GOVERNMENTAL IMMUNITY:
LEGAL BASIS AND
IMPLICATIONS FOR PUBLIC EDUCATION

by

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To Sofie Madelyn Connors

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This study had three purposes: First, it traced the historical development of the concept of sovereign immunity in the English common law system. Second, it sought to determine the means by which the concept of sovereign immunity from liability became ingrained in the American legal system. Third, it identified the trends and movements in the governmental immunity concept on the United States' public school in 1977. Governmental immunity had its origin in the Middle Ages where the feudal system and Canon law merged together, thus creating the concept of "The King shall do no wrong." This concept flourished and became firmly established in the statutory legal system under the reign of King Henry VIII.

Since the American colonies were under the legal jurisdiction of the English Crown, the principle of sovereign

immunity became an accepted legal principle which was subsequently endorsed by the United States. Governmental immunity, then was inherited from the English legal system.

Governmental immunity flourished in the United States until the late 1950's when a series of court cases brought challenges. In the 1960's, states began a trend of abrogating governmental immunity either by statutory or judicial means. In 1977, a majority of states have abrogated their governmental immunity, at least in part.

The effect of this trend of abrogation on public education is great. For centuries, education had enjoyed the protection of governmental immunity since education was a function of the state. However, the recent trends in abrogation has left many educational systems liable. In many instances, it was education cases which the courts used in abrogating a state's governmental immunity. Consequently, educators can no longer depend on the principle of governmental immunity for protection against liability suits. The study contains recommendations for educators who may be concerned about tort liability and governmental immunity.

A survey of legal precedence, statutes, and attorneys general opinions provide detailed information regarding the current status of governmental immunity in each state.

CHAPTER 1

INTRODUCTION

Governmental immunity has been an established principle in the United States' system since 1798.[1] The principle of governmental immunity is where governments and their agencies are immune from liability suits. This principle is believed to have been part of the legal system which the United States inherited from England.[2]

All levels of United States' government (local, state, and federal) have endorsed and embraced the concept that governments are immune from tortious acts. In the late 1950's, an era began in which the entire concept of immunity was vigorously attacked on several fronts. Victims who sustained injury and damages as a result of tortious acts by the state maintained that the state should absorb the cost of this injury rather than make the individual bear the burden. Some authorities questioned the use of public funds in acquiring liability insurance rather than simply paying

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[1] Date of ratification of the Eleventh Amendment to the United States Constitution. The inclusion of this amendment initiated the statutory use of the governmental immunity concept in the United States.

[2] C. E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

the damages.[3] Historical criticism questions the entire foundation on which the sovereign (governmental) immunity principle is based.[4]

In 1959, however, an Illinois court stripped away the immunity from liability which a school district had previously enjoyed.[5] As a result of this decision and of increasingly strong criticisms, governmental immunity has undergone several changes. Between 1959 and 1976, several states voluntarily abrogated immunity either partially or completely.[6] Other states have had this privilege terminated for them by state and/or federal courts.[7]

Purpose of the Study

This study had three purposes:

First, it traced the historical development of the concept of sovereign immunity in the English common law system.

Second, it sought to determine the means by which the concept of sovereign immunity from liability became ingrained in the American legal system.

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[3] Molitor v. Kaneland Community Unit District No. 302 18 Ill. 2d 11, 163 N.E. 2d 89 (1959).

[4] Supra note 3.

[5] Id note 3.

[6] New York (1959), Iowa (1967), Nebraska (1969), Florida (1969), and Colorado (1970).

[7] Massachusetts (1869), Washington (1907), New York (1907), California (1928), Illinois (1959), Michigan (1961), Wisconsin (1962), and Arizona (1963).

Third, it identified the trends and movements in the governmental immunity concept on the United States' public school in 1977.

Delimitations of the Study

This study will be delimited to an examination of the United States and British common and statutory law in relation to governmental immunity as well as how the concept was utilized during the Middle Ages. The focus of this study will be on public education at all levels with special emphasis on the kindergarten through twelfth grade levels.

Definition of Terms

The following terms and their definitions will be used throughout this study. Adequate understanding of this study requires a knowledge of the definition of these terms. They are provided to help eliminate any misunderstandings which might arise as a result of semantic variations:

Abrogation of immunity. The term, as used herein, is the destruction or annulling of immunity by an act of the legislative power, by constitutional authority, or by usage.[8]

Canon law. Law enacted and enforced by the Roman Catholic Church before the Reformation and by any state

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[8]H. C. BLACK, BLACK'S LAW DICTIONARY 21 (1968).

recognized church after the Reformation. Sir William Blackstone describes canon law as:

> . . . a body of Roman ecclesiastical law, relative to such matters, over which that church professed to have proper jurisdiction. It is compiled from the opinions of the ancient Latin fathers, the decrees of general councils and the decretal epistles and bulls of the Holy See.[9]

Civil law. Civil Law is that law enacted or created by various governmental bodies such as congresses, general assemblies, or administrative agencies.

Common Law. Law which derives its authority from previous uses of customs. Court decisions (case law) are common law since they set precedents on which other court decisions may be based. Blackstone's narrative on common law provides more insight.

> The ancient collection of unwritten maxims and customs called the common law, had subsisted immemorially in this kingdom (England) . . . the people were attached to it, because its decisions were universally known.[10]

Constitutional law. That law which is derived from the constitution of a particular state.[11]

Governmental immunity. A term, the meaning of which has evolved considerably over the three hundred years.

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[9]WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 23 (1897).

[10]Supra note 9 at 4.

[11]Supra note 8 at 385.

In its original sense, it meant immunity from taxation.[12] In the last two centuries, however, the phrase has come to mean "immunity from liability" (see sovereign immunity).

Liability. "The word is a broad legal term and has been referred to as of the most comprehensive significance, including almost every character of hazard of responsibility, absolute, contingent, or likely."[13] Or, the "condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden."[14]

Sovereign immunity. Originally embodied the concept of "governmental immunity." This phrase originated in Seventeenth Century England where the King or Queen declared that their sovereignty made them immune from prosecution or suit.[15]

Sovereign prerogative. Predecessor of the "sovereign immunity" concept. According to Blackstone, "sovereign prerogative" can be divided into two divisions; first, and most important, was the prerogative of property rights.

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[12] Supra note 8 at 826.

[13] Id note 8 at 720-721.

[14] First National Bank v. National Surety Co. 228 N.Y. 469, 127 N.E. 478.

[15] D. L. KEIR & F. H. LAWSON, CASES IN CONSTITUTIONAL LAW 74 (1967).

Among these medieval (feudal) rights, the concept of "immunity" is embedded. The second division of prerogative is a vague category which can be labeled as "inherited powers." The monarchs were able to inherit the concept of "The King can do no wrong" from their feudal predecessors as a part of their inherited powers.[16]

Statutory law. Law relating to or created by an act of the legislative branch of government.[17]

Tort. "A private or civil wrong or injury. A wrong independent of contract."[18]

Tortious act. An act done by some person which leads to a tort.

Justification of the Study

There are two general justifications for this study and four specific justifications which coincide with the three purposes of the study which are as follows: First, the study traces the development of sovereign immunity in the English common law system. Second, it determines the means by which sovereign immunity transferred into the American legal system. And third, it identifies trends and movements in governmental immunity in the United States' public schools in 1977.

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[16] Supra note 9 at 239.

[17] Supra note 8 at 1581.

[18] Id note 8 at 1660.

The major justification for this study is its advancement of knowledge concerning the governmental immunity concept.

It is important from a historical and legal perspective that the issues concerning these three major issues be resolved. Significant court decisions have relied heavily on the lack of knowledge in the area of immunity.[19] Therefore, a more secure knowledge base should be found providing a better basis for sound judicial adjudication.

A second general justification is that this study will offer solutions to the practical problems which educational administrators face concerning the issues of governmental immunity.

Public school administrators who understand the development and/or historical traditions of the governmental immunity concept possess a better basis to view trends and movements in governmental immunity and, therefore, are able to offer wiser leadership through their knowledge.

Procedures and Sources of Data

Since this study is essentially a legal-historical examination of governmental immunity, there are two primary steps in the research process.

The first step is to locate and collect all pertinent data relating to the topic; and the second step is to

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[19] Supra note 3.

interpret these data in relationship to the purposes of the study which were presented earlier.

Location and collection of data will be done by searching all relevant United States' Supreme Court, circuit courts of appeals' and district courts' cases as well as selected state court rulings. Other pertinent information contained in works of history and/or political science was also be used. Location of relevant data from British sources will consist of searching British court decisions, statutes, and related historical and political science works.

In locating these data, such legal materials as The American Digest System, The Dicennial Digest, and specific state indexes will be used to find specific cases relevant to this study. These cases will then be located in various reporters as the United States Reports, The Federal Reporter, The Federal Supplement, regional and state reporters.

Peripheral information regarding the topic of this study will be obtained from other legal encyclopediac sources as American Law Reports, Corpus Juris Secundum, American Jurisprudence, and various law journals.

All data will be scrutinized regarding their relevance, impact, and implications and reported in the Research Report.

Organization of the Study

The study is organized in the following manner:

Chapter 2: Historical analysis of Medieval and British sovereign immunity.

Chapter 3: Development and Evolution of Governmental immunity in the United States.

Chapter 4: Implications of the governmental immunity principle to education in the United States.

Chapter 5: Conclusion.

CHAPTER 2

HISTORICAL ANALYSIS OF MEDIEVAL AND ENGLISH SOVEREIGN IMMUNITY

Since several United States' courts have attacked the concept of sovereign immunity because "the whole doctrine of governmental (sovereign) immunity from liability from tort rests upon a rotten foundation," it is necessary to examine this foundation and to analyze its historical impact on modern-day usage of sovereign immunity.[20]

Review of the Literature

The term "governmental immunity" represents an evolution of the term "sovereign immunity." When the United States declared independence in 1776, American governments absorbed the duties and responsibilities of the previous colonial governments which were authorized and sanctioned by the English Crown.[21] During the pre-revolutionary war period, the state was immune from suits of tort liability, because it was held that the state was an extension of the sovereign crown--hence the name "sovereign immunity." The founders of the new American nation, however, in their attempt to eliminate all references to

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[20] Supra note 3.

[21] Dartmouth College v. Woodward 4 Wheaton 517 (1819).

"kingship," and "sovereignty" adopted this principle of immunity from suit, but changed its name to "governmental immunity." It was felt that the sovereign was replaced by a government; and since the principle was still applicable, the name change was justified.

Historical Development

The origination of the governmental immunity concept is uncertain. Scholars present various theories regarding its inception. Literature relevant to this discussion reveals two major theories concerning the origination of governmental immunity.

The most popular school of thought is represented by the English scholar Bracton and his successors Maitland and Pollock, who suggested that many common law concepts evolved during the dark ages.[22] One common law custom established during this period was that the lord of the fief was also the law-maker and judge of the fief. Since this arrangement placed the lord (for all practical purposes) above the law, a type of common law immunity from suit was developed. The only person who could hold a lord legally responsible for his actions was the superior power that gave

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[22] BRACTON, TRACTATUS DE LEGIBUS (ed. F. W. Maitland) 107-108 (1887) and 2 F. POLLOCK & F. W. MAITLAND, THE HISTORY OF ENGLISH LAW 124-215 (1968).

him his fief--the king.[23] The king, in turn, was immune from suit as a result of his sovereignty.[24]

Another point of view is expounded by the English Law historian Blackstone, and later by Keir and Lawson. This school of thought maintains that sovereign immunity was a royal "advantage" of one of the king's two prerogatives.

> The chief among his advantages in litigation was that he could not be made defendant to an action at law; this was hardly a prerogative in the earlier Middle Ages since it was shared by other lords, being merely an application of the feudal rule that a lord cannot be sued in his own court. It later came quite correctly to be regarded as a prerogative; for when the King's courts had become national courts and absorbed the greater part of the legal business of the country, the King's immunity ceased to have any real connection with feudalism.[25]

Blackstone maintains that the King's prerogatives were the only legal basis for his authority.[26] Therefore, there appears to be a controversy regarding initiation of the immunity concept.

Movement from Common Law to Statutory Law Status

Even though governmental immunity is a legal principle which has existed in statute for hundreds of years, no major research has been conducted regarding its movement from common law to statutory law status. Bracton,[27]

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[23] Supra note 15 (BRACTON) at 107.

[24] Id note 15 at 109.

[25] Id note 15 at 107.

[26] Supra note 9 at 74.

[27] Supra note 22.

Maitland,[28] Pollock,[29] and Jacobs[30] are some of the scholars who have identified a type of governmental immunity which existed in common law during the Middle Ages.

Blackstone, Keir, and Lawson are representative of those scholars who have identified the concept in a quasi-statutory law status.[31] By quasi-statutory law status, it is meant the concept possessed a solid and firm foundation in the King's prerogative but had not been placed into civil statute.

Jones maintains that the status of governmental immunity was changed from common law to statutory law in 1532 and 1533 by two acts of Henry VIII. He does not, however, offer any explanation regarding the events which lead to this historical change in legal principle.

English Law Heritage

English statutory law and common law has a long and complex history. In its simplest form, English law is comprised of Roman civil law (both statutory and common),

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[28] F. POLLOCK & F. W. MAITLAND, THE HISTORY OF ENGLISH LAW (1923).

[29] Id note 28.

[30] Supra note 2.

[31] Supra note 15 at 18.

ecclesiastical or canon common law, feudal common law, European common law (especially French and Norman), and its own Anglo-Saxon law.[32]

The influence of each of these laws will be examined in terms of the contribution to the English system of law which is able to endorse the concept of sovereign immunity, and the contribution concerning the evolution of the sovereign immunity doctrine.

Roman Law

Roman law played an important role in determining the foundation of English law and was able to influence the form of English law by two primary paths. Since Roman law consisted of both statutory and common law,[33] each of these elements had a unique impact on the development of the English legal system and its system's ability to so easily adopt the principle of sovereign immunity.

The primary path of influence results from the fact that England was occupied by the Roman empire until 410 A.D. and, consequently, was subject to its statutory laws. Even though the Romans left England early in the Fifth Century, the influence of Roman law continued and eventually influenced (to a certain degree) Anglo-Saxon law.

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[32] Supra note 9 at 17-19.

[33] HENRY S. MAINE, ANCIENT LAW at 52 (1930).

Even though many scholars maintain that "when the Romans left Britain, his law departed with him."[34] Percy Winfield claims that the Roman influence continued:

> Nor is it credible that Rome, of all empires, should have ruled any dominion for three and a half centuries without making her subjects familiar with some of the principles of law that backed her government . . . . Grants of land to private individuals, unclogged by the native "folkright," can be linked up to Roman conceptions of ownership.[35]

Therefore, English law has a direct historical connection with the Roman statutory law system.

There is another means by which Roman statutory law helped to influence English law. Early during the Twelfth Century, a revival of Roman law was begun in continental Europe. This revival was quickly spread to England where conflicting reports show Roman law (on one hand) endorsed by English lawmakers[36] or (on the other hand) opposed due to ecclesiastical matters.[37] In any event, there was a new move towards reviving Roman law in England, and its influence is bound to exist. A more detailed discussion of the extent of this influence will be discussed later in this chapter.

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[34]PERCY WINFIELD, THE CHIEF SOURCE OF ENGLISH LEGAL HISTORY 55 (1925).

[35]Supra note 34.

[36]Supra note 33.

[37]Supra note 28 at 122-135.

A second primary means of influence also had two paths. First, and contrary to most beliefs, Roman law possessed a type of common law which directly influenced ecclesiastical law. Ecclesiastical law, in turn, had a direct influence on English law as well as having strong influence on feudal law. The second path was a feudal system which operated in England for many centuries. Therefore, through the dual paths of ecclesiastical law and feudal law (both of which had their beginnings in Roman common law), Roman common law influenced English law.

The Dualistic Nature of Roman Law

A superficial examination of Roman law often reveals that Roman law was a civil law, based on statutory or written provisions. While this observation is correct, it is far from complete. Roman law, in fact, was comprised of two separate legal elements:

> The Romans described their legal system as consisting of two ingredients. "All nations," says the Institutional Treatise published under the authority of the Emperor Justinian, "who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the Civil Law of that people, but that which natural reason appoints for all mankind is called the Law of Nations, because all nations use it."[38]

The "Institutional Treatise" which Main refers to is the basis for the statutory laws which governed the Roman Empire.

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[38] Supra note 33 at 53-54.

It is appropriate at this point to mention that both the English and American legal systems incorporate statutory provisions as part of the overall system of laws. The Roman Statutory provisions consisted of "Twelve Decemviral Tables" which were tablets that contained all Roman civil laws. These laws were written on these tables and, therefore, were standard throughout the Roman Empire. England was governed by these statutory laws up until 410 A.D. when the Roman occupation ceased.

The Roman treatment of torts (law of wrongs) and the English treatment of torts, while having similar results, are administered quite differently. The Roman law of torts not only included torts (in the modern sense) but also crimes against an individual since it is the individual that suffers, not the state.

> Offenses which we are accustomed to regard exclusively as crimes are exclusively treated as torts, and not theft only, but assault and violent robbery, are associated by the jurisconsult with trespass, libel, and slander. All alike gave rise to an Obligation or vinculum juris, and were all requited by a payment of money. This peculiarity, however, is most strongly brought out in the consolidated Laws of the Germanic tribes. Without an exception, they describe an immense system of money compensations for homicide, and with few exceptions, as large a scheme of compensation for minor injuries . . . . a sum was placed on the life of every free man, according to his rank, and on his person, for nearly every injury that could be done to his civil rights, honour, or peace; the sum being aggravated according to adventitious circumstances. These compositions are evidently regarded as a valuable source of income; highly complex rules regulate the title to them and the responsibility for them; and, as I have already had occasion to state, they often follow a very peculiar line of devolution, if they have not been acquitted at the decease of

> the person to whom they belong. If therefore the criterion of a delict, wrong or tort be that the person who suffers it, and not the State, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort.[39]

The Romans, then, obviously treated any wrong (physical or tort) against an individual as a type of statutory tort.

The English system, however, deals with torts in a common law fashion which requires judicial procedures. It is interesting to note the similarities of the outcomes. Under both systems, a monetary compensation is required to the person who sustained injury. Often, these compensations carry previously determined remedies much like the Roman statutory law. Insurance contracts often spell out exact damages for each type of physical injury in much the same manner as Blackstone in his Commentaries on the Laws of England.[40]

While Roman statutory law did exert some influence on English law and tort actions in England, it was not the primary method. The Roman equivalent of English common law--the law of nature--appears to be the primary source of influence. The Roman Law of Nature was a common law.[41] No statutes were written regarding its use or implementation. The primary element of the "law of nature" was "Equity,"

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[39] Supra note 33 at 392-393.

[40] Supra note 9 at 239.

[41] Id note 33 at 54.

which Henry S. Maine describes as "a set of legal principles entitled by their intrinsic superiority to supersede the older law."[42]

Maine contends that much of the law practiced in England by Chancery judges was law derived from Equity. In fact, "the Court of Chancery, . . . bears the name of Equity," adopted many principles of Roman jurisprudence.[43]

> The Roman law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the Corpus Juris Civilis imbedded, with their terms unaltered, though their origin is never acknowledged.[44]

Therefore, Roman law (hence its influence on English law) possessed not only statutory law, but also in equity. The statutory law influenced the English legal system through a historical path and a scholarly revival path. Equity influenced English law in a more indirect manner--through Church ecclesiastical law.

Canon and Ecclesiastical Law

It is necessary to immediately differentiate between canon and ecclesiastical law. Canon law is law which was derived from Roman common law and which, eventually, absorbed civil law in medieval Europe. Ecclesiastical

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[42] Supra note 33 at 52.

[43] Id note 33 at 52.

[44] Id note 33 at 52.

law, on the other hand, is a law which has a civil law basis, but where the reigning monarch accepts the merger of Canon law with his civil law. Technically, then, "Ecclesiastical laws (were) issued by the Anglo-Saxon Kings on the advice of their bishops, with whom they were closely allied."[45]

Canon law began as an internal religious law that not only was not sanctioned by the Roman government, but was persecuted by various Roman emperors until 313 A.D.. Pollock and Maitland report that during this period Roman law "was stricken with sterility."[46]

By the time the fall of the Roman Empire was completed, canon law, governed by the Church, was the only operating jurisprudence in Europe. This law, however, was growing so quickly that no standardized format was in existence between European countries or even between bishop's deities.

> Slowly and by obscure processes a great mass of ecclesiastical law had been forming itself. It rolled, if we may so speak, from country to country and took up new matter into itself as it went, for bishop borrowed from bishop and transcriber from transcriber. Oriental, African, Spanish, Gallican canon were collected into the same book and the decretal letters of later were added to those of earlier popes.[47]

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[45] Supra note 34 at 55.

[46] Supra note 33 at 3.

[47] Id note 33 at 16.

It is important to remember that while these various laws were multiplying and increasing in complexity, they were still operating at a common law level. No statutory provisions existed in the canon law until Gregory IX's decrees in 1230. In the Ninth Century, however, one attempt at consolidation of the legal principles governing canon law prevailed which helps to cast some light on the early development of sovereign immunity.

> Then out of the depth of the ninth century emerged a book which was to give law to mankind for a long time to come. Its core was the Hispana; but into it there had been foisted besides other forgeries, some sixty decretals professing to come from the very earliest successors of St. Peter. The compiler called himself Isidorus Mercator. . . . The false decretals are elaborate mosaics made up out of phrases from the Bible, the fathers, genuine canon, genuine decretals, the West Goth's Roman law-book; but all these materials, wherever collected, are so arranged as to establish a few great principles: the grandeur and superhuman origin of ecclesiastical power, the sacrosanctity of the persons and the property of bishops, and, though this is not so prominent, the supremacy of the bishop of Rome.[48]

Mercator's work is of major importance to this study. According to Pollock and Maitland, Mercator expresses (what this researcher finds to be) the first legal reference to the principle of sovereign immunity.

> Above all, no accusation can be brought against a bishop so long as he is not despoiled of his see: Spoliatus episcopus ante omnia debet restitui.[49]

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[48] Supra note 33 at 17.

[49] Id note 33 at 17.

Most legal observers have attributed the concept of sovereign immunity to the feudal legal system. The above reference, however, reveals that the concept was imbedded in the canon law before passing on to the feudal system.

During the Ninth Century, canon law's influence on England took two separate paths. First, the Catholic Church, in its attempt to spread Christianity throughout Europe, was preserving and transmitting the canon legal system which was based on the Roman "law of equity." Since England was one of the many countries converted to Christianity, it (too) began to adopt this legal system in conjunction with its other legal heritages. Therefore, ecclesiastical law was being created in England through the merger of the operating civil law system and the Church's canon law. As noted previously,[50] the Canon law possessed an element of immunity from tort which would also become merged with the new English Ecclesiastical law.

The second path of transmission is the method by which canon law influenced the feudal system which provided the legal basis for English law.

The Feudal System

While the feudal system existed in northern Europe before the fall of the Roman Empire, it did not become

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[50] Supra note 33 at 17.

prevalent until around 800.[51] Prior to this time, civil laws either did not exist or were ignored. It was inevitable, however, that the canon law system and the feudal system would influence each other and, eventually, merge. The Church found it useful to endorse certain feudal lords who would in return for this endorsement, spread and support the dogma of the Church.

It is believed by many that the feudal system has been the vehicle which transported the principle of sovereign immunity into statutory law. This system consisted of a hierarchy of lords solely responsible to a single king (of a country). Each lord derived his power from the king's sanction; and the king derived his power from the collective power of his lords who supported him maintained the king in his position of power. Under the "divine right of kings" concept, the king claimed sovereignty over his kingdom because he was sanctioned by God and acted as God's regent on earth. He claimed that he derived his power from God and that only God could take it away.

Since each lord was, in essence, a little king of his fief, his powers over the people and activities of his fief were almost unrestricted. One custom that was established during this period was that the lord of the fief was also the law-maker and judge of the fief. Since this arrangement places the lord (for all practical purposes) above the law,

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[51] Supra note 9 at 183.

a type of common law immunity from suit was developed. The only person who could hold a lord legally responsible for his actions was the superior power that gave him his fief--the king.[52]

Therefore, sovereign immunity was a common law principle which evolved from two sources. First, the canon law of the Church endorses this concept as mentioned earlier in Mercator's work.[53] Second, the concept developed as a common law principle that grew out of the feudal system (which was also influenced by canon law).

Unification of the English Legal System

English law, as we know it today, began to evolve shortly after the Norman Conquest in 1066. The Norman Conquest caused a consolidation of all the influences on English law to take place. The feudal system, the Church canon law, and the historical heritage of Roman civil law all merged into a common law system.

In 1100, Henry I became the first king of England whose authority extended over all of what is known as modern day England. In uniting England, Henry I took two actions which would affect his successors. First, he was able to have himself recognized by all the English people as Sovereign of England (which technically, he inherited from

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[52] Supra note 22.

[53] Supra note 33 at 4-5.

Rufus - William the Conqueror's son). This sovereignty entitled him as the law-giver, law-maker, and supreme judge of the realm. It also made him immune from suit. Second, he established the beginnings of a judicial system. In this judicial system, "the King sat in person in Curia regis."[54] Because the king held court in different locations during the year, suitors were required to follow the king in order to pursue whatever legal actions they were seeking. To compensate for this problem, Henry divided the court into two systems, one would continue to follow the king and maintain the legal concept of Curia regis; the other court was permanently based in Westminister and became known as the Exchequer.[55]

Henry II assumed the English throne in 1154 and made great progress in the formation of an equitable and just judicial system. Under him, the Exchequer became known as the Bench. However, a struggle began between Henry II and Rome concerning which set of legal laws were to prevail in the English civil courts--the English civil laws or the Roman canon laws. Henry II's attempt to check the power of the clergy lead to the fatal dispute with Archbishop Becket of Canterbury.[56] Pollock and Maitland report that Henry was

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[54] 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 23 (1959).

[55] Supra note 34 at 131.

[56] Supra note 9 at 739.

so angered by his power being usurped by Rome, that he made assurances that civil law and the king's sovereignty would prevail in future legal contests.

> During the first half of the twelfth century the claims of the church were growing, and the duty of asserting them passed into the hands of men who were not mere theologians but expert lawyers. Then, as all know, became the quarrel between Henry and Becket. In the Constitutions of Clarendon (1164) the king offered to the prelates a written treaty, a treaty which, so he said, embodied the 'customs' of his ancestors, more especially of his grandfather. Becket, after some hesitation, rejected the constitutions. The dispute got hot; certain of the customs were condemned by the Pope. The murder followed, and then Henry was compelled to renounce, though in carefully guarded terms, all his innovations. But his own assertion all along had been that he was no innovator; and though the honours and dishonours of the famous contest may be divided, the king was left in possession of the greater part of the field of battle. At two points he had been beaten:--the clerk suspected of felony could not be sentenced by, though he might be accused before, a lay court; appeals to Rome could not be prohibited, though in practice the king could, when he chose, do much to impede them. Elsewhere Henry had maintained his ground, and from his time onwards the lay courts, rather than the spiritual, are the aggressors and the victors in almost every contest.[57]

This incident is indicative of the type of sovereignty which English monarchs possessed during this period. Immunity evolved from this sovereignty in civil matters, but the king still had to answer to Rome's canon law. Canon law was still the dominant law until Henry III's (1216) and Edward I's (1272) reigns. It was during their reigns that the split in

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[57] Supra note 33 at 122-123.

canon law and English civil law became severe enough to be labeled as a separation.[58]

Under Edward I's reign, three courts emerged which were the early basis for today's English Courts-- The Common Bench, The King's Bench, and King in Council.[59] Along with the judicial structure being stabilized and formalized, the concept of immunity was set as a common law doctrine.

> At least as early as the Thirteenth Century, during the reign of Henry III (1216-1272), it was recognized that the king could not be sued in his own courts, but this immunity did not imply that the sovereign was above the law. To the contrary, the king was regarded as the fountain of justice and, as such, bound by law and conscience to redress wrongs done to his subjects. This conception appears to account for the initial development of remedies against the ruling sovereign as these began to take shape during the reign of Edward I (12721307).[60]

Therefore, the doctrine of sovereign immunity began to blossom forth under the reign of Henry III and Edward IV. Initially, this sovereign immunity did not apply the maxim "The King can do no wrong"[61] but rather endorsed the maxim "The King is the fountain of justice."[62] This difference is important. Under this initial type of sovereign immunity, the king cannot be sued but is duty bound to abide by his own laws. Sovereign immunity under the reign of Henry VIII is quite different.

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[58] Supra note 9 at 739.

[59] Id note 9 at 131.

[60] Supra note 30 at 5.

[61] 38 AM. JUR., MUN. CORPS., s573, 266.

[62] Supra note 33 at 5.

There were few major developments concerning the law and sovereign immunity until the rise of the Tudors in the Fifteenth Century. The struggle of the Tudors line concerning the law, immunity, and the Holy Roman Empire seems to be exemplified by the reign of Henry VIII. It was during his reign that immunity from prosecution and suit moved from common law status to statutory law status.

Keir and Lawson, when speaking of Henry's prerogatives, are quick to point out,

> The chief among his advantages in litigation was that he could not be made defendant to an action at law; this was hardly a prerogative in the earlier Middle Ages since it was shared by other lords, being merely an application of the feudal rule that a lord cannot be sued in his own court. It later came quite correctly to be regarded as a prerogative; for when the King's courts had become national courts and absorbed the greater part of the legal business of the country, the King's immunity ceased to have any real connection with feudalism.[63]

The other prerogative[64] was inherited from "the medieval lawyers (who) had held the view that the law was a bridle on the King, and in their famous maxim, 'The King can do no wrong,' they had insisted that his power extended to do only what is right."[65]

Henry VIII had decided to choose another wife but was opposed by the Pope who still claimed sovereignty (even over kings). Henry had, as a part of his royal prerogatives,

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[63] Supra note 9 at 74.

[64] Id note 9 at 239.

[65] GARETH JONES, THE SOVEREIGNTY OF THE LAW 93 (1973).

first, immunity from prosecution; second, supposedly the "Divine Right of Kings" concept; and third, the fact that the "King can do no wrong." His solution was simple. He declared first, that he was given his power from God and God alone (Divine Right of Kings); second, that he was immune from all suits; because third, he was sovereign and not under the authority of anyone, including the Bishop of Rome.

> His realm is declared to an empire, and his crown imperial, by many acts of parliament, particularly the statutes 24 Henry VIII. c. 12. (1532) and 25 Henry VIII. c. 28. (1533); which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: Authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it: but who, says Finch, shall command the king? Hence it is likewise, that by law the person in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment.[66]

It was at this point, then, that the feudal concept of "The King can do no wrong" and "Sovereign Immunity" (which were common law based) were combined with the civil law. This produced the general concept of Sovereign Immunity which has been transported to America in the form of "Governmental Immunity from Liability."

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[66] Supra note 65 at 94-95.

It is ironic that the Roman Catholic Church and Canon law, which were one of the primary influences on the establishment of the common law doctrine of sovereign immunity, was also the primary cause of the principle movement from common law status to statutory law status. Also imbedded in the many acts of Henry VIII which declared him sovereign of all England and free from interference from Rome was the statutory establishment of the "divine right of Kings" concept.

> . . . for where this your Grace's Realm recognifing no Superior under God, but only your Grace, hath been and is free from Subjection to any Man's Laws, but only to fuch as have been devifed, made and obtained within this Realm, for the Wealth of the fame, or to fuch other as by Sufferance of your Grace and your Progenitors, the People of this your Realm have taken at their free Liberty, by their own Confent to be ufed amongft them, and have bound themfelves by long Ufe and Cuftom to the Obfervance of the fame, not as to the Obfervance of Laws of any foreign Prince, Potentate or Prelate, but as to the cuftomed and ancient Laws of this Realm, originally eftablifhed as Laws of the fame, by the faid Sufferance, Confents and Cuftom, and none otherwife: (4) It ftandeth therefore with natural Equity and good Reafon, that in all and every fuch Laws human made within this Realm, or induced into this Realm by the faid Sufferance, Confents and Cuftom, your Royal Majefty, and your Lords Spiritual and Temporal, and Commons, repref enting the whole State of your Realm, in this your moft high Court of Parliament, have full Power and Authority, not only to difpenfe, but alfo to authorize fome elect Perfon or Perfons to difpenfe with thofe, and all other human Laws of this your Realm, and with every one of the, as the Quality of the Perfons and Matter fhall require; (5) and alfo the faid Laws, and every of them, to abrogate, annul, amplify or diminifh, as it shall befeen unto your Majefty, and the Nobles and Commons of your Realm prefent in your Parliament meet and convenient for the Wealth of your Realm, as by divers good and wholfome Acts of Parliaments,

> made and eftablifhed as well in your Time, as in the Time of your moft noble Progenitors, it may plainly and evidently appear.[67]

Henry VIII was also astute enough to insure that from that time (1532) on, all subjects of England, including the clergy, were subject to the laws of England.[68] This move helped to assure Henry of total sovereignty from Rome and Canon law.

There appears to be no case law defending Henry VIII's position on sovereign immunity. However, one of his successors, James I, called upon this prerogative in 1607 when suit was brought against him for causing damage to a subjects property while digging for saltpetre (an ingredient used in the manufacture of gunpowder).[69]

The English court ruled that the statute III Henry VIII, CXV made the King immune from suit and that the individual must incur the damages.

> as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in III Henry VIII, CXV. And in this case the rule is true, Princeps et respublica ex justa causa possunt rem meam auferre.[70]

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[67] XXV HENRY VIII, C. XXI

[68] XXIV HENRY VIII, C. XII & C. XIX.

[69] The Case of the King's Prerogative in Saltpetre, 12 Co. Rep. 12 (1607).

[70] Supra note 69.

The decision in this 1607 case, reaffirms that sovereign immunity was placed in statute by Henry VIII and that it made the sovereign immune from all suits.

William Blackstone's Contribution

In 1758, the famed English law historian and scholar, William Blackstone, wrote his famed, An Analysis of the Laws of England which documented the evolution of sovereign immunity into what had come to be known as "the King's prerogatives."[71] Blackstone defines this prerogative as follows:

> Prerogative is that fpecial Power and pre-eminence, which the King hath above other Perfons, and out of the ordinary Courfe of Law, in right of his regal Dignity.[72]

Regarding the king's role in English justice, Blackstone wrote:

> The King is alfo the Fountain of Juftice, and general Confervator of the Peace; and therefore may erect Courts, profecute Offenders, pardon Crimes, and iffue Proclamations.[73]

Blackstone's contribution to the formalization of the sovereign immunity concept is important to this study since it will be pointed out (in the succeeding chapter) that many courts relied on Blackstone's reporting of this principle in their dicta which subsequently established the concept in American law.

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[71] 1 W. BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND (1758).

[72] Supra note 71 at 75.

[73] Id note 71 at 18.

England's Abrogation of Immunity

The doctrine of sovereign immunity became so firmly entrenched into the English legal system, that it was not until late in the Nineteenth Century that the English Parliament and courts began to seriously challenge the concept.

In 1860, Parliament passed into law "The Petitions of Right Act, 1860" which formalized the procedure of petitioning the crown to bring suit against the crown.[74] While this right had always existed in English law, Holdsworth reports that few, if any, subjects had ever taken advantage of this right because of the intricate legal procedures.[75] The Petitions of Right Act, 1860 outlined a fifteen step procedure to petition the crown for permission to sue the crown. It established a time period of twenty-eight days for the reigning monarch to either accept or reject such a petition as well as designating "any One of the Superior Courts of Common Law of Equity at Westminister" as having jurisdiction over such suits.[76]

However, The Petitions of Right Act, 1860 did not authorize suits against the crown for torts.

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[74] 23 VICTORIA I, C34 (1860).

[75] 6 HOLDSWORTH, THE HISTORY OF ENGLISH LAW 266 (1956).

[76] Supra note 71.

> The remedy was available for the recovery of property, whether land or goods, for breach of contract and indeed, it would seem, in every case where the suppliant would have had an action against a subject with the single exception of tort. The exception covered not merely cases where it was alleged that the King himself had committed a tort but also cases where, had he been a subject, he would have been vicariously liable for the torts of his servants. This meant that Petition of Right could not be used as a remedy for any torts committed by anyone in the course of government.[77]

Therefore, the Petitions of Right Act, 1860 did not really abrogate sovereign immunity from tortious acts, but rather clarified the petition procedure which had always been an Englishman's legal right.

In 1866, an English court determined that public bodies are responsible for the negligent acts of their employees.[78] The court, in Mersey Trustees v. Gibbs and The Same v. Penhallow, ruled that a public entity, like the master-servant relationship, is liable for damages caused by acts of its employees.[79] The decision in this case opened new avenues for liability suits in England. Public entities were no longer protected from suits where damages were caused by official acts of employees.

The major case which abrogated the sovereign immunity concept was a public school case in 1890.[80] In

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[77] Supra note 15 at 203.

[78] Mersey Trustees v. Gibbs, L.R.1 H.L.93 (1866).

[79] Supra note 78.

[80] Crisp v. Thomas 63 LINS 756 (1890).

this case, a school teacher was being sued for damages because a portable blackboard fell upon and injured a student. The student's parents sued for damages claiming teacher negligence. The Queen's Bench Division Court held that the fall of the blackboard was not evidence of negligence, but if there had been negligence, the school or the teacher could be held liable.

> Then, if there was negligence, someone must be liable. Fees are paid for the schooling, therefore someone must have duties towards the children. The defendant is the only active member of the committee; he was the master of Rider pro hac vice. (Lord Esher, M.R.--It seems that the defendant could not have forbidden Rider to teach.) The fact of his position being only honorary is of no consequence.[81]

This court decision is quite important to this study because it is the first instance of a court abrogating the sovereign immunity concept whether it be statutory law or common law based. This case also reversed the findings of lower English courts, especially in the case of Russell v. The Men Dwelling in the County of Devon[82] which many scholars claim to be the basis of American governmental immunity.[83]

> It should be noted that the Russell case was later overruled by the English courts, and that in 1890 it was definitely established that in England a school board or school district is subject to suit in tort for personal injuries on the same basis as a private

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[81] Supra note 80 at 756.

[82] 100 ENG. REP. 359 (1788).

[83] Lee O. Garber, Origin of the Governmental Immunity from Tort Doctrine, YEARBOOK OF SCHOOL LAW 235-243 (1964).

> individual or corporation. (Crisp v. Thomas, 63 L.T.N.S. 756 (1890).) Nonimmunity has continued to be the law of England to the present day.[84]

Following this landmark decision by the English courts, many tort liability suits were filed against governmental agencies (especially school systems).

> In a great number of cases, most of which involved the personal injuries of a pupil or student resulting from alleged negligence of an educational authority or that of a school official, schoolmaster or teacher, or other school personnel, such authorities have been treated as liable in tort to the same extent as private persons or corporations, although no mention was made therein as to the doctrine of immunity.[85]

In 1893, Queen Victoria and the British Parliament passed The Public Authorities Protection Act, 1893[86] where the act attempted to insure certain public officials at least a rudimentry immunity against suit. This act also specified certain provisions which must be followed before a suit against the state could be brought.

Following the official passage of this act, the British courts became swamped with education tort suits against school boards.[87] Finally, in 1939, Parliament passed the Limitation Act, 1939, s. 31 where all sovereign immunity was abolished.[88] Chapman suggests that this may

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[84] Supra note 3.

[85] 160 ALR 84.

[86] 56 VICTORIA I, C. 61 (1893).

[87] Supra note 85 at 84.

[88] S. CHAPMAN, STATUTES ON THE LAW OF TORTS 439 (1963).

have been a move to abolish immunity on a statutory level rather than allow British courts to totally abrogate it.[89]

In 1954, the Parliament passed The Law Reform Act, 1954[90] which removed the restrictions and provisions (set up in 1893 by the Public Authorities Protection Act, 1893[91]) which private individuals needed to meet in order to bring suit against the state. This latest act is considered to remove the last obstacle in absolute and total abrogation of sovereign immunity in England.

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[89] Supra note 88 at 440.

[90] 2 ELIZABETH II, c 36 (1954).

[91] Supra note 86.

Summary

The evolution of the sovereign immunity concept into the English legal system is a complex and vague principle to follow. A combination of feudal influence and Canon law (which was derived from Roman law) supplied the base for the common law evolution of the principle. The Roman civil law supplied the statutory basis for the principal to become imbedded in law.

The reigns of Henry II, Henry III, and Edward I allowed the sovereign immunity concept to flourish independent of Canon law. Henry VIII's dispute with Rome became the vehicle for this monarch's exercise of his sovereignty. Immunity against suit was placed into statutory law as a means to protect the king against the Canon forces of Rome as well as increasing the king's already awesome power.

Sovereign immunity was the rule of law until 1890 where a British court abrogated it for school boards and school districts. As a compromise move, Queen Victoria passed the Public Authorities Protection Act, 1893 which partially abrogated immunity while protecting the concept as applied to certain public officials. Queen Victoria finally abrogated all sovereign immunity in 1939. However, the restrictions and provisions set in 1893 were still in effect. Queen Elizabeth passed The Law Reform Act in 1954 which removed these restrictions and, consequently, totally

abrogated all sovereign immunity in England. So, 422 years after Henry VIII had the concept of sovereign immunity placed in statute, and many more years after the development of the common law basis for the concept, England has finally abandoned sovereign immunity as a means of protecting the state against suit.

CHAPTER 3

DEVELOPMENT AND EVOLUTION OF GOVERNMENTAL IMMUNITY IN THE UNITED STATES

Prior to 1776, the American colonies were subject to and governed by the laws and the courts of England. One of the common laws which was maintained in the colonies was the concept of sovereign immunity. A colony could not be sued since the colony was an extension of the English crown and protected by the privilege of sovereign immunity.

In 1776, the colonies declared their independence from England. During and following the Revolutionary War, each state assumed governmental control of the state functions which were previously performed by the English crown (and its appropriately appointed ministers and governors). Because the United States is an offspring of England, its governmental, legal, and judicial systems are very similar to those of England. Many of the legal concepts developed and used in England were (and still are) endorsed by our own system of government. England's colonial rule simply gave way to each state's individual governmental rule. The method of governing changed little except to correct for the obvious inequities which caused the split in the first place.

One of the specific elements or principles of this legal system which the newly formed state governments inherited and endorsed was the concept of sovereign (governmental) immunity. In England, the state was immune from suit because the state was an extension of the English crown who is immune from suit.[92]

Even though it is apparently inconsistent with the principles of a democratic government, the founding fathers of each and every individual state (as well as the federal government) readily accepted this notion.

Method of Transmission

The exact method of transmission of the principle of sovereign immunity in England to governmental immunity in the United States is difficult to locate. As stated previously, the underlying principles of the governmental immunity concept seem inconsistent with the reasoning that lead to the formation of the United States. The sovereignty of the English crown, the privileges of that position, the prerogatives of the kingship, and the unchallengeable arbitrary and capricious acts made by the English crown were the primary reasons for this country's formation. Yet, the leaders of this new republic, readily accepted and endorsed the governmental immunity concept which gave the state (and federal) government sovereignty, which gave the state (and

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[92]W. L. PROSSER, LAW OF TORTS 971, (1971).

federal) government one of the privileges and prerogatives that used to be enjoyed by the English king, and which gave the state (and federal government) the power to act without fear of legal reprisal.

Many legal scholars and authorities are at a loss to explain why such a concept was allowed to develop in the United States. William L. Prosser, in his textbook, Law of Torts, contends:

> Just how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America is today a bit hard to understand.[93]

The National Association of Attorneys General, in their publication, Sovereign Immunity, The Liability of Government and Its Officials, query:

> 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. 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.[94]

Edwin M. Borchard, in his famed article, "Government Liability in Tort," states:

> The jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown

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[93] Supra note 92.

[94] SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS (published by the National Association of Attorneys General) 1 (1975).

> is one of the mysteries of legal evolution. Admitting its application to the sovereign and its illogical ascription as an attribute of sovereignty generally, it is not easy to appreciate its application to the United States, where the location of sovereignty--undivided sovereignty, as orthodox theory demands--is a difficult undertaking.[95]

Alexander and Solomon, in their book, College and University Law, speculate that:

> It is difficult to comprehend why in the United States, where there was such great fear of tyranny of kings, this doctrine was unquestionably adopted so wholeheartedly. It would have been reasonable to assume that in the absence of sheer oversight by the framers of the constitution, immunity of the government would have been denied or at least carefully circumscribed.[96]

Prosser and Wade, in Torts: Cases and Materials, observe that "(t)he explanations for the initial acceptance of this feudal and monarchistic doctrine in the democracy of this country are quite obscure."[97]

Mr. Justice Klingbiel of the Supreme Court of Illinois in the famed Molitor v. Kaneland decision ponders how the concept of governmental immunity survived in the United States since it conflicts with the basic concept of the law of torts.

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[95] E. W. Borchard, "Government Liability in Tort," 24 YALE LAW JOURNAL 4 (1924).

[96] KERN ALEXANDER & ERWIN S. SOLOMON, COLLEGE AND UNIVERSITY LAW 649 (1972).

[97] W. L. PROSSER AND J. W. WADE, TORTS: CASES AND MATERIALS 1117 (1971).

> It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The doctrine of governmental immunity runs directly counter to that basic concept. What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit wrongdoing without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortious conduct?[98]

The Supreme Court of Florida in Hargrove v. Town of Cocoa Beach noted that the "divine right of kings" concept which is embodied in governmental immunity was abolished because of the Revolutionary War.[99] The court could not understand how the principle had been maintained. And a California court found that:

> The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs . . . Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that "divine right of kings" on which the theory is based.[100]

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[98] Supra note 3 at 17.

[99] Barker v. City of Santa Fe 47 N.M. 85, 136 P.2d 480.

[100] Hargrove v. Town of Cocoa Beach 96 So. 2d 130 (1957).

In essence, the above authorities, scholars, and courts question why a new nation, whose entire reason for breaking away from its mother country is distaste with the sovereign crown, would so heartily endorse and accept a concept that "prima facie" appears to contradict that basic premise. The authorities also agree that the exact method of transmitting this immunity concept from England into the United States' legal system is, at best, ambiguous.

In order to examine this unique migration and adoptance of the sovereign (governmental) immunity principle, it is necessary to divide this examination into the same divisions as the governments are arranged. Therefore, the balance of this chapter will look at first, governmental immunity in the United States federal government, and second, governmental immunity in the individual states.

The Federal Government and Immunity

In December 1787, the seventy-four delegates who attended the Constitutional Convention submitted the Constitution of the United States to each state for ratification. One particular article of the Constitution enlightens this study regarding the liability of governments. Article III, section 2, of the United States Constitution reads as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies

> between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[101]

It is interesting to note that framers of the Constitution were providing a vehicle for citizens of one state to sue in equity another state, and for all "Controversies to which the United States shall be a party"[102] to be settled. A strict interpretation of this article would lead one to believe that the United States government is consenting to being sued.

However, in 1788, when ratification no longer seemed certain, Alexander Hamilton, James Madison, and John Jay wrote 85 articles defending the Constitution. Paper (article) number 81, written by Hamilton sometime between April 4 and May 28 of 1788, contains a statement regarding sovereign immunity.

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual "without its consent." This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to

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[101] U. S. CONSTITUTION, Article III, section 2

[102] Supra note 101.

> the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[103]

This statement implies that governments maintain their immunity unless they specifically intend to abrogate it. Therefore, it can be construed, in a liberal interpretation, that since the United States federal government did not specifically abrogate governmental immunity, that such immunity was in effect.

The earliest federal tort case bears out this point. In Little v. Barreme, the Supreme Court of the United States held Little, a captain of a United States warship, liable for damages even though the captain was operating in "good faith" on instructions from the President.[104] The appellees, owners of a French ship, did not even attempt to sue the President of the United States or

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[103]THE FEDERALIST PAPERS, No. 81 (Hamilton) (1788).

[104]Little v. Barreme 2 U.S. (Cranch) 170 (1804).

the Government since they determined that the United States was operating under the privilege of governmental immunity.

In 1821, Supreme Court Chief Justice Marshall, writing the opinion of the majority in Cohens v. Virginia declared:

> The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.[105]

Chief Justice Marshall gave no defenses or reasons why immunity would be a "universally received opinion."[106] He did, however, make several references to Chisholm v. Georgia, a case which examined sovereign immunity of an individual state.[107] This case will be discussed in succeeding sections of this chapter. It was at this point then, in 1821, where governmental immunity became a "formally" accepted principle in federal law.

Prosser states that following the Cohens v. Virginia case:

> Consent to be sued began to appear in the form of special legislation by Congress authorizing particular plaintiffs to sue on particular claims. Apart from the obvious possibility of political influence, this of necessity involved considerable delay and inconvenience, as well as inflicting a considerable burden upon the time of Congress.[108]

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[105] Cohens v. Virginia 19 U.S. 264 (1821).

[106] Supra note 92 at 971.

[107] Chisholm v. Georgia 2 U.S. (2 Dallas) 419 (1793).

[108] Supra note 97 at 1117.

In 1855, Congress, growing weary of passing legislation on specific tort cases, passed the Federal Court of Claims Act.[109]

> This Act makes the United States liable under the local law of the place where the tort occurs, for the negligent or wrongful acts or omissions of federal employees within the scope of their employment "in the same manner and to the same extent as a private individual under like circumstances." It has been held to make the government liable where the negligence of some employee is proved, although he is not identified. It has been held to mean that the United States may be impleaded as a joint tortfeasor, and becomes liable for contribution where the local law permits it; and that it creates liability to insurers on subrogation claims.[110]

There were, however, several exemptions to this abrogation of immunity. Parties could not sue the federal government for claims arising out of:

1) Military service[111]
2) Special activities of the government[112]
3) "Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[113]

The United States Court of Claims did not, however, have power to adjudicate findings under the 1855 statute. "This was initially merely an advisory court making recommendations

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[109] 28 U.S.C.A. §1356, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.

[110] Supra note 92 at 972.

[111] 28 U.S.C.A. §2680 (j).

[112] 28 U.S.C.A. §2680 (i).

[113] 28 U.S.C.A. §2680 (h).

to Congress."[114] In 1863, the Court of Claims was empowered to make effective judgements under the 1855 act.[115] Some authorities point out that even with the Federal Tort Claims Act, very few tort claims received redress.[116]

Over 18 bills were introduced into Congress between 1919 and 1946 which intended to alter, amend, or replace the 1855 statute. Finally, in 1946, Congress passed the Federal Tort Claims Act of 1946.[117] This act has been heralded as being "a very important step forward."[118] It abrogated governmental immunity from liability in tort for the United States and provided for litigation of tort claims against the government. Many of the exemptions found in the 1855 act still apply, but redress became much easier to acquire. Since the passing of this act, the Federal Court of Claims has heard and ruled on a great number of tort liability cases. It is important to point out that in 1855 the United States federal government attempted to abrogate its immunity from tort liability 38 years before England did so. However, England totally abrogated their immunity at that time--the United States did not do so until 1946.[119]

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[114] Supra note 97 at 1117-1118.

[115] Id note 97 at 1118.

[116] Supra note 92 at 972 and note 98 at 1118.

[117] 28 U.S.C.A. § 1346.

[118] Id note 92 at 973.

[119] Supra note 86.

The Individual States and Governmental Immunity

Unlike the federal government of the Eighteenth Century, the state governments which replaced the English colonial governments did not have absolute control regarding their governmental immunity status. As pointed out earlier,[120] the newly adopted constitution of 1788 gave federal courts jurisdiction over suits between a citizen of one state and another state. This was viewed by many states to be an infringement on the sovereignty which Hamilton refers to in The Federalist Papers (No. 81).[121] Individual states did inherit some immunity form from the previous English government for there is no mention of the possibility of a citizen of a state suing the state in which he enjoys his citizenship. This is not to mean that an Englishman could not sue the crown. For if an Englishman petitioned the crown to allow itself to be sued (and the crown agreed to do so), then suit could be brought against the English crown. States, through common law transference, were able to maintain their immunity with their own citizens.

In 1793, the newly formed Supreme Court of the United States ruled on a governmental immunity case that is of great importance. Not only did Chisholm v. Georgia[122]

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[120] Supra note 101.

[121] Supra note 103.

[122] 2 U.S. (2 Dallas) 419 (1793).

inspire quick passage and ratification of the Eleventh Amendment to the United States Constitution, but it also established a common law link regarding the transmission of the governmental (sovereign) immunity concept into American law.

The Chisholm case presents the question

> Can the State of Georgia...be made a party-defendant in any case...at the suit of a private citizen of the State of South Carolina?[123]

Chisholm, a resident and citizen of South Carolina, was seeking compensation for the nonperformance of a contract made with the State of Georgia. The attorney general of Georgia claimed that no suit could be brought against the state since the state was sovereign. The Supreme Court's (of the United States) justices examined all the relevant aspects of Georgia's inherited sovereign immunity in analyzing the case.

Mr. Justice Iredell, in discussing the applicability of English law to the newly formed Union states:

> I presume it will not be denied, that in every State in the Union, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in England apply to claims against the crown is that which is called a Petition of right... but now none can have an action against the King, but one shall be put to sue to him by petition. ... The same doctrine appears in Blackstone's Commen-

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[123]Mr. Randolph, Attorney General for the United States, arguing for the plaintiff, Supra note 122 at 420.

> taries. 1 Vol 243.[124] The same doctrine is also laid down with equal explicitness, and without noticing any distinction whatever, in Blackstone's Commentaries, 3 Vol. 256, where he points out the petition of right as one of the common law methods of obtaining possession or restitution from the crown, either of real or personal property; and says expressly the petition of right 'is of use where the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself.'[125]

Justice Blair, while endorsing the concept of sovereignty and immunity from suit, points out

> And if a State may be brought before this Court, as a Defendant, I see no reason for confining the Plaintiff to proceed by way of petition; indeed there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.[126]

Mr. Justice Wilson, however, points out that the Constitution of the United States is conspicuously absent of the word "sovereign";

> To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those,

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[124] Supra note 122 at 437.

[125] Id note 122 at 442.

[126] Id note 122 at 452.

> who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious Declaration.[127]

In examining the historical development of sovereignty and immunity, Wilson refers to Blackstone's Commentaries several times.

> The law, says Sir William Blackstone, ascribes to the King the attribute of sovereignty: he is sovereign and independent within his own dominions; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the King, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power. This last position is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care. Of this plan the author of the Commentaries was, if not the introducer, at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and this side of the Atlantic, been implicitly and generally received by those, who neither examined their principles nor their consequences.[128] . . . In England, according to Sir William Blackstone, no suit can be brought against the King, even in civil matters. So, in that Kingdom, is the law, at this time, received.[129]

Finally, however, Judge Wilson concludes:

> It is plain then, that a State may be sued, and hence it plainly follows, that suability and State Sovereignty are not incompatible.[130]

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[127] Supra note 122 at 454.

[128] Id note 122 at 458.

[129] Id note 122 at 460.

[130] Id note 122 at 473.

Consequently, the Supreme Court of the United States ruled that even though a state may not give consent to be sued or even oppose being sued, a citizen of another state may sue the state because Article III, section 2 of the Constitution authorizes such suits. In upholding the power of the federal courts, the Supreme Court permitted both tort and contract liability suits since the article in question reads "(t)he judicial Power shall extend to all Cases . . . " (italics added).[131] The Constitution does not specify either contract suits or tort suits.

> Chisholm v. Georgia, one of the earliest Supreme Court cases on the subject, held that Article III of the Constitution gave the federal courts jurisdiction over suits against a state by citizens of another state, whether or not the state had consented to suit. 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.[132]

This case's great importance to this study comes from the various justices' discussions regarding the sovereign and governmental immunity aspects of the case.

The situation in 1793 for the states, then was thus:

1) States, by inheriting sovereignty from colonial governments, exercised governmental immunity and could not be sued by one of their own citizens.

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[131] Supra note 101.

[132] Supra note 83.

2) Due to Article III, section 2 of the ratified 1788 United States Constitution, states could be sued in federal court by citizens of other states.

As previously mentioned in this paper, many scholars believe that sovereign immunity was transmitted to this country through the Russell v. Men Dwelling in Devon case.[133] They maintain that this legal precedent set the foundation for the establishment of this concept in the United States. However, this case was decided in 1788. The Supreme Court of the United States decided the Chisholm v. Georgia case in 1793. Five years had passed since the supposedly significant Russell decision, yet there is not one reference to this earlier case in Supreme Court's decision. The Supreme Court of the United States, instead, examines the concept of sovereign immunity in terms of Blackstone's Commentaries on the Laws of England.[134] Mr. Justice Iredell states that "(e)very man must know that no suit can be against a legislative body."[135] He then references "1 Blackstone's Commentaries 243" to prove his point. In discussing the common law transmission of ancient law into modern law, the justice writes:

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[133] Russell v. Men of Devon, 100 Eng. Rep. 359 (1788).

[134] Supra note 83.

[135] Supra note 122 at 437.

> I take it for granted, that when any part of an ancient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that ancient law was formerly appropriated.[136]

He then finds the circumstances of sovereign immunity in ancient times to agree with the circumstances of the new case.

The vital point of this decision to this study is that the United States Supreme Court, the highest court in the land, did not base its decision on some obscure English case,[137] but rather on the writings of the scholar who helped to formalize and legitimize the concept of sovereign immunity in England. Russell and Others v. The Men Dwelling in the County of Devon[138] is probably not the primary method of transmission of the common law principle of sovereign immunity from England to the United States, but rather Sir William Blackstone and his Commentaries on the Laws of England provided the legal basis for adoption of this principle into American law. The courts of the United States relied on the English scholars' interpretation of English laws much more than obscure English case law when justifying their opinions on the sovereign immunity principle.

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[136] Supra note 122 at 447.

[137] Supra note 133.

[138] Id note 133.

Russell and Others v. The Men Dwelling in the County of Devon[139] was not followed by a court in the United States until 1812 when a Massachusetts court ruled on Mower v. Inhabitants of Leicester[140] This left a time period of 24 years where United States courts were ruling on public tort liability cases without using Russell as precedent.

Early Immunity Cases in the States

The 24 year time period between Russell and Mower (1788-1812) is very important to this study. If the theory advancing the "Russell" connection is correct, then on what basis did the various state courts rely in cases concerning immunity during this 24 year period? If it can be shown that many state courts relied on the principles of law which existed prior to Russell or on principles other than Russell, then the Russell theory is questionable.

Many cases were found involving actions against public officials for tortious offenses. By far the most popular type of cases were actions brought against local sheriffs for damages resulting due to a prisoner escaping from the town jail.[141] During this time period, it was generally held that the sheriff is liable for damages

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[139] Supra note 133.

[140] Mower v. Inhabitants of Leicester 9 Mass. 246 (1812).

[141] Sheldon v. County of Litchfield 1 Root 158 (conn. 1790); Clarke v. Little, Johnson, and Webber 1 Smith 100 (N.H., 1805); Moccubbin v. Thornton 4 Md 461 (1807); et cetera.

if he knew of the escape, aided in the escape, or if he knew the jail was defective and this defect led to the escape.[142] Otherwise, the sheriff, being a public official, was held immune from suit. However, none of these early "escape" cases cited authorities or sources of law for their decisions.

Actions against other public officials (town councilmen, constables, clerks, et cetera) were also prevalent during the 24 year period in question.

In 1793, a Connecticut court ruled on a case where the town constable spent bond funds and could not return them to the proper person.[143] The court ruled that

> Towns are not liable or responsible for the conduct of the constable whom they appoint, in the execution of their office.[144]

Another Connecticut case affirms the immunity privilege without citing sources or references. In Willet v. Hutchinson, Town Clerk,[145] a town clerk received a deed and entered upon it "received for record," but forgot to record it in town records, thereby causing the plaintiff monetary damages. The court found

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[142] Supra note 141, Clarke v. Little, Johnson, and Webber 1 Smith 100 (1805).

[143] Hurlburt v. Marsh and the Town of Litchfield 1 Root 520 (1793).

[144] Supra note 143.

[145] 2 Root 85 (1794).

> That a town clerk being an officer of public trust and confidence, much depended upon his duly attending to the law in the execution of his office, and he, having once received a deed as town clerk and entered upon it, "received for records", may not suffer it to go out of his hands, unrecorded; as he will be answerable in damages, to any person that shall be prejudiced thereby.[146]

An early New Hampshire case involving (again) a sheriff provides an interesting connection for the argument of historical common law immunity.

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.[147]

In 1797, a Delaware court ruled on a case[148] much like Russell[149] where the town commissioners of Levy Court chose not to repair a bridge over W. Clay Creek. The State of Delaware brought suit against the local commissioners seeking damages for "neglect" due to their failure to repair the bridge. The court held "(T)he indictment quashed"[150]

> Commissioners form a corporate body, and are not indictable in their individual capacity.
>
> The cases all go to show that judges, etc. are not liable for mistakes, not for neglect on duty.[151]

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[146] Supra note 145 at 86.

[147] Supra note 142 at 102.

[148] State v. Commissioners of the Levy Court 2 Del. Cases 85 (1797).

[149] Supra note 133.

[150] Supra note 148 at 88.

[151] Id note 148 at 86.

A Massachusetts court held in 1804 that the town clerk is not liable for misrecording a deed.[152] Judge S. Dana quotes an English case to support his point.

> But the great point in the case is, that an agent for the public is not liable to be sued upon contracts made by him in that capacity.[153]

Judge Thacher, in finding for the clerk states

> It appears by the record that the plaintiff in error was acting as the agent of the public. The law is settled that any person, acting in that capacity . . . does not render himself personally liable.
>
> an officer appointed by the government . . . is not liable to be sued . . . a servant of the public is not personally answerable.[154]

In 1804, a Massachusetts court interpreted a state statute erroneously and found a local municipality liable in Lobdell v. Inhabitants of New Bedford.[155] However, eight years later, the same court corrected its earlier error and found a local municipality not liable in an identical situation as the 'Lobdell' case and applying the same statute.[156]

None of those cases cited above, nor any of those encountered between the years 1776 and 1812 cited Russell as a legal precedent for the maintaining of sovereign immunity

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[152] Brown v. Austin 1 Mars 208 (1804).

[153] Supra note 152 at 213, Judge S. Dana quoting Macbeath v. Holdmand 1 T Rep 172.

[154] Id note 152 at 217, Judge Thocker.

[155] 1 Mass 153 (1804).

[156] Supra note 140.

in the United States. Indeed, in almost every instance, the various justices felt that it was "settled law" or "common law" that establishes the privilege of governmental immunity.

This indicates that our foundation of governmental immunity was inherited from the English sovereign immunity (as described by Blackstone[157]) through the colonies. The Russell case connected to the United States through the Mower v. Leicester precedent, happened 19 years after the United States Supreme Court in Chisholm v. Georgia[158] discussed the principle of sovereign immunity in terms of inheritance and Blackstone[159].

Governmental immunity, then, as enjoyed by individual states, was inherited (along with much of the rest of the United States' legal system) when American state governments took over control from the English colonial governments in 1776. The immunity which the English colonial governments enjoyed was derived from English common law as described in Blackstone's Commentaries.[160]

For the next 150 years, governmental immunity was the rule when applied to states and their governments. Occasional cases would reach the courts, but the results

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[157] Supra note 9.

[158] Supra note 122.

[159] Id note 9.

[160] Id note 9.

were always the same--the state is immune from suits unless it consents to be sued.

> It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent . . . The exemption from direct suit is, therefore, without exception.[161]
>
> Every government has an inherent right to protect itself against suits . . . The principle is fundamental (and) applies to every sovereign power.[162]

Abrogation of Immunity by the States

As discussed previously, the federal government partially abrogated its immunity in 1855 with the establishment of the Federal Court of Claims, and totally abrogated its immunity in 1946 with the Federal Tort Claims Act of 1946. The individual states, however, were much more reluctant to do so. It was not until the 1950's, that serious challenges began to arise against the governmental immunity doctrine.

These challenges appeared on the most obvious and logical of fronts--the state courts and the state legislatures. Challengers attempted to influence state legislatures or convince state courts to abrogate the governmental immunity enjoyed by the states.

It is appropriate at this point in the study to elaborate on the abrogation issue momentarily. There are

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[161] The Siren 74 U.S. (7 Wallace) 152 (1869) at 154.

[162] Nichols v. United States 74 U.S. (7 Wallace) 122 (1869) at 126.

two types of abrogation: There is total abrogation of governmental immunity. This is where the state gives up all of its privileges of immunity. It can be sued for any type of liability, tort, contractual breach, et cetera. There is also no limitation of damages which can be collected from the state if a suit is successful.

On the other hand, there is partial abrogation of governmental immunity where the state gives up only part of its privileges of immunity. There are two elements of partial immunity--categories of liability and limitations of damages. In the categories of liability, the state may abrogate only types of liabilities for particular kinds of actions. For example, some states will permit only actions resulting from school bus accidents to be heard in state courts. The other element of partial abrogation, limitations of liability, is where a state will set a maximum amount for which it can be sued. For example, a state may allow itself to be sued, but not for more than a specified amount per person per incident. This is an attempt by the state to keep from paying out unusually large sums in damages and, thereby, upsetting the fiscal balance of the state budget.

In many instances, states use a combination of "categories of liability" and "limitations of damages" in their partial abrogation of governmental immunity. The Commonwealth of Virginia is an excellent example of this type of abrogation. In this state, the only action for

which the state can be sued is school bus accidents. And the suit cannot be for more than $30,000.00 per person per incident. In this manner, the state has reduced its liability of both suits and damages through partial abrogation.

As mentioned previously, the two methods of abrogating governmental immunity may be by act of the state legislature or by court order.

In the late 1950's, state legislatures were hesitant to abrogate even partial immunity for fear of causing a flood of suits. Due to this reluctance, state courts took the initiative and began to abrogate governmental immunity in a series of "spectacular decisions abolishing governmental immunity."[163]

> The first of these was Hargrove v. Town of Cocoa Beach (Fla. 1957) 96 So.2d 130. This was followed, over a period of two years, by a trio of rather spectacular decisions abolishing the municipal immunity, in Molitor v. Kaneland Community Unit Dist. No. 302 (1959) 18 Ill.2d 11, 163 N.E. 2d 89; Williams v. City of Detroit (1961) 364 Mich. 231, 111 N.W.2d 1; and Muskopf v. Corning Hospital District (1961) 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457.[164]

A notable case concerning abrogation of governmental immunity was Hargrove v. Town of Cocoa Beach[165] In this case, the Supreme Court of Florida decided that for:

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[163] Supra note 97 at 1124.

[164] Id note 97 at 1124.

[165] 96 So. 2d 130 (1957).

> an individual to suffer a grievous wrong (rather) than to impose liability on the people vicariously through their government . . . is . . . a sham to our constitutional guarantee that the courts shall always be open to redress wrongs.[166]

The court then reversed its previous decisions supporting the governmental immunity concept because of the many incongruities and inconsistencies in applying the immunity principle.

> The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice. We therefore now recede from our prior decisions which hold that a municipal corporation is immune from liability.[167]

Therefore, the Supreme Court of Florida led the way towards abrogation of governmental immunity by abrogating municipal immunity throughout the State of Florida in 1957. In doing so, the court pointed out that the doctrine established in Russell "had its inception . . . in 1788, some twelve years after our Declaration of Independence" and pondered why this new country would support and endorse such a doctrine.

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[166] Supra note 165.

[167] Id note 165.

Quickly after the Hargrove decision was made in Florida, an even more historic case was decided in the State of Illinois. Molitor v. Kaneland Community Unit District No. 302 is of primary importance to this study for several reasons.[168] First, this decision abrogated governmental immunity in the State of Illinois; and second, the decision is an education case concerning a school bus accident. This case is the link between the examination of the governmental immunity concept, and its application to United States education. In its decision, the Supreme Court of Illinois states:

> We do not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection-of-public-funds theory.[169]

The court also found that while the school system did possess limited insurance to cover liability in school bus related accidents, "the question as to whether or not the institution is insured in no way affects its liability."[170] In fact, the court found a grave inconsistency in the entire insurance issue.

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[168] Supra note 3.

[169] Id note 3 at 96.

[170] Id note 3 at 93.

> Thus, under this statute, a person injured by an insured school district bus may recover to the extent of such insurance, whereas, under the Kinnare doctrine, a person injured by an uninsured school district bus can recover nothing at all.[171]

The Illinois Court also faced the Russell doctrine head on and found that:

> It should be noted that the Russell case was later overruled by the English courts, and that in 1890 it was definitely established that in England a school board or school district is subject to suit in tort for personal injuries on the same basis as a private individual or corporation. (Crisp v. Thomas, 63 LTNS 756 (1890).) Non-immunity has continued to be the law of England to the present day.[172]

Yet, in the United States, courts, justices, and legislators have seized upon this acient, obscure case and endorsed it (even) in modern times while ignoring the fact that it was overruled in England in 1890.

Three years after the Molitor case, the Supreme Court of Michigan was faced with a similar situation in Williams v. City of Detroit.[173] In this case, the court endorsed the notion of governmental immunity in the present case, yet "overruled the doctrine of governmental immunity for future cases by a majority of the court."[174]

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[171] Supra note 3 at 92.

[172] Id note 3 at 91.

[173] 111 N.W. 2d 1 (1961).

[174] Supra note 173 at 1.

> From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan.[175]

The court, in essence, was giving the Michigan legislature notice that legislative abrogation of governmental immunity would be preferable to judicial abrogation but the court would do it if the legislature would not.

> The practical situation presented is that if the legislature deems it necessary so to do it may act to modify, or even abrogate entirely, the doctrine of governmental immunity. It is also true that the people acting under the initiative provisions of the State Constitution may accomplish a like result by legislation or by Constitutional amendment.[176]

The Michigan court ignored the English precedent and generally directed its attentions to recent American case law. It did not feel at all bound by the ancient maxim, "the king shall do no wrong."

The third case of what Dean Prosser calls "a trio of rather spectacular decisions" is Muskopf v. Corning Hospital District.[177] The Supreme Court of California in its 1961 decisions found no justification for maintaining the archaic concept and "held that the doctrine of governmental immunity from tort liability is to be rejected as mistaken and unjust."[178]

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[175] Supra note 173 at 2.

[176] Supra note 97 at 1124.

[177] 359 P. 2d 457 (1961).

[178] Supra note 177 at 457.

The court felt that by abrogating governmental immunity, it was not breaking with past precedent, but rather concluding a wrongly established legislative and judicial trend.

> Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. 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 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.[179]

Due to the monumental implications of these three precedent setting decisions, state legislatures began to take rapid action.[180] Many state legislatures, fearful of court ordered total abrogation, immediately passed legislation partially abrogating governmental immunity. In other states, the courts seized upon the new precedents and began abrogation (either partial or total) of governmental immunity. Some state legislatures passed abrogation bills in response to partial abrogation by their own state courts. In any event, the Molitor, Williams, and Muskopf decisions opened the flood gates for challenges to the governmental immunity

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[179] Supra note 177 at 463.

[180] Supra note 97 at 1124.

issue. Since the late 1950's governmental immunity has been in a fluid state, changing from year to year compensating for various community and judicial attitudes. The trend is definitely towards abrogating of governmental immunity.

By 1971, the states of Alaska, Arizona, Arkansas, California, the District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Jersey, and Wisconsin had their governmental immunity abrogated by state court decisions.[181] Many of these courts expressed sentiments similar to those found in Molitor v. Kaneland Community School District.[182]

> 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.[183]

> 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 respondant superior a public body shall be liable for damages for the torts of its officers, agents, and employees occurring in the courts of business of such public body.[184]

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[181] Supra note 97 at 1124.

[182] Supra note 3.

[183] Supreme Court of Minnesota, Spanel v. Mounds View School District No. 621 188 N.W. 2d 795 (1962).

[184] Supreme Court of Wisconsin, Holytz v. City of Milwaukee 155 N.W. 2d 618 (1962).

> 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.[185]

Appendix 1 presents a table which illustrates the major court decisions in states where courts have found the need to abrogate governmental immunity. This table presents the court decision and the appropriate governmental entity affected (if any other than the state). Material found in this table came from a nationwide survey conducted by this researcher regarding state governmental immunity and from the National Association of Attorneys General's January, 1975 report on Governmental Immunity.[186] Over 30 states have case law precedents limiting some aspect of governmental immunity. In all of these states, the court decisions have been since 1957. Fourteen of these states have had court decisions since 1970. This appendix shows that a majority of states have limited governmental immunity by court decision in the last 20 years.

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[185] California Supreme Court, Muskopf v. Corning Hospital District, supra note 177.

[186] Supra note 94.

After this trend of court decisions ordering abrogation, state legislatures immediately began passing legislation concerned with governmental immunity.

> 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.
>
> A second group of states 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, 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. In others, 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, intentional torts by employees, false imprisonment, malicious prosecution, and invasion of privacy.[187]

Appendix 2 is a table which presents information about state legislation concerning governmental immunity. This table lists both the statutory provisions of each state and the appropriate coverage. Like Appendix 1, the information found in this table comes from this researcher's national survey and the 1975 report on governmental immunity for The

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[187] Supra note 94 at 28.

National Association of Attorney's General.[188] Appendix 2 shows that a majority of states (48) have some provision for handling tort suits against the state.[189] These provisions range from insurance coverage (5)[190] to various tort claims acts (18).[191] Many states have statutory provisions requiring the state's attorney general to represent various state officers in tort suits. The appendix reveals that most states deal with governmental immunity concerns through statutory means rather than constitutional provisions. Only Georgia and Montana use the state constitution to direct tort claim procedures.[192]

Mississippi and Pennsylvania have no statutory or constitutional provisions regarding the governmental immunity issue. Eighteen states use some type of tort claims act in their liability legislation while five states make provisions for insurance coverage. Through statutory means, three

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[188] Supra note 94.

[189] Some statutory provision which speaks directly to the tort liability issue.

[190] Colorado, Delaware, New Hampshire, New Mexico, and Wyoming.

[191] Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, and Texas.

[192] GEORGIA CONSTITUTION, ARTICLE VI; and MONTANA CONSTITUTION, ARTICLE II.

states uphold the principle of sovereign immunity[193] while six states substantially abrogate it.[194]

The information compiled in Appendix 3 was gathered primarily from this researcher's nationwide survey. Letters were sent to each attorney general of each state asking for that official to outline the status of governmental immunity in his/her state. Appendix 3 provides a composite presentation of the most recent information regarding the status of governmental immunity. Letters from states' attorneys general cite both courts decisions and statutes in determining the extent to which governmental immunity operates.

The survey reveals that most states (35) have some form of partial abrogation of governmental immunity.[195] The extent of this immunity varies from limitations of damages to limitations of categories of liability. Fourteen states have totally abrogated their immunity[196] while eight states still claim full governmental immunity.[197]

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[193]Arkansas, Minnesota, Oklahoma.

[194]Florida, Illinois, Maryland, Montana, Rhode Island, and Vermont.

[195]See Appendix 1.

[196]Alaska, Arizona, California, Delaware, Florida, Hawaii, Illinois, Louisiana, Mayyland, Michigan, Montana, New Jersey, Vermont, and Washington (state).

[197]Connecticut, Georgia, Kansas, Mississippi, Missouri, North Carolina, Pennsylvanis, and Virginia.

Michigan's attorney general responded that he was unable to ascertain the status of governmental immunity in his state.[198] Responses from the attorneys general indicate that many states are actually engaged in statutory or court examination of the governmental immunity principle. This continued interest indicates that the immunity issue is fluid and changes as the needs of the states fluctuate.

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[198]Letter from Louis A. Riyoli dated December 16, 1976.

Summary

Sovereign immunity was transmitted to both the state and federal governments by two paths: first, the principle was inherited by the state (and federal) governments when they took over the functions of the English colonial government. And second, the concept of governmental immunity was formalized by the courts (especially the United States Supreme Court's) reliance on Blackstone's Commentaries on the Laws of England[199] as a common law principle.

The federal government partially abrogated some of its immunity in 1855 with the establishment of the Federal Court of Claims. In 1946, with passage of the Federal Tort Claims Act of 1946, the federal government totally abrogated its governmental immunity.

Prior to 1798, the individual states were only immune from suits from their own citizens. They could be sued in federal court by citizens of other states. In 1798, however, the Eleventh Amendment to the United States Constitution was ratified and, thereby, gave individual states total governmental immunity. This total immunity continued until the late 1950's and early 1960's where a rash of spectacular court decisions abrogated many state's governmental immunity. State legislators quickly responded by passing legislation abrogating (either partially or totally) governmental immunity by state statute rather than allowing

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[199] Supra note 9.

state courts to determine the extent of abrogation. Since then, state governmental immunity has been changing year by year to accommodate the attitudes of both, the public and the judiciary. The trend is towards abrogation of governmental immunity as Appendices 1, 2, and 3 substantiate.

CHAPTER 4

IMPLICATIONS OF THE GOVERNMENTAL IMMUNITY PRINCIPLE TO EDUCATION IN THE UNITED STATES

Since the late 1950's, many local and state educational systems have become involved in the abrogation of governmental immunity controversy. Education interests are an important aspect of this controversy because in all 50 states, plus the District of Columbia, education is specified as being an official state function.[200] Education has not been viewed by courts as a proprietary function, but rather as a governmental function.[201] Therefore, education is a legitimate and bonafied state interest with official state status in all 50 states.

Prior to the late 1950's, most states in the United States enjoyed the prerogative of governmental immunity. This immunity which the states enjoyed was also extended to the various agencies and departments which perform governmental functions. Education, being one of these agencies or departments, also possessed governmental immunity from liability.

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[200] A. H. LEVINE, E. CAREY, AND D. DIVOKY, THE RIGHTS OF STUDENTS 15 (1973).

[201] 160 A.L.R. 38.

The abrogation movement began to substantially alter this immunity status in the late 1950's. The most notable case involving education being Molitor v. Kaneland which was adjudicated by the Supreme Court of Illinois in 1959.[202] This case was the first of what Dean Prosser called "a trio of rather spectacular decisions" following the important Florida decision in Hargrove v. Town of Cocoa Beach.[203] Therefore, it is important to realize that educational tort liability cases are frequently at the spearhead of the abrogation of immunity movement.

The reasons for this situation probably arise because of the nature of the educational process. Education, by its very nature, is much more susceptible to tortious acts than most other state agencies or departments are. Because of this, there is a great deal more legal activity concerning liability in the education field, than in other governmental function fields.

Early Case Law

The earliest known case involving court abrogation of sovereign immunity in an education case occurred in 1890 in England (Crisp v. Thomas).[204] This landmark decision

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[202] Supra note 3.

[203] Supra note 100.

[204] Supra note 80.

established the liability of education for acts of negligence in torts. It should be noted that this case overruled the immunity doctrine which was established over a hundred years earlier in England. That same year, the English Parliament partially abrogated that nation's sovereign immunity as a result of this decision involving an education case. Therefore, in England, the doctrine of sovereign immunity was judicially abrogated in an education case (Crisp v. Thomas). This decision places education at the spearhead of the abrogation movement in England.

In the United States, however, the judicial attitudes towards both, abrogation of immunity and educational tort liability cases, remained consistent. Court after court in the Nineteenth Century ruled that the doctrine of governmental immunity prevented the state (and schools) from being sued.[205] Everyone of these early education decisions reflected the continuance of the governmental immunity from liability, even in cases of gross negligence.

> (T)he rule of immunity has been applied or recognized where the negligence was that of a school district itself, or of a school board, as well as where the negligence was that of officers,

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[205] Grander v. Pulaski County 26 Ark. 37 (1870 - Arkansas), Elmore v. Drainage Commissioners 135 Ill. 269 (1890 - Illinois), Kinnare v. Chicago 171 Ill. 332, 49 N.E. 536 (1898 - Illinois), Freel v. Crawfordsville 142 Ind. 27, 41 N.E. 312, 37 LRA 301 (1895 - Indiana), Kincaid v. Hardin County 53 Iowa 430 (1880 - Iowa), McKenna v. Kimball 145 Mass. 555, 14 N.E. 789 (1888 - Massachusetts), Ferris v. Board of Education 122 Mich 315, 81 N.W. 98 (1899 - Michigan), Bank v. Brainerd School District 49 Minn. 106, 51 N.W. 814 (1892 - Minnesota), Finch v. Board of Education 30 Ohio St 37 (1896 - Ohio), Ford v. Kendall School District 121 Pa. 543, 15 A. 812 (1888 - Pennsylvania).

> such as the trustees or directors of a school district, or the negligence of agents or employees.
>
> And the rule of immunity is applicable for negligence committee in connection with duties or functions which are merely optional or permissive, as well as in connection with those mandatory in character.
>
> The rule of nonliability for negligence has been applied or recognized to preclude recovery against school districts, school boards, or similar school agencies for the personal injuries, illness, or death of pupils attending public schools, as well as of other persons, such as teachers, school janitors or janitresses, employee in a school cafeteria, workmen or laborers, persons, other than servants or employees, on school premises for business reasons, such as one making a survey of certain needed repairs to a school building, and an employee of one under contract to remove ashes from school premises, boy scouts, members of the general public invited upon school premises to attend school or other functions upon payment of admission price, speakers or other guests at school or other functions held on school premises for which no admission price was charged, and members of the general public on school premises or elsewhere, such as on public sidewalks, streets, or highways.
>
> And the rule of tort immunity for negligence has been applied or recognized with respect to injuries or damage to private property, as well as in connection with loss caused by unreasonable delay in disposing of condemnation proceedings.
>
> With respect to liability for personal injuries or death caused by a wrong other than negligence, judicial statements have been made, for the most part in cases involving negligence, to the effect that the general rule of tort nonliability applies irrespective of the nature of the wrong causing such injuries or death.[206]

Therefore, prior to the 1950's, there seemed to be almost no action which an education agency, department, board, official, or employee could perform which would cause agency liability damages.

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[206] 160 A.L.R. 42-48.

Court Ordered Abrogation in Education Cases

As stated previously, the Molitor decision changed the steadfast principle of governmental immunity. Mr. Justice Klingbiel, in his 1959 Supreme Court of Illinois decision, found no solid basis for the governmental immunity principle.

This ground breaking decision abrogating governmental immunity was an education case. Like Crisp v. Thomas in England,[207] Molitor v. Kaneland is at the spearhead of the abrogation of governmental immunity movement in the United States. This means that educational systems can no longer rely on the protection of governmental immunity since education cases are the precedent-breaking decisions. Education cases are setting the new trend in this field.

Application to Education: Political and Fiscal

This section is intended to present a series of political and fiscal alternatives that various states are using or are attempting to use in order to deal with the governmental immunity controversy.

In the states where governmental immunity has been totally abrogated, education (both local and state agencies) is liable for damages of tortious acts. School districts in these states frequently purchase liability insurance for

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[207] Supra note 80.

fiscal protection. State courts of claims frequently hear tort cases and thereby offer some control of the situation.

In the states where governmental immunity has been partially abrogated, education is liable for the categories of claims and the extent of damages allowed in the partial abrogation. Local school districts in these states have the appearance of limited protection since they can only be sued in particular circumstances. For these circumstances, most states allow or require their school districts to purchase liability insurance. However, the fact that partial abrogation has occurred in no way prohibits a state court from totally abrogating the state's (or agency's) governmental immunity.

In the states where governmental immunity is still in effect and is enjoyed by all state agencies, education is protected from liability suits. In some of these states, however, local school districts still purchase liability insurance for additional protection in high risk situations such as school bus use, field trips, shop classes, et cetera. It should be pointed out that state courts can, at any time, abrogate this immunity either in total or partially. And since education cases have the tendency to spearhead this abrogation movement, school districts could, at any time, lose their immunity from liability.

The fiscal implications of abrogation of governmental immunity are numerous and far reaching. In situations where school systems have suddenly lost their immunity by

court abrogation, the damages must be paid out of the system's current operating budget. Obviously, this situation is undesirable since the budget, then, must be reduced and funding of the educational program endangered. To compensate for situations such as this, school systems often use state appropriated funds to purchase liability insurance. This has become a common practice for many school systems throughout the United States. However, some courts have found this practice to be unwise and inappropriate.

> If tax funds can properly be spent to pay premiums on liability insurance, there seems to be no good reason why they cannot be spent to pay the liability itself.[208]

While the Molitor decision adds some insight into the problems of purchasing liability insurance, other problems exist in its solution.

It would be impossible for local school districts to predict exactly how much damages (if any) they would be paying out in the next fiscal year. It is quite conceivable that the damages may exceed the allotment and consequently create a categorical deficit. If, on the other hand, a school system did not use all the funds appropriated for damage claims, "carrying-over" these funds until the next year might not be possible. Many states have laws prohibiting or limiting "carry-over" accounts. Therefore, the "pay-as-damages-come-in" philosophy is often neither practical or legal.

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[208] Supra note 9.

The "savings-account" idea also possesses the same inherent problems as the "carry-over" accounts, so this option is not viable either.

Some states have, through legislative action, created a state court of claims. Often, these courts of claims are fashioned after the federal Court of Claims. In these instances, the court adjudicates the tort claims and, thereby, is able to exercise some amount of control over the type of claims and the extent of damages. However, school districts cannot count on help from these courts.

The purchasing of liability insurance, superficially, at least, seems to be the only practical solution to the fiscal dilemma and is, by far, the most common.

Political alternatives offer some possibility of relief. States that do not have courts of claim might be prodded into legislating such courts. States that do not require insurance, might be wise to consider mandating that such insurance be possessed by each local school division. Another alternative is for the creation of a state-wide tort claims account from which damages caused by any state agency could be paid out of.

In any event, solutions to the governmental immunity controversy will have to be effective, efficient, and fair.

Summary

The implications of the abrogation of governmental immunity movement are substantial. More and more school districts and agencies are finding themselves liable for damages incurred by tortious acts. This increase in liability is directly attributable to the increase in the abrogation of governmental immunity either by court or legislative action. The school district can no longer rely on the, heretofore, steadfast rule of governmental immunity.

Avoiding liability suits is particularly difficult since the very nature of the educational process exposes it to more than its share of tortious risks.

Fiscal and political alternatives offer limited relief at present, but creative and imaginative administration may open up many new avenues of protection.

CHAPTER 5

CONCLUSION

This study has had three major purposes. It has attempted to demonstrate the following:

(1) The origination and the development of the sovereign immunity concept into the English legal system,

(2) The transmission or migration of this concept into the United States' legal system, and

(3) The evolution of the concept of governmental immunity in the United States, and the application of this concept to education in the United States.

Origination

It has been shown that the origin of the concept of sovereign immunity had two evolutionary paths. First, the canon law system developed a type of sovereign immunity for its higher level clergy. And second, the feudal system also developed the concept that the lord who made the laws could not be sued under those same laws. These two paths were merged into the early English legal system where the doctrine of sovereign immunity became formalized in case law during the reign of King Henry II.

Development in England

The doctrine of sovereign immunity continued to develop in case law until the reign of King Henry VIII in 1532 when, as a result of his marital difficulties with the Bishop of Rome, he had the royal prerogative established into statutory law. By doing so, he legitimized his immunity--even from Rome.

The English law historian Blackstone helped to incorporate this principle into the established legal system in his Commentaries on the Laws of England[209] where he justified the concept of sovereign immunity became "the king can do no wrong."[210] Blackstone's reputation as a great legal scholar helped to further this principle in the newly formed United States.

Transmission of the Principle

When the states assumed the responsibility of governmental functions from the earlier colonial governments in 1776, they inherited the prerogative as part of their legal heritage. The endorsement and acceptance of such a medieval concept into the new democratic government defies all rational explanations. It was the same prerogative of sovereignty that the Revolutionary War was fought to abolish.[211]

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[209] Supra note 9.

[210] Id note 9.

[211] Supra note 3 at 95.

Shortly after the federal Constitution was ratified in 1788, the United States Supreme Court ruled on an immunity case in Chisholm v. Georgia.[212] While finding the state liable for suit in a federal court, the Supreme Court endorsed the concept of sovereign immunity as applied against a state's own residents. The court's rationale for this endorsement of immunity was the famous Blackstone's Commentaries.[213] No mention of an obscure English case (Russell v. Men of Devon[214]) was made. This, therefore, established a case law principle which was apparently founded on Blackstone's Commentaries.

Evolution in the United States

Shortly after the Chisholm decision, the Eleventh Amendment to the United States Constitution was ratified. This amendment guaranteed absolute governmental immunity to the United States.

The federal government partially abrogated its immunity in 1855 with the establishment of a federal court of claims. Ninety-one years later (56 years after England abolished its sovereign immunity) the Federal Tort Claims Act of 1946 totally abrogated the federal government's immunity from liability. The states, however, were still

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[212] Supra note 107.

[213] Supra note 9.

[214] Supra note 133.

clinging to their immunity using the Russell doctrine as the justification even though this doctrine (which was established in England in 1788) was overruled in England in 1890.

It was not until the late 1950's when "a trio of rather spectacular decisions" by state courts began the abrogation movement.[215] The first case of this "trio" was an education case where the doctrine of sovereign immunity was abolished. Within ten years time of these decisions, over 15 states had abrogated (at least partially) their governmental immunity.[216] The data presented in Appendices 1, 2, and 3 details the current status of governmental immunity in the United States.

The trend in this movement is clear. State legislatures are gradually abrogating the states' governmental immunity. This abrogation movement is frequently in response to court decisions where legislative abrogation is either required or totally circumvented.

The usual mode of abrogation is partial liability with a limitation of the tort categories as well as a limitation of the damages. Frequently, a state court of claims, patterned after the federal court of claims, is established to hear such actions.

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[215] Supra note 97 at 1124.

[216] Alaska, Arizona, Arkansas, California, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Jersey, and Wisconsin.

The study conducted by this researcher found only eight states which are attempting to maintain full governmental immunity. On the other hand, only 16 states have total abrogation of their governmental immunity. The rest of the states have some form of partial abrogation of governmental immunity in effect. Data found in Appendices 1, 2, and 3 give specific details on a state-by-state basis.

Application of the Governmental Immunity Principle to Education

As stated in Chapter 4, the implications of the movement of the governmental immunity principle are great and far reaching.

Before the abrogation movement began, educational agencies and local school districts enjoyed the privilege of governmental immunity. But education soon found itself at the forefront of the abrogation movement. Some courts, which abrogated school district immunity, indicated that the presence or lack of insurance was a moot factor in their decision.[217] In other states, the purchasing of school liability insurance was interpreted by the courts as consent to be sued.

This places local school districts in quite a dilemma. On one hand, they cannot be certain that the

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[217] Supra note 3 at 93.

state's governmental immunity will protect them against liability suits. On the other hand, if they attempt to protect themselves by obtaining liability insurance, it can be said that they relinquished their immunity protection.

Some courts suggested that instead of paying insurance premiums with state funds that local school districts should use these funds to pay off liability damages instead. However, the amount of these damage claims cannot always be accurately predicted and incorporated into school system budgets. Therefore, this is not a practical solution to this problem. A "savings account" type of solution, where funds will be placed into an account to build up reserves for such damage claims, has been ruled illegal in some states. So this, too, is not a practical solution.

This dilemma, which education finds itself in, is compounded by the fact that society is becoming much more "legally aware" of their rights and are using the courts more to settle education related controversies.

Recommendations

Given the above circumstances, the following recommendations are applicable to this study.

(1) School systems should not rely on any type of immunity protection against liability suits. Governmental immunity is no longer absolute and realization of this fact may eliminate potential liability problems in the future.

(2) Educational agencies and local school systems should purchase as much (categorical) liability insurance as possible (and practical) and not rely on the governmental immunity doctrine since education cases are frequently at the spearhead of the abrogation movement.

(3) An intensive campaign aimed at enlightening and informing educational officials and employees of their legal liabilities within the scope of their employment may drastically reduce claims which arise from tortious acts. Legal education may provide an element of "extra-care" in potentially tortious situations.

Appendix I

STATE DECISIONS LIMITING
GOVERNMENTAL IMMUNITY

State	Decision
Alabama	No Information
Alaska	City of Fairbanks v. Schaible 375 P.2d 201 (1962)
Arizona	Stone v. Arizona Highway Commission 93 Ariz. 384, 381 P.2d 107 (1963)
Arkansas	Parish v. Pitts 244 Ark. 1239, 359 P.2d 457 (1961)
California	Muskopf v. Corning Hospital District 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).
Colorado	Evans v. Board of County Commissioners 174 Colo. 97, 482 P.2d 968 (1971)
Connecticut	No Known Case Law
Delaware	Pajewski v. Perry 363 A.2d 429 (1976)
Florida	Hargrove v. Town of Cocoa Beach 96 So. 2d 130 (1957)
Georgia	Crowder v. Department of State Parks 228 Ga. 436, 185 S.E. 2d 908 (1971), Azizi v. Board of Regents 132 Ga. App. 384, 208 S.E. 2d 153 (1974), and Bushee v. Georgia Conference AAUP 235 Ga. 752 (1975)

Appendix I (continued)

State	Decision
Hawaii	No Known Case law
Idaho	Smith v. State 93 Idaho 795, 473 P.2d 937 (1970)
Illinois	Molitor v. Kaneland Community Unit District No. 302 18 Ill. 2d 11, 163 N.E. 2d 89 (1959)
Indiana	Campbell v. State 284 N.E. 2d 733 (1972) Brinkman v. City of Indianapolis 231 N.E. 2d 169 (1967)
Iowa	No Known Case Law
Kansas	Brown v. Wichita State University 217 Kan. 79 (1976)
Kentucky	Haney v. City of Lexington 386 S.W. 2d 738 (1964)
Louisiana	Board of Commissioners of Port of New Orleans v. Splendour Shipping and Enterprises 273 So. 2d 19 (1973)
Maine	No Known Case Law
Maryland	No Known Case Law
Massachusetts	Morash v. Commonwealth of Massachusetts 296 N.E. 2d 461, and Hannigan v. The New Gamma Delta Chapter of Kappa Sigma Fraternity 327 N.E. 2d 882 (1975)

Appendix I (continued)

State	Decision
Michigan	Williams v. City of Detroit 364 Mich. 231, 111 N.W. 2d 1 (1961)
Minnesota	Nieting v. Blondell 235 N.W. 2d 597 (1975), and Spanel v. Mounds View School District No. 621 264 Minn. 279, 118 N.W. 2d 795 (1962)
Mississippi	Reed v. Evans ___ S. 2d ___ (August 24, 1976)
Missouri	O'Dell v. School District of Independence 521 S.W. 2d 403 (1975), V. S. DiCarlo Construction Company, Inc. v. State 485 S.W. 2d 52 (1972), and Wood v. County of Jackson 463 S.W. 2d 834 (1971)
Montana	No Known Case Law
Nebraska	Johnson v. Municipal University of Omaha 184 Neb. 512, 169 N.W. 2d 286 (1969) and Brown v. City of Omaha 183 Neb. 430, 160 N.W. 2d 805 (1968)
Nevada	Rice v. Clark County 79 Nev. 253, 382 P.2d 605 (1963)
New Hampshire	No Known Case Law
New Jersey	Willis v. Department of Conservation and Economic Development 55 N.J. 534 (1970)
New Mexico	Hicks v. New Mexico State Highway Department 544 P.2d 1153 (1976)

Appendix 1 (continued)

State	Decision
New York	No Known Case Law
North Carolina	Smith v. State 289 N.C. 303
North Dakota	Kitto v. Minot Park District 224 N.W. 2d 795 (1974)
Ohio	No Known Case Law
Oklahoma	No Known Case Law
Oregon	No Known Case Law
Pennsylvania	Ayala v. Philadelphia Board of Public Education 305 A.2d 877 (1973)
Rhode Island	Becker v. Beaudoin 106 R.I. 562, 261 A.2d 896 (1970)
South Carolina	No Known Case Law
South Dakota	No Known Case Law
Tennessee	No Known Case Law
Texas	No Known Case Law
Utah	No Known Case Law
Vermont	No Known Case Law

Appendix 1 (continued)

State	Decision
Virginia	Wilson v. State Highway Commissioner 174 Va. 82, 4 S.E. 2d 746 (1940); Sayers v. Bullar 180 Va. 222, 22 S.E. 2d 9 (1942), and Lawhorne v. Harlan 214 Va. 405 (1973)
Washington	No Known Case Law
West Virginia	No Known Case Law
Wisconsin	Holyty v. City of Milwaukee 17 Wis. 2d 26, 115 N.W. 2d 618 (1962)
Wyoming	Kostas Jivelekas v. City of Warland 546 P.2d 419

The data contained within this table were gathered from two sources. The primary source was a nationwide survey conducted by this researcher during the months of October 1976 to February 1977. Letters were sent to the Attorney General of each state asking for a summary of the status of governmental immunity in their state. The secondary source was used when states' attorneys general did not reply to the survey or did not provide adequate information in their response. The secondary source of information was Sovereign Immunity: The Liability of Government and Its Officials published by the National Association of Attorneys General, 1975.

Appendix 2

STATE LIABILITY LEGISLATION

State	Statutory Provision	Coverage
Alabama	Tit. 35, §199	Defense of state militia
Alaska	§09.50.250 Tit. 26, Ch. 05 §140	Discretionary acts A.G. defend militia.
Arizona	§26-159C §41-192.02	A.G. defend militia. A.G. has discretion to defend state employees.
Arkansas	§11-1008 §12-2901	A.G. defend militia. Immunity doctrine asserted.
California	§810-998	Public entities open to liability.
Colorado	§24-10-101 §94-11-46 §72-16-2	Defense of militia. Insurance for state officials
Connecticut	§4-165 §3-125	Immunity for state officers and employees. A.G. represents state in suits.
Delaware	18 Del. C. ch. 65	Insurance coverage

Appendix 2 (continued)

State	Statutory Provision	Coverage
Florida	§95.241, 240.191, 284.38, 373.443, 768.14, 768.28, 768.30, and 768.151	State has waived all governmental immunity.
Georgia	Ga. Const. Art. VI, Sect. II, para. X §2-3710	Establishment of Court of Claims
Hawaii	§661 and §662	Partial coverage
Idaho	Tit. 6, ch. 9	Tort Claims Act
Illinois	Const. Article 14 §4 Const. Article 127 §801	Immunity Abolished Establishment of Court of Claims
Indiana	§34416.51	Tort Claims Act
Iowa	§25A.14(1) §29A.51	Tort Claims Act A.G. defends militia.
Kansas	§46-901	Exhaustive Coverage (declared unconstitutional in January, 1976)
Kentucky	1976 §44.070	Establishment of a board of claims
Louisiana	§29.70 §49:461	A.G. defends militia. A.G. defends state ministerial officers.
Maine	Tit. 37A, §211	A.G. defends militia.

Appendix 2 (continued)

State	Statutory Provision	Coverage
Maryland	1976 Ch. 450	Abrogates contractual immunity.
Massachusetts	Ch. 12 §3	A.G. must defend state officials.
Michigan	§4.678(179) (d) §691.1408	A.G. defends militia. A.G. may defend state officials or employees.
Minnesota	(1976) Ch. 331	Restricts claims
Mississippi	No Statutory Provisions	
Missouri	§105.710	Tort Defense Fund
Montana	Con. Art. II, §18 §82-4301	Abrogation of immunity Tort Claims Act
Nebraska	§81-857	Tort Claims Act
Nevada	§41.032 §81-857	Protects employee's actions Tort Claims Act
New Hampshire	§412:3	State may obtain liability insurance.
New Jersey	Tit. 59-1	Tort Claims Act
New Mexico	Ch. 58 §4-3-16	Requires insurance. A.G. defends state officers and employees.

Appendix 2 (continued)

State	Statutory Provision	Coverage
New York	§17 Public Officers Law	Tort Claims Act
North Carolina	§143-291	Tort Claims Act
North Dakota	Ch. 295 §54-12-01	Partial limitation A.G. defends state officers and employees.
Ohio	§2743.01	Tort Claims Act
Oklahoma	110.5.1757-1761	Establishes sovereign immunity.
Oregon	§30.260	Tort Claims Act
Pennsylvania	No Statutory Provisions	
Rhode Island	Tit. 9 Ch. 31	Abolishes governmental tort immunity.
South Carolina	§10-2621-10-2625	Motor Vehicle Tort Claims Act
South Dakota	§3-19-1	When officer or employee sued, state may 1) pay or endemnify for cost of defense, 2) pay or endemnify for settlement or judgment.
Tennessee	§9-801	Establishes a Board of Claims

Appendix 2 (continued)

State	Statutory Provision	Coverage
Texas	Tit. 110A, Art. 6252-19	Tort Claims Act
Utah	§63-30-1	Governmental Immunity Act
Vermont	Tit. 29 §1403-1404	Abrogates immunity
Virginia	§21-121	A.G. defends state officials and employees.
Washington	§4.92.090	A.G. may defend state officials and employees.
West Virginia	§5-3-2	A.G. defends state officials and employees.
Wisconsin	§285	Limitation of liability
Wyoming	§1-1018.1	Authorizes liability insurance

The data contained within this table were gathered from two sources. The primary source was a nationwide survey conducted by this researcher during the months of October 1976 to February 1977. Letters were sent to the Attorney General of each state asking for a summary of the status of governmental immunity in their state. The secondary source was used when states' attorneys general did not reply to the survey or did not provide adequate information in their response. The secondary source of information was Sovereign Immunity: The Liability of Government and Its Officials published by the National Association of Attorneys General, 1975.

Appendix 3

STATUS OF GOVERNMENTAL IMMUNITY
IN THE UNITED STATES

Alabama

Did not respond to the survey.

Alaska

The State of Alaska has waived sovereign immunity but for discretionary acts, acts in execution of a statute or regulation (exercising due care), acts imposing a quarantine, and acts constituting intentional torts (other than trespass). AS 09.50.250. There is no immunity whatever for its political subdivisions. The former result is statutory; the latter, judicial. City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962).[218]

Arkansas

Did not respond to the survey.

Arizona

Mr. John T. Amey, Chief Counsel for the Attorney General of Arizona referenced a document entitled Sovereign Immunity and the Settlement of Claims Against the State[219] as containing information concerning Arizona's status of governmental immunity.

Arizona Revised Statutes, Sections 12-821 through 12-826 establish a procedure for bringing an action against the state "on contract or for negligence."

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[218] Letter from Rodger W. Pegues, Assistant Attorney General, to this researcher, dated October 6, 1976.

[219] J. T. Amey, SOVEREIGN IMMUNITY AND THE SETTLEMENT OF CLAIMS AGAINST THE STATE (1965).

Such claims must have been presented to the appropriate state agency and disallowed and where the pleadings fail to so allege, the complaint is subject to dismissal since these are conditions which must be met before the court has jurisdiction of the subject matter. State of Arizona v. Miser, (1937) 50 Ariz. 244, 72 P.2d 408.

A two year statute of limitations applies and the plaintiff must file a bond of not less than $500 to secure the payment of all costs incurred by the state if he fails to recover judgment.

If plaintiff recovers a judgment he is entitled to interest from the time the obligation accrued. It is the duty of the Governor to report such judgments to the legislature. But the State Auditor is not authorized to draw his warrant for the payment of such judgment, until the legislature has made its appropriation.

In Stone v. Arizona Highway Commission, (1963) 93 Ariz. 384, 381 P.2d 108, the Arizona Supreme Court abrogated the doctrine of sovereign immunity. In so doing, it specifically overruled a line of cases including the Miser case, cited above, upholding the state's sovereign immunity with respect to its torts. In the Miser case, the claimant contended that A.R.S. §12-821, et seq. constituted a waiver by the legislature of the state's sovereign immunity for "negligence." It was held that while this legislation had provided a procedure for bringing actions against the state for "negligence," it had not waived the state's substantive defense of sovereign immunity. The Stone decision made no mention of these sections, in abrogating the substantive defense of sovereign immunity, but it must be presumed that they are still operative.[220]

California

The California Government Code sections 810-998 holds public entities and public employees open to liability. Several main headings include: liability of Public Entities and Public Employees; Claims Against Public Entities; Actions Against Public Entities and Public Employees; Payment of Claims and Judgments; Insurance, and Defenses of Public Employees.[221]

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[220] Supra note 219 at A2.

[221] Letter from Jerry Littman, Chief of Information Services of the Department of Justice of California, to this researcher dated December 13, 1976.

In the landmark decision of the California Supreme Court in Muskopf v. Corning Hospital District abrogated all public entity governmental immunity (see chapter 2).[222]

Colorado

Colorado statute §72-16-2 authorizes insurance for state officers and employees.

Connecticut

Stated briefly, this State enjoys the practical benefit of nearly full sovereign immunity, despite sporadic attempts at piecemeal judicial abrogation. The Connecticut General Assembly has enacted legislation which provides for exclusions from general sovereign immunity in such areas as defective highways and other specific types of claims.

I might further call your attention to the establishment of the Connecticut Claims Commission which has the statutory authority to hear certain types of claims against the sovereign State of Connecticut. The Claims Commissioner, under certain circumstances, may grant permission for an individual to sue the State or may actually award damages in situations where there is a limited ad damnum claimed. Of course, it is always possible for a claimant to seek special legislation authorizing suit from any session of the Connecticut General Assembly.[223]

Delaware

The Delaware Supreme Court recently held that the State had "presumptively waived" its constitutionally based sovereign immunity by the enactment of 18 Del. C. ch. 65, "Insurance for the Protection of the State." The case, Pajewski v. Perry, Del. Supr., 363 A.2d 429 (1976) has been remanded to the trial court for a

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[222] Supra note 177.

[223] Letter from Donald M. Longley, Assistant Attorney General of the State of Connecticut, to this researcher dated January 17, 1977.

determination of the question whether that statute constitutes an effective waiver without supporting insurance coverage.[224]

Florida

The 1957 landmark case, Hargrove v. Town of Cocoa Beach abrogated governmental immunity in the State of Florida. Through various statutes, §95.241, 240.191, 284.38, 373.443, 768.14, 768.28, 768.30, and 768.151, the state legislature abrogated all governmental immunity.

> 768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitation; exclusions.
>
> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.[225]

Georgia

By decisions in Crowder v. Department of State Parks, 228 Ga. 436, 185 S.E. 2d 908 (1971), and Azizi v. Board of Regents, 132 Ga. App. 384, 208 S.E. 2d 153 (1974); ibid. 233 Ga. 487, 212 S.E. 2d 627 (1975),

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[224] Letter from Regina M. Small, Deputy Attorney General of the State of Delaware, to this researcher dated January 6, 1977.

[225] Florida Code §768.28(1).

the doctrine of sovereign immunity appeared to have been firmly confirmed so far as the law of this State was concerned. This feeling of assurance on the part of the State, however, was severely buffeted in the decision in Busbee v. Georgia Conference, AAUP 235 Ga. 752 (1975), wherein a serious inroad was made as to the sovereign immunity of a significant element of State government, to wit, the Board of Regents. In view of this last decision, it must now be assumed that Georgia has no more than a partial sovereign immunity.

By an amendment to the Constitution of 1945, ratified in 1974, the Constitution now confers jurisdiction upon the General Assembly to create and establish a court of claims with jurisdiction to try and dispose of cases involving claims for injury or damage other than the taking of private property for political purposes against the State, its agencies or political subdivisions. This amendment now appears in Art. VI, Sect. II, as Paragraph X (Ga. Code Ann., §2-3710). The resolution proposing this amendment appears in Ga. Laws 1973, p. 1489. No action was taken pursuant to this authority by the General Assembly in either 1975 or 1976, although at least two bills were introduced which would create a State Court of Claims.

The foregoing represents the present posture of the law however unsettled it might be. Several earlier opinions of the Attorney General do no more than expound upon the basic principles seemingly confirmed in the Crowder and Azizi decisions.[226]

Hawaii

Sections 661-11 and 662-2 of the Hawaii Revised Statutes reads as follows:

> §661-11 Tort claims against State limited to insurance coverage. No defense of sovereign immunity shall be raised in any suit where the State is a part defendant and the subject matter of the claim is covered by an insurance policy entered into by the State or any of its agencies. However, the State's liability under this section shall not exceed the amount of, and shall be defrayed by, such insurance policy. (L 1955, c 253, §1; RL 1955, §245-11).

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[226] Letter from Robert S. Stubbs, II, Chief Deputy Attorney General of the State of Georgia, to this researcher dated October 5, 1976.

§662-2 Waiver and liability of State. The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the State shall be liable only for actual or compensatory damages measured by the pecuniary injuries resulting from the death to the persons respectively, for whose benefit the action was brought. (L 1957, c 312 pt of §1; Supp, §245A-2).

"As revealed by the foregoing, Hawaii's legislature has partially abrogated sovereign immunity in this jurisdiction."[227]

Idaho

Preliminary response received from Wayne L. Kidwell, Attorney General of the State of Idaho on November 1, 1976. However, the comprehensive information requested has never been received.

Illinois

Article 14, Section 4, of the Constitution of Illinois reads:

Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

The Illinois Constitution was amended in Article 127 §801 as follows:

Except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named," filed July 17,

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[227]Letter from Hiromu Suzawa, Deputy Attorney General of the State of Hawaii, to this researcher dated October 8, 1976.

1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

Indiana

Sovereign immunity in Indiana was reduced to its current residual status by a series of court decisions ending with Campbell v. State, ___Ind.___, 284 N.E. 2d 733 (1972). In 1974, the Indiana General Assembly codified this result in the Tort Claims Act, I.C. 34-4-16.5-1 et seq.[228]

Iowa

Iowa possesses partial sovereign immunity as specified in Chapter 25A.14(1) (1975) of the Code of Iowa. The partial abrogation of the state's governmental immunity was inspired by the legislature and not court action.

Kansas

Prior to January, 1976, Kansas Statutes Article 9 §46-901 provided exhaustive governmental immunity coverage.

> 46-901. Governmental immunity of state; implied contract, negligence or other tort; notice in state contracts. (a) it is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute:
> (1) The state of Kansas; and
> (2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and
> (3) all committees, assemblies, groups, by whatever designation, authorized by constitution or statute to act on behalf of or for the state of Kansas.
> (b) The immunities established by this section shall apply to all the members of the classes described,

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[228]Letter from Robert S. Spear, Assistant Attorney General of the State of Indiana, to this researcher dated December 8, 1976.

> whether the same are in existence on the effective date of this act or become members of any such class after the effective date of this act.
> (c) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to be immune from liability and suit under the provisions of subsection (a) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit.[229]

However, in a recent judicial opinion, this statute has been declared unconstitutional.

> Governmental immunity as applied by K.S.A. 46-901 and 902 is completely contradictory to the principles on which our government is based--that government exists for the benefit of the people and must be held responsible to them. In 1976, insulating state government at the expense of the personal well-being of the people shocks the conscience. To maintain a system of laws whereby we are individually liable but collectively immune is more than irrational, it is immoral.[230]

Kentucky

Governmental immunity in the Commonwealth of Kentucky is controlled by statutory provisions (1976) §44.070 and §44.160. An attorney general's opinion reports:

> While the person injured by the State employee may choose to sue the State employee in a circuit court, he also has an alternative remedy of prosecuting against the Commonwealth in the Board of Claims pursuant to KRS 44.070 through 44.160 (for personal injuries). Generally the State is sovereignly immune from suit except where the General Assembly has authorized a means by which claims may be filed against the State. The General Assembly has so authorized recovery under the Board of Claims Act within the limits of that Act. Under KRS 44.160 where a claimant has prosecuted a

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[229] K.S.A. §46-901.

[230] Brown v. Wichita State University 217 Kan. 79 (1976).

> claim to an award of judgment under the Board of Claims Act, the claimant would then be precluded from prosecuting against the Commonwealth or its officers or agents or employees in any other forum.[231]

Louisiana

Article 12, Section 10 of the 1974 Louisiana State Constitution abrogates total governmental immunity.

> (A) No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

This state constitutional article is the result of a 1973 tort liability case against the state where the Supreme Court of Louisiana that "(state) boards and agencies are not immune from suits for tort".[232]

Maine

Did not respond to the survey.

Maryland

> Until very recently this state (Maryland) possessed full sovereign immunity except in a few limited situations expressly provided for by statute. However, Chapter 450 of the 1976 Laws of Maryland (copy enclosed) significantly changes the law by providing relief in cases where the state, its agencies or political subdivisions have breached a contractual obligation.[233]

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[231] An Attorney General's opinion provided in a letter from Thomas R. Emerson, Assistant Attorney General of the State of Kentucky, to this researcher dated December 9, 1976.

[232] Board of Commissioners of Port of New Orleans v. Splendor Shipping and Enterprises Co., Inc. 273 So. 2d 19 (1973).

[233] Letter from George A. Nilson, Deputy Attorney General of the State of Maryland, to this researcher dated October 8, 1976.

Massachusetts

Until recently the Commonwealth of Massachusetts enjoyed complete immunity from tort liability except to the extent permitted by statute.

In Morash v. Commonwealth of Massachusetts, 296 N.E. 2d 461, the Supreme Judicial Court partially rejected this rule and held that, even in the absence of a statute allowing such action, the Commonwealth is liable if it creates or maintains a private nuisance which causes injury to the real property of another. However, while pointing out that there are persuasive reasons why the government immunity doctrine that is applicable to the Commonwealth should be abolished, the court felt that such a sweeping change should come from the Legislature.

In 1975 the Supreme Judicial Court decision, Hannigan v. The New Gamma Delta Chapter of Kappa Sigma Fraternity, 327 N.E. 2d 882, again refused to abolish the immunity of the Commonwealth generally point out that the Legislature is currently studying the matter. The court stated that it will continue to refrain from abolishing the Commonwealth's immunity until the Legislature acts or until events demonstrate that it does not intend to act.[234]

Michigan

In 1961, the Supreme Court of Michigan abrogated that state's governmental immunity.[235] However, apparently this state's attorney general is unaware of the specifics of the status of sovereign immunity in Michigan.

> This is in reply to your request for information on Michigan law regarding sovereign immunity.
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> This information is not readily available. In order to adequately respond to your inquiry would require considerable research. Unfortunately, this office does not have the staff to meet your request

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[234] Letter from Louis A. Riyoli, Assistant Attorney General of the State of Massachusetts, to this researcher dated December 16, 1976.

[235] Supra note 181.

and fulfill its constitutional and statutory duties to state departments and agencies.

Regrettably, therefore, I am unable to assist you. I would hope that your own research will be able to provide you with such information.[236]

Minnesota

Minnesota Laws 1976, Chapter 331, was enacted by the state legislature and attempts to restrict "the kinds of claims that can be filed against the state."[237] However, "since August 1, 1976, Minnesota has had no sovereign immunity . . . (t)his situation stems from a 1975 court decision"[238] (Nieting v. Blondell).[239]

Mississippi

In a recent decision by the Supreme Court of Mississippi, Reed v. Evans ___S. 2d __ (August 24, 1976), Mississippi retained full governmental immunity privileges even though there was apparently no statutory provisions which were enacted by the state legislature.

Missouri

In two recent decisions concerning tort liability, the Supreme Court of Missouri reaffirmed the concept of

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[236]Letter from Frank J. Kelley, Attorney General of the State of Michigan, to this researcher dated October 11, 1976.

[237]Letter from Michael Saeger, Special Assistant Attorney General of the State of Minnesota, to this researcher dated October 8, 1976.

[238]Supra note 235.

[239]235 N.W. 2d 597 (1975).

governmental immunity.[240] In a contractual case, however, this same court found liability.[241] These cases support governmental immunity for tort liability and abrogate governmental immunity for contractual violations.

Montana

Article II, Section 18, Constitution of Montana 1972, states:

> The state, counties, cities, and towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-thirds vote of each house of the legislature.

The legislature has not enacted any legislation concerning sovereign immunity.[242]

Montana also has a Tort Claims Act as specified in state statute §82-4301.

Nebraska

In 1969 the Nebraska Legislature passed the Tort Claims Act (§81-857) explained as follows:

> Our Legislature (Nebraska) in the year 1969 passed a State Tort Claims Act and also a Political Subdivision Tort Claims Act which abrogates sovereign

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[240] O'Dell v. School District of Independence 521 S.W. 2d 403 (1975) and Wood v. County of Jackson 463 S.W. 2d 834 (1971).

[241] V. S. DiCarlo Construction Company, Inc. v. State 485 S.W. 2d 52 (1972).

[242] Letter from Robert L. Woodahl, Attorney General of the State of Montana, to this researcher dated October 5, 1976.

immunity as far as tort liability is concerned in this state within certain limits.

Exempt from the acts are claims based upon an act or omission of an employee of the state for failure to perform a discretionary act or function or to perform an act or function in the execution of a statute or regulation. Also exempt are claims arising in respect to assessment or collection of taxes or fees or detention of goods or merchandise by law enforcement officers, claims for the imposition or establishment of quarantine (both as to persons or property), claims arising out of assault, battery, false imprisonment, etc., claims where the employee is covered by workmen's compensation and certain claims of the National Guard which are cognizable under the National Guard Tort Claims Act of the United States. Also, as far as liability for want of repair of a highway, the state act is limited to such liability as existed for counties prior to the passage of the act.

It might also be of assistance to you to know that prior to the passage of the act we had several Supreme Court decisions in this state where the court gave warning that they would by degree abrogate sovereign immunity if the Legislature did not do so, but in the opinion of the Supreme Court the abrogation should come through the Legislature. As above stated, it did so in 1969.[243]

Nevada

The State of Nevada has partial sovereign immunity. In 1965, the legislature waived the immunity of its agencies and departments, including its political subdivisions, in all cases except those mentioned in the enclosed Nevada Revised Statute 41.032. There is also a dollar limitation of $25,000 which any single claimant may recover. This limitation is currently under attack as violative of the equal protection clause and the Nevada Supreme Court is expected to rule on its constitutionality within the month.[244]

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[243]Letter from Harold S. Salter, Deputy Attorney General Claims Division of the State of Nebraska, to this researcher dated October 6, 1976.

[244]Letter from James H. Thompson, Chief Deputy Attorney General of the State of Nevada, to this researcher dated October 7, 1976.

Nevada statute 41.032 reads thus:

41.032 Conditions and limitations on actions: Employees' acts or omissions. No action may be brought under NRS 41.031 or against the employee which is:

1. Based upon an act or omission of an employee of the state or any of its agencies or political subdivisions, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, provided such statute or regulation has not been declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused.

(Added to NRS by 1965, 1413; A 1967, 992)[245]

New Hampshire

Did not respond to the survey.

New Jersey

The State of New Jersey did enjoy sovereign immunity, both tort and contract law, until court decisions in 1970. In Willis v. Department of Conservation and Economic Development, 55 N.J. 534 (1970), the Supreme Court of our state abolished the common law doctrine of sovereign immunity as it applied to tort cases against the State of New Jersey. It determined that the courts would entertain tort claims against the state effective January 1, 1971. The legislature thereafter determined that they wanted more time to study the subject and by a series of statutes which can be found in the New Jersey Statutes Annotated at N.J.S.A. 52:4A-1, it extended the effective date of the abolition of sovereign immunity to July 1, 1972, and effective that date, the state

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[245]Nevada State Statute 41.032.

> adopted a Tort Claims Act which can be found in the Statutes Annotated as Title 59. A copy of that act, which became effective July 1, 1972, is attached to this letter.[246]

New Jersey statutes (Annotated) Title 59, subtitle 1-2 describes the attitudes of the new Jersey legislature regarding the abrogation of governmental immunity.

> 59:1-2. Legislative declaration
> The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaraction. L.1972, c. 45, §59:1-2.[247]

New Mexico

New Mexico has partial sovereign immunity. Prior to July 1, 1976, governmental subdivisions had no sovereign immunity in areas in which they were insured or in areas involving ministerial functions. The State and its agencies, etc., were not liable where there is insurance coverage.

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[246]Letter from Lawrence G. Moncher, Deputy Attorney General of the State of New Jersey, to this researcher dated November 16, 1976.

[247]New Jersey Statute 59:1-2.

Since July 1, 1976, a Torts Claims Act has been in effect and is in the process of being amended at this time. This Act, in substance, provided for a requirement for insurance and for tort liability within limits set by the legislation. This Act is Chapter 58, Laws of 1976. It was a result of the decision in Hicks vs. State of New Mexico, ex rel, New Mexico State Highway Department, which is reported in 544 P2d 1153. In substance, this decision held that sovereign immunity insofar as tort was concerned was a creator of judicial creation and abolished it effective July 1, 1976.[248]

New York

Unfortunately, the Attorney General does not have sufficient staff to conduct research and assemble materials for persons who are not officers or department heads of our State government.

However, we suggest that sovereign immunity of the State of New York has been statutorily limited by the creation of the Court of Claims. The Court of Claims Act is located in the Judiciary, Part 2, Book 29A of McKinney's Consolidated Laws of the State of New York.[249]

North Carolina

The doctrine of sovereign immunity, that the State cannot be sued without its consent, has long been the law in North Carolina. The doctrine applied both to contracts and tort actions against the State and its administrative agencies, as well as to suits to prevent a State officer of commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies. In 1951 the General Assembly enacted the Tort Claims Act, which permits claims to be heard by the North Carolina Industrial Commission against the State Board of

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[248]Letter from James V. Noble, Assistant Attorney General of the State of New Mexico, to this researcher dated November 5, 1976.

[249]Letter from Ralph D. Comardo, Attorney, State of New York, to this researcher dated October 19, 1976.

Education, the Board of Transportation and all other departments, institutions, and agencies of the State from claims resulting from the negligent act of any officer, employee, servant or agent of the State while acting within the scope of his office, employment or service. The extent of the liability is $30,000 per claim.

In addition, G. S. 143-135.3 authorizes any contractor who fails to receive such settlement as he claims to be due under contract with the State of North Carolina or any board, bureau, commission, institution or agency of the State, or have a hearing before the Director of the Department of Administration and if he is not satisfied with the hearing, he may institute a civil action in the Superior Court of Wake County.

In addition, the North Carolina Supreme Court recently, in the case of Smith v. State, 289 NC 303, held that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State consents to be sued for damages on the contract in the event it breaches the contract, and the doctrine of sovereign immunity will not be a defense to the State. However, the Court further stated that in the event plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment and the judgment cannot be paid unless the General Assembly specifically authorizes the appropriation therefor.

The Legislature has also consented to be sued, G.S. 136-29(b), to allow a road construction contractor to sue if his contract claim is denied by the State Highway Administrator. G. S. 115-142(n) allows teachers, whose employment has been terminated, to appeal to the Superior Court and G. S. 153A-11 and G. S. 160-11 provide that counties and cities may contract and be contracted with and that they may sue and be sued.

In addition, the North Carolina Supreme Court has held that a county hospital is operated as a proprietary function of the county and therefore may be sued in tort for the negligent acts of its employees committed within the course and scope of their employment.

See Sides v. Hospital, 287 NC 14, wherein the Supreme Court discussed many situations where a county or municipality may be sued when it is engaged in proprietary functions.[250]

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[250]Letter from James F. Bullock, Senior Deputy Attorney General of the State of North Carolina, to this researcher dated October 4, 1976.

North Dakota

The State of North Dakota enjoys sovereign immunity pursuant to Section 22 of the North Dakota Constitution, which provides in part that 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. The Legislative Assembly has provided for suit against the State in tort actions only in those instances in which the State has secured liability insurance and then only to the extent of such liability insurance coverage. See Chapter 295, 1975 Session Laws of North Dakota.

The political subdivisions of the State enjoyed immunity until it was abolished by a North Dakota Supreme Court decision in December, 1974, with an effective date fifteen days following the adjournment of the 1975 Legislative Assembly. See Kitto v. Minot Park District, 224 NW 2d 795 (ND 1974). The Legislature adjourned on March 26, 1975. The obvious purpose of the effective date of the court's decision was to permit the Legislative Assembly to take some action concerning this matter which the Legislature did by the enactment of Chapter 295 of the 1975 North Dakota Session Laws, limiting the liability of political subdivisions as set forth therein.[251]

Ohio

The Ohio statute 2743.01 established a Tort Claims Act. Sub-section 2743.02 describes the limitations of liability.

§2743.02 (State waives immunity from liability.)

(A) 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, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one

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[251] Letter from Gerald W. VandeWalle, Chief Deputy Attorney General of the State of North Dakota, to this researcher dated October 5, 1976.

or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This chapter is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to the effective date of this section.

(C) Such hospital may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant.[252]

Oklahoma

The State of Oklahoma as a sovereignty is immune from suit. However, this immunity is statutorily waived in certain instances. Specifically, 47 O.S. 1971, §§157.1, et seq., relating to motor vehicles owned by the State, allows three state agencies to contract for insurance on vehicles, motorized machinery, or equipment owned and operated by the State Highway Department, State Board of Agriculture, and the State Department of Public Welfare. This statute further provides that "to the extent that the insurer has provided indemnity and the contract of insurance to a department or state agency described in this Section, the said insurer may not plead as a defense in any action involving insurance purchased by the authority of this Section, the governmental immunity of either the State of Oklahoma or of any department or agency thereof purchasing insurance pursuant to this Section.

Similar provisions are found in 11 O.S. 1971, §§1757 and 1761, relating to cities and towns. Of special note is Section 1761 which states:

The doctrine of 'governmental immunity from tort liability' is hereby enacted as a rule of statutory law as defined herein applicable to the municipality subject to the provisions of this act.

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[252]Ohio Code §2743.02.

> Thus, in answer to your questions, the State of Oklahoma has sovereign immunity with the exceptions of specific statutory enactments wherein the defense of sovereign immunity is waived.[253]

Oregon

"The legislature of the state of Oregon abrogated its sovereign immunity in part in 1967."[254] The Tort Actions Against Public Bodies Act (§30.260) contains the context of the details. Of particular interest to this study is §30.265.

> 30.265 Scope of liability of public body for torts.
> (1) Subject to the limitations of ORS 306.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function. As used in this section and in ORS 30.285, "tort" includes any violation of 42 U.S.C. section 1983.
> (2) Every public body is immune from liability for:
> (a) Any claim for injury to or death of any person or injury to property resulting from an act or omission of any officer, employee or agent of a public body when such officer, employee or agent is immune from liability.
> (b) Any claim for injury to or death of any person covered by any workmen's compensation law.
> (c) Any claim in connection with the assessment and collection of taxes.
> (d) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

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[253]Letter from Kay K. Kennedy, Assistant Attorney General of the State of Oklahoma, to this researcher dated November 1, 1976.

[254]Letter from John Leaky, Chief Trial Counsel of the State of Oregon, to this researcher dated October 21, 1976.

(e) Any claim which is limited or barred by the provisions of any other statute.

(3) Neither a public body nor its officers, employees, and agents acting within the scope of their employment or duties are liable for injury or damage:

(a) Arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.

(b) Because of an act done or omitted under apparent authority of a law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

(4) ORS 30.260 to 30.300 do not apply to any claim against any public body or its officers, employees or agents acting within the scope of their employment arising before July 1, 1968. Any such claim may be presented and enforced to the same extent and subject to the same procedure and restrictions as if ORS 30.260 to 30.300 had not been adopted.

(5) The amendments to ORS 30.270 and 30.285 enacted by chapter 609, Oregon Laws 1975, do not apply to any claim against the state or its officers, employees or agents acting within the scope of their employment or duties, arising before July 2, 1975. Any such claim may be presented and enforced to the same extent and is subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted, but the procedure set forth in ORS 278.120 shall be applicable thereto.

Pennsylvania

Pennsylvania does have full sovereign immunity. There are however, occasions when the legislature has seen fit to permit recovery from the Commonwealth in very limited circumstances. For example, we have the State Board of Arbitrations and Claims which permit private citizens to recover funds from the Commonwealth in the event of a breach of contract on the part of the Commonwealth. There are other minor exceptions to the sovereign immunity rule, however, in nearly every instance, the Commonwealth does have full sovereign immunity.[255]

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[255] Letter from Jeffrey G. Cokin, Deputy Attorney General of the State of Pennsylvania, to this researcher dated October 20, 1976.

Rhode Island

Did not respond to the survey.

South Carolina

South Carolina has full sovereign immunity except in those instances where it has waived it by statutory enactment. Suit may be brought in tort against certain agencies of the State, such as the State Highway Department, counties and cities, and recovery of damages made in limited amounts. A general motor vehicle tort law relating to government-owned vehicles is also in effect and is of recent vintage. Generally efforts to abrogate the rule of sovereign immunity have been expressed in terms of legislative encroachments and the doctrine has been attacked in the courts, but always without success.[256]

South Dakota

Did not respond to the survey.

Tennessee

"Tennessee is still immune from suits with a view to reach the treasury of the state. Claims against Tennessee are filed with the Board of Claims."[257] §-812 describes the details of the Board of Claims Act.

> 9-812. Injuries and Property Damage Arising from Negligence of State Employees.--Said board of claims is vested with full power and authority to hear and determine all claims against the state for personal injuries or property damages caused by negligence in

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[256] Letter from Daniel R. McLeod, Attorney General of the State of South Carolina, to this researcher dated October 6, 1976.

[257] Letter from Weldon B. White, Jr., Assistant Attorney General of the State of Tennessee, to this researcher dated October 7, 1976.

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 or divisions in the operation of state-owned motor vehicles or other state-owned equipment while in the line of duty, its awards under this section to be paid out of the general highway fund in the case of claims arising from the negligence of employees of the department of highways and public works and out of the general fund in the case of claims arising from negligence of employees of all other departments.

Any settlement or award made by said board shall be made only after a careful and thorough investigation and examination of all facts and circumstances in controversy and no award or settlement shall be made unless the facts found by said board of claims establish such a case of liability on the part of a department or agency of the state government as would entitle the claimant to a judgment in an action at law, if the state were amenable to such.

Said Board of Claims is vested with full power and authority to hear and determine all claims against the State based upon, or arising out of, any written contract executed as prescribed by law on behalf of any Department of the State, and its awards, if any, under this section are to be paid out of funds of the Department in each case available for the performance of the contract. (Acts 1965, ch. 218.)

The provisions of this section shall apply only to claims against the state arising from the performance of functions of its various departments and agencies imposed upon them by law where in such performance said departments have exclusive control of the personnel and equipment involved. (Acts 1945, ch. 73, §5; C. Supp. 1950, §1034.5 (Williams, §1034.30)

Texas

The State of Texas has partial governmental immunity as specified in the Texas Tort Claims Act (6252-19).

Liability of governmental units

Sec. 3. Each unit of government in the state shall be liable for money damages for personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven

vehicle and motor-driven equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state. Such liability is subject to the exceptions contained herein, and it shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to $100,000 per person and $300,000 for any single occurrence for bodily injury or death.

Waiver of sovereign immunity

Sec. 4. To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the Legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.

Utah

The State of Utah has five specific "waivers of immunity" as sub-sections of the Governmental Immunity Act (§63-30-1) which partially abrogates governmental immunity in the state.

63-30-5. Waiver of immunity as to contractual obligation.--Immunity from suit of all governmental entities is waived as to any contractual obligation and actions arising out of contractual rights or obligations shall not be subject to the requirements of sections 63-30-12, 63-30-13, or 63-30-19 of this act.

63-30-6. Waiver of immunity as to actions involving property. Construction and application. The waiver of immunity from suit "for the recovery of any property real or personal or for the possession thereof" does not include an action for damages for impairment of access to property caused by construction of

highway underpass; this act should be strictly construed to preserve sovereign immunity and to waive it only as clearly expressed therein. Holt v. Utah State Road Comm., 30 U. (2d) 4, 511 P.2d 1286.

63-30-8. Waiver of immunity for injury caused by defective, etc. Discretionary function. Power of public service commission under 54-4-14 to require public utility to construct and maintain appropriately safety devices at grade crossings is a discretionary function, and 63-30-10 excepts the commission from waiver of immunity for injuries caused by failure to require warnings at crossing. Velasquez v. Union Pacific R. Co., 24 U. (2d) 217, 469 P.2d 5. Negligent construction. Where university construction diverted flow of surface water flooding basement and causing other damage to adjoining landowner, governmental immunity was waived and university was liable to landowner. Sanford v. University of Utah, 26 U. (2d) 285 488 P.2d 741. New duties not created. This section did not create any new duties but merely waived immunity, and since county had no duty to correct conditions on private property that obstructed motor bike driver's view of county roads it could not be held liable for driver's injuries caused as result of obstruction. Stevens v. Salt Lake County, 25 U. (2d) 168, 478 P.2d 496.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, etc. Legislative intent. Intent of legislature was to include within the waiver of immunity an action for private nuisance in so far as the action is predicated on a dangerous or defective condition of a public improvement that unreasonably interferes with the use and enjoyment of the claimant's property. Sanford v. University of Utah, 26 U. (2d) 285, 488 P.2d 741. Negligent construction. Where university construction diverts flow of surface water flooding basements and causing other damage to adjoining landowner, governmental immunity is waived and university was liable to the owner. Sanford v. University of Utah, U. (2d) 285, 488 P.2d 741.

63-30-10. Waiver of immunity--Injury caused by negligent act or omission of employee--Exceptions.--Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment.[258]

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[258]Sections 63-30-5 to 63-30-10 of Utah's civil code.

Vermont

Title 29, Vermont Statutes Annotated, sections 1403-1404 provide for abrogation of governmental immunity by the State of Vermont.

> §1403. Waiver of immunity by state, municipal corporations and counties. When the state or a department or board purchases a policy of liability insurance under the provisions of section 1401 of this title, and when a municipal corporation purchases a policy of liability insurance under section 1092 of Title 24, and when a county purchases a policy of liability insurance under the provisions of section 131 of Title 24, it waives its sovereign immunity from liability to the extent of the coverage of the policy and consents to be sued.--Added 1959, No. 328 (Adj. Sess.) §14.
>
> §1403. Waiver of immunity by state, municipal corporations and counties. 1. Generally. Section 1092 of 24 V.S.A. does not impose an absolute duty on city to carry liability insurance on its motor vehicles and drivers but if there is insurance coverage the defense of governmental immunity is not available to the municipality since it is waived by provisions of this section. Medlar v. Aetna Insurance Company (1968) 127 Vt. 337, 248 A.2d 740.
>
> §1404. Judgments, maximum liability. Upon trial of any action in which sovereign immunity has been waived, as provided in section 1403 of this title, a judgment shall not be rendered against the state of Vermont, a department or board thereof or a municipal corporation or county for more than the maximum amount of liability insurance carried by it and applicable to the subject matter of the action. Added 1959, No. 328 (Adj. Sess.), §14.

Virginia

The General Assembly (of Virginia) commissioned a committee to give consideration to the abrogation of certain aspects of sovereign immunity. That committee rendered a report in January, 1975, making certain recommendations with regard to waiver of certain governmental immunities. That report has not been acted upon through the sponsoring of legislation in either the 1975 or 1976 General Assembly. I do not know whether any attempts will be made to alter the present law of sovereign immunity in upcoming sessions.

Several cases which would be of interest to you with regard to governmental immunity in Virginia are Wilson v. State Highway Commissioner, 174 Va. 82, 4 S.E.2d 746 (1940); Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942), and Lawhorne v. Harlan, 214 Va. 405 (1973).[259]

Washington

The State of Washington does not have governmental immunity as §4.92.090 illustrates.

> 4.92.090 Tortious conduct of state--Liability for damages. The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. (Amended by Laws 1963 ch 159 §2.)

West Virginia

Did not respond to the survey.

Wisconsin

Wisconsin statute §285.01 defines the limitations of liability for that state.

> 285.01 Actions against state;bond. Upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state by service as provided in §262.06 (3) and by filing with the clerk or court a bond, not exceeding $1,000 with 2 or more sureties, to be approved by the attorney general, to the effect that the claimant will indemnify the state against all costs that may accrue in such action and pay to the clerk of court all costs, in case the claimant fails to obtain judgment against the state.

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[259] Letter from Stuart H. Dunn, Deputy Attorney General of the State of Virginia, to this researcher dated October 5, 1976.

Wyoming

(T)he doctrine of sovereign immunity is very much alive in this State. However, the Wyoming Legislature in 1975 passed a statute, 1-1018.1 which authorized the agency of government to purchase liability insurance and to the extent that such insurance was obtained, sovereign immunity was waived to the extent of that liability. Whether or not such liability insurance was obtained was left at the option or discretion of the agency or political entity.

No change has been made in the statutory status of sovereign immunity except that the Wyoming Supreme Court and particularly Justice Rose wrote a lengthy opinion in the case of Kostas Jivelekas v. City of Worland, 546 P.2d 419 which perhaps indicates what the future of this doctrine may be in Wyoming, at least insofar as one member of our Court is concerned.[260]

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[260] Letter from Charles J. Carrol, Deputy Attorney General of the State of Wyoming, to this researcher dated October 4, 1976.

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BIOGRAPHICAL SKETCH

Eugene T. Connors was born in Washington, D.C. in 1949, the son of Mr. and Mrs. Eugene T. Connors. Graduating from Glenelg High School in rural Maryland, he attended the University of Maryland, Baltimore County for four years and graduated in 1971 with majors in English and drama and a minor in education. He immediately entered graduate school at Virginia Commonwealth University in Richmond, Virginia. In 1973, he was awarded a Master of Fine Arts degree with a major in dramatic design. Also during this time, Eugene Connors was teaching high school English in inner-city Richmond, Virginia. In August, 1974, he was made special assistant to the area superintendent of the Richmond City Schools. In September of 1974, Eugene Connors also entered the Master of Education degree program at Virginia Commonwealth University with a major in administration and supervision and special emphasis in the area of school Law. Graduating from Virginia Commonwealth University with a Master of Education degree in May, 1975, he immediately moved to Gainesville, Florida, to work on his doctorate in Educational Administration at the University of Florida. In August, 1976, Eugene Connors finished his course work for his Doctor of Philosophy degree and gained a position of Assistant Professor of Educational Law and Finance at James Madison University in Harrisonburg, Virginia. During the

first year at "Madison," Eugene Connors finished work on his dissertation as well as publishing three articles in editorial board journals. "Legal Entanglement of Reading Diagnosis Procedures" is scheduled for publication in the January, 1978 issue of the JOURNAL OF READING. The TEXAS TECH LAW REVIEW will publish his article "Governmental Immunity: Implications for Public Education" in their fall, 1977, issue; and the journal EDUCATION TECHNOLOGY, will publish Eugene Connors' article "Technological Forecasting: An Overview for Educators" in their fall, 1977, issue. Eugene T. Connors plans to remain at James Madison University for the 1977-78 academic year.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

S. Kern Alexander, Chairman
Professor of Educational Administration

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

John M. Nickens
Assistant Professor of Educational Administration

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

William B. Ware
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I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Leland L. Zimmerman
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This dissertation was submitted to the Graduate Faculty of the Department of Education Administration in the College of Education and to the Graduate Council, and was accepted as partial fulfillment of the requirement for the degree of Doctor of Philosophy.

December, 1977

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Dean, Graduate School