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Constitutional Law - Government Immunity - Tort Liability - Right of Court to Abrogate Immunity without Legislative Consent

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RECENT CASES

CONSTITUTIONAL LAW—GOVERNMENT IMMUNITY—TORT LIABILITY —RIGHT OF COURT TO ABROGATE IMMUNITY WITHOUT LEGISLATIVE CONSENT.—Plaintiff, a paying patient in a county hospital brought suit against the hospital district upon alleged negligence of the staff. The defendant's demurrer was sustained by the trial court, based on the long established rule of governmental immunity from tort liability. On appeal the Supreme Court of California *held,* two justices dissenting, that after a re-evaluation of governmental immunity from tort liability it must be discarded as mistaken and unjust. *Muskopf v. Corning Hospital District,* 359 P.2d 457 (Cal. 1961).

The principle is firmly established that a state or its subdivisions, when a governmental function, cannot be sued without their consent.[1] This doctrine of sovereign immunity had its origin with the personal prerogatives of the King of England,[2] and gained impetus from sixteenth century political concepts.[3] The rule was gradually extended to county immunity,[4] making its first appearance in the United States in 1812[5].

To relax the rigid doctrine of governmental immunity, certain states have adopted a constitutional provision directing the legislature to provide in what manner suits may be brought against the state.[6] However, such a provision is not self-executing,[7] and manifestly not so intended.[8] A state by adopting such a provision has recognized that sovereign immunity is a part of the substantive

1. Rogers v. Holmes, 214 Ore. 687, 332 P.2d 608, 611 (1958) "That a sovereign state cannot be sued without its consent is a cardinal principle of law so well established as to require no citation."

2. See 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW, 512-518 (2d ed. 1952).

3. See 4 Holdsworth, The History of English Law 190-197 (1924).

4. See Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (1788) (unincorporated county not liable for tort) ". . . no fund out of which satisfaction is to be made . . . it is better that an individual should sustain an injury then that the public should suffer an inconvenience."; See also Schaeffer v. Franklin County Veterans Hospital, 171 Ohio St. 228, 168 N.E.2d 547, 549 (1960) "A county is purely a political subdivision, an agency or instrumentality of the state and is clothed with the same sovereign immunity from suit."

5. Mower v. Inhabitant of Leicester, 9 Mass. 247 (1812) (incorporated town, could sue and be sued, but not liable in tort).

6. Examples of such constitutional provisions can be found in 20 states: *e.g.* Cal. Const. art. 20 § 6 "Suits may be brought against the State in such a manner and in such courts as shall be directed by law."; Fla. Const. art. III, § 22; N.D. Const. art. I § 22. "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."; Ohio Const. art. I, § 16; Pa. Const. art. I, § 11; S.D. Const. art III, § 27; Wis. Const. art. 4, § 27.

7. Wolf v. Ohio State Univ. Hospital, 170 Ohio St. 49, 162 N.E.2d 475 (1959); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).

8. Schlesinger v. State, 195 Wis. 366, 218 N.W. 440, 441 (1928) "Otherwise, the mandate would have been to the courts instead of the Legislature . . ."

law;[9] thus, the power to abrogate such immunity rests exclusively with the legislature,[10] and is clearly beyond the reach of the courts.[11] If a legislature does attempt to waive immunity, it must appear by express provision,[12] and be strictly construed.[13] The common "sue or be sued" statutory provisions adopted in many states, including California,[14] merely mean that the state or county is to appear as a party to the action, but does not affect or enlarge the liability.[15] It is essential to observe when considering immunity, that it has a double aspect; *i. e.* immunity from suit, and immunity from liability itself, the two being separate and distinct.[16]

It is interesting to note the only other attempt to abolish governmental immunity in the absence of legislative action, has been an Illinois school district decision.[17] It appears North Dakota would not judicially discard immunity, but wait for action by the legislature.[18] In summary it may be said that blind following of antiquated and outgrown precedent should not be countenanced, but it seems the courts have recognized immunity only with reluctance because bound by precedent and the constitutional division of powers.

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9. Schaeffer v. Franklin County Veterans Hospital, *supra* note 4.

10. Zeppi v. State, 174 Cal. App. 2d 484, 345 P.2d 33, 36 (1959) ". . . and where, as here, the Legislature has clearly expressed its intention to maintain immunity, that intention is controlling."; Bergner v. State, 144 Conn. 282, 130 A.2d 293, 296 (1957) "Counsel have cited no case, nor has our research discovered any, which holds that a state may be held liable for either negligence or nuisance in the absence of a statute permitting suit and imposing liability."; Hinds v. City of Hannibal, 212 S.W.2d 401, 402 (Mo. 1948) "Any change in this situation must be made by the Legislature . . . because only the Legislature could prescribe all regulations and limitations necessary to protect the public interest and provide the fiscal basis for payment of such claims."; Taylor v. State, 73 Nev. 151, 311 P.2d 733, 734 (1957); Scates v. Board of Comm'rs of Union City, 196 Tenn. 274, 265 S.W.2d 563, 567 (1954).

11. *Supra* note 10.

12. Spielman v. State, 91 N.W.2d 627 (N.D. 1958).

13. See Los Angeles County v. Riley, 20 Cal. 2d 652, 128 P.2d 537 (1942); Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609, 615 (1957) "A statute authorizing suit against the state is in derogation of sovereignity and therefore must be strictly construed."

14. Cal. Health & Safety Code § 32121 provides: "Each local hospital district shall have and exercise the following power: (b) To sue and be sued in all courts and places and in all action and proceedings whatever."

15. Talley v. Northern San Diego Hospital Dist., 41 Cal. 2d 33, 257 P.2d 22 (1953); *cf.* Elizabeth River Tunnel Dist. v. Beecher, 117 S.E.2d 685, 689 (1961) (A procedural right only) "The fact that the . . . act provides that it may sue and be sued' cannot be advanced as an assertion of State waiver of immunity or State consent to suit for torts."

16. Duree v. Maryland Casualty Co., 238 La. 166, 114 So. 2d 594, 596 (1959) ". . . there exists a distinction between the traditional immuinty of the state from suit and its long recognized immunity from liability *vel non* as respects actions based on torts committed by agents engaged in the performance of governmental functions."; Manion v. State, 303 Mich. 1, 5 N.W.2d 527 (1942); Jerauld County v. St. Paul-Mercury Indemnity Co., 76 S.D. 1, 71 N.W.2d 571 (1955).

17. Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, 96 (1959). Two justices dissenting. "The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. We closed our courtroom doors without legislative help, and we can likewise open them."

18. Spielman v. State, 91 N.W.2d 627 (N.D. 1958).