt that although governmental immunity was a judicial doctrine, sovereign immunity was mandated in N.D. Const. art. 1, § 22.[35] To bolster the perception that § 22 applied only to the state, the court relied on other powers spelled out in the Constitution that deliniated between the state government itself and its political subdivisions.[36] Therefore, it concluded that the word "state" in § 22 was to be given its literal meaning.[37]

In light of *Kitto*, it has now been recognized that a person injured by the negligence of a local governmental unit may pursue compensation through our judicial system. On the other hand, an individual similarly injured through the negligence of the state government is precluded from seeking recompense. This distinction seems unreasonable in view of the fact that sovereign immunity is every bit as harsh and unfair as governmental immunity.[38] When confronted with a similar situation in *Muskopf v. Corning*

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cising powers which are substantially within the park district's province. See City of Fargo v. Geary, 33 N.D. 64, 156 N.W. 552 (1916).

32. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Knowles v. Housing Authority, 212 Ga. 729, 95 S.E.2d 659 (1956).

33. 224 N.W.2d 795, 802 (N.D. 1974). Had the court found that such language constituted a waiver of immunity, another exception would have been created in the chaotic field of governmental immunity. It seems the court preferred to meet the issue directly instead of engaging in any evasive tactics. *See generally* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

34. While the doctrine of governmental immunity seems to have originated in *Russell*, the concept of sovereign immunity may have stemmed from the ancient maxim that "the King can do no wrong." In reference to this, Justice Traynor of the California Supreme Court commented: "How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution'." Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214-15, 359 P.2d 457, 458-59, 11 Cal. Rptr. 89, 90-91 (1961) *quoting* Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1, 4 (1924). It has been suggested that the precarious financial condition of the colonies subsequent to the Revolutionary War had an effect on the adoption of sovereign immunity. Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947).

35. N.D. CONST. art. 1, § 22 (hereinafter referred to as § 22) provides as follows:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. *Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.*

(Emphasis added).

36. *See* N.D. CONST. art. 10, §§ 182, 183, 184, 187; N.D. CONST. art. 2, § 69.

37. Kitto v. Minot Park Dist., 224 N.W.2d 795, 801 (N.D. 1974).

38. The court seemed to acknowledge the injustice of sovereign immunity, but, feeling restrained by § 22, deferred the problem to the legislature. *Id.* at 804. It has been suggested that one of the most recurring reasons for the slow demise of the doctrines of governmental and sovereign immunity is deference to the legislature. *See* 8 U. RICH. L. REV. 372 (1974).

*Hospital District*,[39] the California Supreme Court abrogated both doctrines. It is interesting to note that *Muskopf* involved the interpretation of a constitutional provision comparable to § 22.[40] Justice Traynor remarked that if the clause had any substantive significance at all, it would appear to be a waiver of immunity rather than a mandate.[41]

Sovereign immunity is a common law concept that seems to have been given a constitutional basis. When the provision is explicit,[42] it is incontrovertible that the doctrine is rooted in the constitution and, thus, there can be no question as to the intention of the framers. The language of the North Dakota Constitution contained in § 22, however, would appear to be neutral in this respect.[43] The basis that sovereign immunity is grounded in the constitution is actually a judicial construction.[44] In fact, it is extremely peculiar that the drafters of the North Dakota Constitution would have inserted such a particularly burdensome clause within the Declaration of Rights.[45] Arguably, the court could have taken a different approach in *Kitto* and abolished both governmental and sovereign immunity.[46]

Most judicial action concerning governmental immunity has been followed by legislative reaction. Following judicial abrogation in other jurisdictions, governmental immunity has been restored,[47] partially restored,[48] or comprehensive torts schemes have been enacted.[49] Recently, however, these tort schemes have been vulner-

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39. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

40. CAL. CONST. art. 20, § 6 (1849) provided: "Suits may be brought against the state in such manner and in such courts as shall be directed by law."

41. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 217, 359 P.2d 457, 460-61, 11 Cal Rptr. 89, 92-93 (1961). Recently, other jurisdictions have found that the constitutional provisions regarding sovereign immunity are not insurmountable. Perkins v. State, 252 Ind. 549, 251 N.E.2d 30 (1969); Campbell v. State, 284 N.E.2d 733 (Ind. 1972); Bd. of Comm'rs. v. Splendour Shipping and Enterprises, ——La.——, 273 So. 2d 19 (1973). Contra, Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973).

42. *E.g.*, ALA. CONST. art. 1, § 14 reads as follows: "That the State of Alabama shall never be made a defendant in any court of law or equity."

43. The pertinent clause in § 22 reading as follows: "Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." N.D. CONST. art. 1, § 22.

44. *See* Wirtz v. Nestos, 51 N.D. 603, 200 N.W. 524 (1924); Spielman v. State, 91 N.W.2d 627 (N.D. 1958).

45. N.D. CONST. art. 1, §§ 1-24. Enumerated within the Declaration of Rights are the inalienable rights of free speech, association, speedy trial and other guarantees. To find that sovereign immunity is mandated within this section is to ignore the surroundings in which the clause is found. In other words, as it is now interpreted, § 22 is a "thorn amongst the roses."

46. Certainly it would have been a valid alternative to interpret § 22 as only an acknowledgement of procedural regulation of the people's substantive rights against the state and a mere qualification of the immediately preceding clause. *See* N.D. CONST. art. 1, § 22.

47. Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968) (followed by ARK. STAT. ANN. §§ 12-2901 to 2903 (Supp. 1973)).

48. *E.g.*, Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1961) (followed by COLO. REV. STAT. ANN. §§ 24-10-101 et seq. (Supp. 1973)).

49. *E.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), followed by CAL. GOVT. CODE §§ 810-996.6 (West Supp. 1974)).

able to equal protection attacks.[50] If the North Dakota Legislature acts in response to *Kitto*, this should be taken into consideration.[51]

In the formulation of rules and exceptions, it must be remembered that when we speak of negligence, liability is the rule and immunity is the exception. Yet, it somehow developed in this country that for governmental tort, immunity was the rule and liability was the exception. Whether such a concept evolved out of the misinterpretation of an ancient English maxim or as a consequence of struggling municipalities and colonies that wanted to evade burdensome judgments, the justifications for the application of the doctrines of governmental and sovereign immunity no longer exist. State and local governments have greatly matured, both financially and structurally, since early days of settlement and stand in a unique position to spread losses which have, historically, fallen upon lone individuals. With *Kitto*, these developments were acknowledged and governmental immunity has been abrogated in North Dakota. However, the matter of sovereign immunity was deferred to the legislature. If the legislature fails to act, the court should reconsider the questionable mandate of the doctrine and, hopefully, the substantive rights of all injured tort victims will soon be recognized.

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50. Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972); Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973). These tort schemes set up procedural technicalities that do not exist for the non-governmental tort victim. In *Reich* the court found that a 60-day notice of claim provision for bringing a cause of action against the government was a violation of equal protection since it set up a special statute of limitations different from that affecting the private tort feasor. These notice provisions arbitrarily divide tort feasors into two classes: (1) private tort feasors to whom no notice of claim is owed, and (2) governmental tort feasors to whom notice is owed.

51. At the time of this writing there is a proposal in the North Dakota Legislature concerning tort liability for political subdivisions, HB 1541. The bill, however, expressly excludes any application affecting sovereign immunity and, moveover, sets up separate claim requirements that would severely limit the rights of the governmental tort victim. It should be noted that the 90-day notice of claim requirement for injuries arising from defective streets and sidewalks has been upheld in North Dakota. Aune v. City of Mandan, 167 N.W.2d 754 (N.D. 1969).