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Ohio's Abrogation of Sovereign Immunity - A Rude Awakening

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OHIO'S ABROGATION OF SOVEREIGN IMMUNITY — A RUDE AWAKENING

INTRODUCTION

The Ohio Supreme Court's recent decisions have practically abolished the defense of sovereign immunity for state subdivisions and municipal corporations. For many years, governmental units such as municipal corporations have used this ancient legal doctrine to defend themselves from tort suits arising out of the negligence of their employees. The court's decisions have sent municipalities searching for insurance coverage[1] and have sent plaintiff's attorneys back into court, filing motions to vacate previous adverse judgements.[2]

The effect of such decisions have become more pronounced since the court's decision in *Marrek v. Board of Commissioners.*[3] In *Marrek,* the Ohio Supreme Court applied its recently revised standard of governmental liability, giving it retroactive effect, and discussed the only two types of governmental acts still retaining immunity. In light of the court's recent decisions concerning sovereign immunity, it is necessary for any attorney litigating the liability of the state or its subdivisions to understand *Marrek's* new definition of governmental liability in Ohio.

FACTS OF *MARREK V. BOARD OF COMMISSIONERS*

The plaintiff in *Marrek* was injured while sledding in the Cleveland Metropolitan Park. Another sledder negligently struck Marrek in the face with his foot, causing facial injuries and permanent eye damage.[4] On March 14, 1979, Marrek sued the Cleveland Metroparks Board of Commissioners, alleging it had negligently failed to supervise a known sledding area and thereby proximately caused Marrek's injuries.[5] The Board of Commissioners moved for dismissal of Marrek's claim, arguing that since a park district is a subdivision of the state, it was protected from Marrek's claim by sovereign immunity.[6] The trial court granted the Board's motion on August 20, 1979.[7]

Nearly two years later, a case with similar facts reached the Ohio Supreme Court.[8] In *Schenkolewski v. Cleveland Metroparks System,*[9] the

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[1]Akron Beacon Journal, March 6, 1985, at C4, col. 1.

[2]Marrek v. Cleveland Metroparks Bd. of Comm'rs, 9 Ohio St. 3d 194, 459 N.E.2d 873 (1984).

[3]*Id.*

[4]*Id.* at 195, 459 N.E.2d at 874.

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]Schenkolewski v. Cleveland Metroparks Sys., 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981).

[9]*Id.*

court held that the defense of sovereign immunity was unavailable to a board of commissioners of a park district where the liability is alleged to have arisen from a proprietary function.[10] In light of the *Schenkolewski* decision, Marrek moved to vacate the trial court's decision in favor of the Park Commissioners.[11] When her motion was denied, she appealed, arguing that the trial court erred in failing to find the maintenance of a sledding area to be a proprietary function.[12]

The Eighth District Court of Appeals affirmed the trial court's denial of the motion.[13] It distinguished *Schenkolewski* since the metropark (a zoo), whose liablity was in issue, had charged an admission fee to the plaintiff.[14] However, the metropark in *Marrek* neither charged an entry fee nor rented equipment.[15] Because Marrek was a gratuitious user, the appellate court felt she had entered the park at her own risk.[16] The appellate court also cited the Ohio Revised Code section 1545.11, which charged the Board of Park Commissioners with promoting the use of the parks for the furtherance of the public welfare.[17] The appellate court felt that the statute gave the board a duty to promote activities like sledding and therefore, the board became "an arm of the sovereign in the exercise of a governmental function."[18]

On February 22, 1984, the Ohio Supreme Court reversed the appellate court's decision regarding the issue of common law sovereign immunity.[19] In a recent series of cases beginning in 1982, the court has abolished the doctrine of sovereign immunity in Ohio[20] as well as the familiar[21] distinction between gov-

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[10]The underlying test of governmental actions as compared with the proprietary has been held to be "whether the act performed is public in its nature and performed as the agent of the state and in furtherance of a general law for the interest of the public at large or whether it is performed primarily for the benefit of those within the corporate limits of the municipality." Houston v. Wolverton, 154 Tex. 325, 328, 277 S.W.2d 101, 103 (1955).

[11]*Marrek*, 9 Ohio St. 3d. at 195, 459 N.E.2d at 874.

[12]Marrek v. Cleveland Metroparks Bd. of Comm'rs, No. 44581, slip op. at 2 (8th Dist. Ct. App. Dec. 9, 1982).

[13]*Id.* at 6.

[14]*Id.* at 4.

[15]*Id.* at 5.

[16]*Id.*

[17]Ohio Revised Code §1545.11 requires the Board of Park Commissioners to create "lands, parkways, forest reservations and other reservations and afforest, develop, improve, protect, and promote the use of the same in such a manner as the board deems conducive to the general welfare." OHIO REV. CODE ANN. §1545.11 (Baldwin 1984).

[18]*Marrek*, No. 44581, slip op. at 6.

[19]*Marrek*, 9 Ohio St. 3d at 197, 459 N.E.2d at 876 (1984).

[20]In Mathis v. Cleveland Pub. Library, 9 Ohio St. 3d 199, 459 N.E.2d 877 (1984), the court held that public libraries were liable for their torts. In Carbone v. Overfield, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983), a school board was sued for the negligence of an employee of the school system. The court refused to grant immunity to the school board. In Haverlack v. Portage Homes Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982), the court allowed recovery against the city of Aurora for the negligent operation of a sewage treatment plant. The successful plaintiffs were nearby residents who objected to the noise and odor of the plant.

[21]The distinction between "governmental" and "proprietary" functions was first articulated in Bailey v. City of New York, 3 Hill 531 (N.Y. 1842). Use of the distinction spread to other jurisdictions until every state used it

ernmental and proprietary acts,[22] which had been used by Ohio courts since 1927.[23] The court had adopted a new standard in *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*,[24] and the *Marrek* case provided one of the first opportunities for the court to apply it. An ability to use this new standard is now a prerequisite to any successful litigation against the state or its subdivisions.

THE DEMISE OF SOVEREIGN IMMUNITY IN OHIO

Absolute governmental immunity was abolished by the Ohio Legislature in 1912 when the Ohio Constitution[25] was amended to allow suits against the state "as may be provided by law."[26] In 1975, the legislature passed Section 2743.02(A) of the Ohio Revised Code, which equated the liability of the state to that of private parties and created a forum for the litigation (the Court of Claims).[27] However, the act specifically excluded political subdivisions[28] such as school boards, park districts, and municipal corporations. Those subdivisions' remained intact until a recent series of cases, beginning in 1981 with *Schenkolewski v. Cleveland Metroparks System,*[29] abolished their immunity.

In *Schenkolewski,* the plaintiff was injured when she tripped over a piece of pipe jutting up through the sidewalk at the entrance of the zoo. The zoo maintenance employees had negligently failed to cut the pipe flush with the surface of the pavement.[30] Before reaching the question of the zoo's negligence, the court had to determine if immunity was available to a state owned and operated zoological park. In holding that it was not available, the court pointed

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except South Carolina and Florida. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §131, at 979 (4th ed. 1971).

[22]*See,* Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

[23]Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927).

[24]6 Ohio St. 3d 31, 36, 451 N.E.2d 228, 232 (1983).

[25]Section 16, article I was amended to read, "all courts shall be open and every person for and injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." OHIO CONST. ART. I, §16.

[26]*Id.*

[27]The relevant portion of the Ohio Revised Code Section 2743.02(A) reads, "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 . . ." OHIO REV. CODE ANN. §2743.02 (A) (Baldwin 1984).

[28]Section 2743.01 of the Ohio Revised Code reads: As used in this chapter:

> (A) "State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.
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> (B) "Political Subdivisions" means municipal corporations, townships, counties, school districts, and all other bodies corporate and politically responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches. OHIO REV. CODE ANN. §2743.01 (Baldwin 1984).

[29]67 Ohio St. 2d 31, 426 N.E.2d 784 (1981).

[30]*Id.* at 32, 426 N.E.2d at 785.

out that because sovereign immunity was a judicially created doctrine, it could be modified or abrogated without resort to legislative means.[31]

Schenkolewski's hint of the court's willingness to do away with sovereign immunity was confirmed eighteen months later in *Haverlack v. Portage Homes, Inc.*[32] By a four to three vote the court held:

> [The] defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant. A municipal corporation, unless immune by statute, is liable for its negligence in the performance or nonperformance of its acts.[33]

The dissenting opinion, authored by Justice Lochner, questioned the impact and reach of the majority decision.[34] Lochner questioned whether the majority's holding was limited to the facts of *Haverlack*[35] or would apply to all municipal corporations.[36] He also questioned the lack of manageable standards given in the majority opinion to guide the lower courts in determining how far this newly created liability should reach.[37] Lochner stated that "[t]he majority opinion, therefore, provides neither explanation as to why it singled out this particular governmental function nor guidance as to what is the next to fall. This will cause uncertainty in the lower courts and propagate cases needing resolution by this court."[38]

The asked for guidance for the lower courts was soon forthcoming. In *Enghauser,*[39] the court provided some guidance by adopting a new rule of liability for municipal corporations. For fifty-six years, Ohio courts had applied the governmental-proprietary function test first[40] used in *Wooster v. Arbenz.*[41]

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[31] *Id.* at 36, 426 N.E.2d at 787. In doing so, the court essentially adopted the reasoning of Justice William B. Brown who had been advocating judicial abrogation of sovereign immunity by his dissents in Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 67, 298 N.E.2d 542, 552, (1973) (W. Brown, J., dissenting); and Haas v. Hayslip, 51 Ohio St. 2d 135, 142, 364 N.E.2d 1376, 1380 (1977) (W. Brown, J., dissenting).

[32] 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

[33] *Id.* at 30, 442 N.E.2d at 752.

[34] *Id.* at 31, 442 N.E.2d at 753-54 (Lochner, J., dissenting).

[35] In *Haverlock,* the plaintiffs were homeowners who objected to the noise and odor emanating from a sewage treatment plant operated by the city of Aurora. The city was named as a defendant and pled sovereign immunity. 2 Ohio St. 3d at 27, 442 N.E.2d at 750.

[36] "Ultimately, it will be necessary for this court to reconcile the apparently narrow wording of the syllabus with the broad language of the opinion. Although the syllabus seems limited to 'the negligent operation of a sewage treatment plant,' the opinion speaks broadly: 'We join with the other states in abrogating this doctrine.'"
2 Ohio St. 3d at 32, 442 N.E.2d at 753-54 (Lochner, J., dissenting).

[37] *Id.* at 31, 442 N.E.2d at 753.

[38] *Id.*, 442 N.E.2d at 753.

[39] 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

[40] *Marrek,* No. 44581, slip op. at 3.

[41] Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927).

The governmental-proprietary function distinction[42] has been used by nearly every jurisdiction[43] in the United States at one time or another.[44]

In *Enghauser,* the court considered the liability of the city of Lebanon, Ohio for designing and constructing a new bridge in a manner which allegedly caused flooding to plaintiff's property. The city pled sovereign immunity and won judgements in the trial and appellate courts.[45] The Ohio Supreme Court reversed and reaffirmed its judicial abrogation of sovereign immunity.[46] In the words of Justice Brown's majority opinion, "[h]enceforth, so far as municipal government responsibility for torts is concerned, the rule is liability — the exception is immunity.[47]

The court also addressed the complaints of Justice Lochner's *Haverlack* dissent by delineating a new standard to determine which acts of the state subdivision would be actionable and which would remain immune. First, the court emphasized that it was only abrogating the tort immunity of the state subdivision.[48] The court also emphasized an important exception to liability that was part of the *Haverlack* holding; that is, liability only attaches in the absence of a statute to the contrary.[49] After excepting all nontortious harms as well as any acts protected by statute, the court articulated its new rule of governmental liablity:

> [T]his court holds that no tort action will lie against a municipal corporation for those acts or omissions involving the exercise of a legislative or judicial function, or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. . . . However, once the policy has been made to engage in a certain activity or function, municipalities will be held liable, the same as private corporations and persons, for the negligence of their employees in the performance of the activities.[50]

Justice Holmes authored a dissenting opinion that was joined by Justice Lochner. While Holmes acknowledged that the majority opinion addressed some of the concerns raised in Lochner's *Haverlack* dissent, Holmes argued

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[42]For an informative review of the Ohio Supreme Court's experience with the governmental-proprietary function distinction, *see* Hack v. Salem, 174 Ohio St. 383, 391-402, 189 N.E.2d 859, 862-67 (1963) (Gibson, J., concurring).

[43]W. PROSSER, *supra* note 21, at 979.

[44]For a discussion of the troublesome nuances of the governmental-proprietary function distinction, *See, Recent Important Tort Cases Against Governmental Units,* 32 AM. TRIAL LAW. L.J. 284, 289 (1968).

[45]6 Ohio St. 3d at 33, 451 N.E.2d at 230.

[46]*Id.*, 451 N.E.2d at 233.

[47]*Id.*, 451 N.E.2d at 230.

[48]*Id.* at 35, 451 N.E.2d at 232.

[49]*Id.*

[50]*Id.* at 36, 451 N.E.2d at 232.

that any abrogation of immunity should be applied only prospectively instead of retroactively.[51]

Justice Holmes stressed that "[t]he doctrine of sovereign immunity has been a long standing principle of law in this state. To abolish it retroactively would deny municipalities that have relied upon it the opportunity to make arrangements to meet the new liabilities to which they are subject."[52] Since the availability of liability insurance has been used to justify the dramatic expansion of tort liablity, Holmes questioned why the majority imposed "liability on municipalities without allowing them the opportunity to obtain liability insurance."[53] He further added that

> this immunity should be annulled prospectively so that the General Assembly will be given an opportunity to act upon our decision. It is that branch of government which is best equipped to balance competing considerations of public policy. Lastly, the prospective abolition of this defense would be in line with the overwhelming weight of authority from other jurisdictions that have considered this question.[54]

COURT APPLICATION OF THE *ENGHAUSER* RULE IN *MARREK*

In the eight months after the *Enghauser* decision, the court heard several cases dealing with the immunity of state subdivisions. In *Carbone v. Overfield,*[55] sovereign immunity was abolished for school boards; in *Zents v. Board of Commissioners,*[56] immunity for counties was abolished; in *Mathis v. Cleveland Public Library,*[57] immunity for public libraries was abolished. On the same day the court decided *Zents* and *Mathis,* the court also decided *Marrek v. Cleveland Metroparks Board of Commissioners.*[58]

The Ohio Supreme Court reversed the appellate court on the issue of a metropolitan park's liability to gratuitous users. The court avoided review of the appellate court's findings which had focused upon the old governmental-proprietary distinction.[59] Instead the court applied its new rule first articulated in *Enghauser.* The court found that Marrek's allegation did not "concern 'the

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[51]Retroactive abrogation raises interesting constitutional considerations. It has been suggested by Professor Van Alstyne that a retroactive abrogation of a private person's immunity would violate their due process rights, but abrogation of the state's immunity would not, since the state is not similarly protected by the Constitution. Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu,* 15 STAN. L. REV. 163, 229-35 (1963).

[52]*Enghauser,* 6 Ohio St. 3d at 37, 451 N.E.2d at 233-34 (Holmes, J., dissenting).

[53]*Id.*

[54]*Id.*

[55]6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983).

[56]9 Ohio St. 3d 204, 459 N.E.2d 881 (1984).

[57]9 Ohio St. 3d 199, 459 N.E.2d 877 (1984).

[58]9 Ohio St. 3d 194, 459 N.E.2d 873 (1984).

[59]*Id.* at 196, 459 N.E.2d at 875.

exercise of an executive or planning function involving the making of a basic policy decision.' Instead, the 'conduct complained to be tortious involves rather the carrying out of previously established policies or plans.'"[60] On the basis of this determination, the court found the board of commissioners could be liable, barring the existence of a statute giving immunity.[61]

Under the *Marrek* facts, the court did find such a statute. Section 1533.181(A) of the Ohio Revised Code provides that a landowner owes no duty to a recreational user.[62] Judicial interpretation of the passage has held that it applied to both state and privately owned lands.[63] Additionally, Section 2743, the Court of Claims Act, provided that the liability of the state was to be determined by "the same rules of law applicable to suits between private parties. . . ."[64] Since Section 1533.181(A) protected a gratuitous private party from liability, the Cleveland Metropark Board of Commissioners was equally protected. Therefore, the court held that the defense of sovereign immunity was not available to a park system board of commissioners, and that the acts of the Board were not policy decisions worthy of immunity. However, the court found the statute in this case provided immunity to the park system.[65]

ABROGATION PROVIDES IMMUNITY LOOPHOLE

While most legal authorities would applaud the demise of sovereign immunity,[66] the Ohio Supreme Court's treatment of this issue might cause as much inequity and confusion as it purports to solve. The argument in favor of abrogation is obvious — injured citizens have redress against the tortfeasor. The arguments against its abrogation — mainly the increased financial load to the sovereign of defending suits and paying judgments[67] and the chilling effect on the state's legislatures, making them more fearful and tentative in their decision-making[68] — have been universally discounted by legal writers.[69]

Although this note is in agreement with the Ohio Supreme Court's abrogation of sovereign immunity, its change was long overdue. Considering

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[60] *Id.*, 459 N.E.2d at 875 (quoting *Enghauser*, 6 Ohio St. 3d at 35, 451 N.E.2d at 232).

[61] *Id.*

[62] "(A) No owner, lessee, or occupant of premises: (1) Owes any duty to a recreational user to keep the premise safe for entry or use. . . ." OHIO REV. CODE ANN. §1533.181 (Baldwin 1984).

[63] Moss v. Department of Natural Resources, 62 Ohio St. 2d 138, 404 N.E.2d 742 (1980).

[64] OHIO REV. CODE ANN. §2743.02(A) (Baldwin 1984).

[65] 9 Ohio St. 3d at 198, 459 N.E.2d at 877.

[66] PROSSER, *supra* note 21, at §131, at 978.

[67] *Id.* For a statistical study used by the California legislature to determine whether that State could afford the cost of its own torts, *see* CAL. SENATE FACT FINDING COMM'N. ON JUDICIARY, SEVENTH PROGRESS REPORT TO THE LEGISLATURE: TORT LIABILITY (1963).

[68] *See* Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 337 (1925).

[69] *See, e.g.*, PROSSER, *supra* note 21, at §131, at 978.

that Ohio is the forty-fifth state[70] to abolish sovereign immunity, the change hardly seems overly progressive. The court has had ample opportunity to study the long term effects of abrogation in other states and to seek the least disruptive way to bring about the change. Unlike states which have totally abrogated the immunity, the Ohio court has wisely left a "loophole" exception. The exception provides that the state will retain immunity if a statute so provides, thus allowing the legislature to protect certain areas especially vulnerable to crippling judgments.

Judging from the overwhelming trend in the United States toward the abrogation of sovereign immunity,[71] states can apparently afford liability for their own torts as long as their liability is thoughtfully limited by their legislatures and budgeted for by the cities' financial planners.[72] Unfortunately for Ohio, the Ohio Supreme Court decided to apply its new holding retroactively instead of prospectively.[73] This allowed no opportunity for the legislature to protect appropriate areas, thus presenting political subdivisions and municipalities, perpetually short on cash, with a significant unplanned expense.

Predictably, some Ohio municipal corporations and political subdivisions are now in financial mayhem. The City of Dayton paid an average of $50,000 to $60,000 per year in claims before the 1982 *Haverlack* decision and $3 million since the decision.[74] The city has $400 million in liability claims against it presently outstanding.[75] To make a bad situation worse, the city's insurer has cancelled its coverage.[76] In July of 1983, the City of Columbus, Ohio was facing 2,500 lawsuits with claims totalling over $160 million.[77] Enghauser Manufacturing Company, the successful plaintiff in *Enghauser Manufactur-*

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[70]*See* Celebrezze & Hill, *The Rise of Sovereign Immunity in Ohio,* 32 CLEVE. ST. L. REV. 367, 379 n. 75 (1983) [hereinafter cited as Celebrezze & Hill]. Delaware, South Carolina, Utah, and South Dakota have retained general immunity for government acts.

For example, in South Dakota, recent cases by that state's supreme court hint that the future of general sovereign immunity may be tenuous. *See Note, An Analysis of South Dakota's Sovereign Immunity Law: Governmental v. Official Immunity,* 28 S.D.L. REV. 317 (1983) for a discussion of three recent cases that appear to eliminate official immunity while retaining sovereign immunity.

In Utah, a 1965 Act of the Utah legislature made that state one of the first to restrict the immunity of its government by legislative action. *See* Utah Governmental Immunity Act, UTAH CODE ANN. §§63-30-1 to -34 (Supp. 1965). *See also* Note, *The Utah Governmental Immunity Act: An Analysis,* 1967 UTAH L. REV. 120. However, the Act retains general immunity for the state and simply specifies areas where Utah consents to be sued.

[71]*See* Celebrezze & Hill, *supra* note 68, at 379.

[72]Akron Beacon Journal, March 6, 1985, at C4, col. 1. *See also, supra* note 65.

[73]*See Enghauser,* 6 Ohio St. 3d at 37, 451 N.E.2d at 234 (Holmes, J., dissenting).

[74]Akron Beacon Journal, March 6, 1985, at C4, col. 2.

[75]*Id.*

[76]Many insurance carriers are cancelling long term policies or significantly increasing premiums. In December of 1984, the Republican Franklin Insurance Company of Columbus, Ohio, cancelled policies held by four Akron area school districts. Additionally, the cost of Summit County's liability insurance tripled in 1985 from $14,000 to $42,000. Akron Beacon Journal, April 25, 1985, at D1, col. 1.

[77]*See* Note, *Can Municipal Immunity in Ohio Be Resurrected From the Sewers After Haverlack v. Portage Homes, Inc.?,* 13 CAP. L. REV. 41, 54 (1984) [hereinafter cited as Municipal Immunity].

ing Co. v. Eriksson Engineering Ltd., requested the Clerk of Warren County to issue a writ of execution to seize $134,904 of the city of Lebanon's assets to satisfy the judgment in the case.[78] Clearly this situation is making the already difficult task of governing even more onerous.

LEGISLATIVE RESPONSE TO THE ABROGATION OF SOVEREIGN IMMUNITY

In response to this urgent need, in 1985[79] the Ohio House passed legislation limiting the liability of the State and its subdivisions.[80]

Major features of the bill are the reinstatement of the governmental-proprietary dichotomy[81] and a cap on the amount recoverable. Successful plaintiffs would be limited to $250,000 per individual to a maximum of $1 million per accident.[82] Other features include a two year statute of limitations,[83] a denial of punitive damages,[84] and a prohibition of subrogation actions against the state by private insurers.[85] Furthermore, no state owned property would be subject to garnishment or attachment.[86]

The bill is presently under consideration[87] in the Ohio Senate Judiciary

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[78] *Id.* at 62.

[79] It seems apparent that the court's abrogation of immunity was made with the expectation of and desire for a legislative response and refinement. It is almost as if the court tried to force the legislature's hand by setting into motion events that required immediate statutory solutions.

In *Enghauser*, Justice Holmes stated, "This court's decisions in the area of governmental immunity cry out for a legislative response. I, for one, hopefully anticipate that the General Assembly will proceed as have the legislative bodies in other states, and enact responsive laws." 6 Ohio St. 3d at 38, 451 N.E.2d at 234 (Holmes J., dissenting).

Justice Brown's dissent in *Thacker* similarly suggested that the legislature "spell out the types of governmental acts where immunity is provided in a logical scheme." Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 78, 298 N.E.2d 542, 559 (1973) (Brown, J., dissenting).

[80] H.B. No. 176, 116th Ohio General Assembly, Regular Session (1985-86).

[81] *Id.* at 12. The bill defines a "governmental function" as:

> (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
> (b) A function that promotes or preserves the public peace, health, safety, or welfare, that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons, and that is not specified in division (f)(2) of this section as a proprietary function.

The bill cites schools, libraries, roads, judicial decisions, traffic regulation, sewers, and building inspections as areas that are "governmental."

A proprietary function is defined as one that "promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons." Examples given in the bill include hospitals, public cemetaries, zoos, swimming pools, parks, utilities, auditoriums, stadiums, and parking decks.

[82] *Id.* at 20.

[83] *Id.* at 19.

[84] *Id.* at 20.

[85] *Id.*

[86] *Id.*

[87] Telephone conversation with Laura Chambers, staff member of Legislative Information. For more current information call 1-800-282-0253.

Committee.[88] The bill has already been approved by the Ohio House.[89] The main proponent of the bill is the Ohio Municipal League,[90] which had filed *amicus curiae* briefs urging retention of sovereign immunity in some of the cases discussed previously in this casenote.[91] The primary opponent of the bill is expected to be the Ohio Academy of Trial Lawyers.[92] To date, the Ohio Bar Association has expressed no opinion on the bill.[93]

As the smoke clears, it appears that the Ohio Supreme Court was well advised by Justices Lochner and Holmes to make only prospective changes in the state's immunity.[94] Hopefully, the remedial actions by the Ohio Legislature will calm the financial waves caused by the court's method of abrogation.[95]

MARREK'S APPLICATION OF THE NEW STANDARD IS AN IMPROVEMENT

While retroactive application of the Ohio Supreme Court's abrogation may prove to be harmful, the substantive change in the law should be an improvement. *Marrek's* application of the new standard defined in *Enghauser* will probably be easier to apply than the governmental-proprietary distinction it replaced.

Although the old standard had been entrenched in Ohio for a long time[96] and had been adopted by many jurisdictions,[97] it proved to be a quagmire for

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[88]Two other bills seeking partial reinstatement of sovereign immunity are presently being considered by the Ohio Legislature.

Both are similar to the House Bill No. 176 discussed previously in the text of this note. The first, Senate Bill No. 106, is nearly identical to the House Bill except for its treatment of wrongful death actions and for the maximum amount recoverable per accident. House Bill No. 176 limits all recovery, including wrongful death actions to $250,000 per individual to a maximum of $1 million per accident. On the other hand, Senate Bill No. 106 limits recovery to $250,000 per individual with a maximum of $500,000 per accident. However, Senate Bill No. 106 specifically excludes wrongful death actions from the bill, implying that recovery in a wrongful death action would have no statutory limit.

The second Senate Bill, Senate Bill No. 79, is nearly identical to Senate Bill No. 106, except that the former also establishes a joint underwriting association to help Ohio municipalities obtain insurance to pay adverse judgments. The underwriting association would be called the "Political Subdivision Civil Liability Joint Underwriting Association" and every insurer who was authorized by the state to write liability insurance would be required to belong. The bill provides that any political subdivision of the state is entitled to apply to the underwriters association. If the subdivision meets some minimum standards, the underwriting association is required to issue an insurance policy with a term of one year.

[89]Akron Beacon Journal, April 25, 1985, at D1, col. 1. The Bill was passed by a vote of 78 to 15 on April 24, 1985.

[90]Akron Beacon Journal, March 6, 1985, at C4, col. 1.

[91]*See, e.g., Mathis,* 9 Ohio St. 3d 199, 459 N.E.2d 877 (1984).

[92]Akron Beacon Journal, March 6, 1985, at C4, col. 3.

[93]*Id.*

[94]*See supra* notes 65 and 72 and accompanying text.

[95]*See* Note, *Municipal Torts: The Rule Is Liability, The Exception Is Immunity — Enghauser Engineering Ltd.*, 9 DAYTON L REV. 327, 334 (1984) for a good discussion of how the California legislature reacted to California's judicial abrogation of sovereign immunity in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). For a state by state analysis of typical immunity statutes, *See Municipal Immunity, supra* note 77, at 54.

[96]Bailey v. City of New York, 3 Hill 531 (N.Y. 1842).

[97]*See supra* note 22.

attorneys and judges alike.[98] Too many times the injurious act had governmental elements and proprietary elements, leaving the beleaguered justices to seek firm footing in a sea of conflicting precedent.[99]

The new standard adopted in *Enghauser* clearly spells out the immunized governmental actions (legislative, judicial, and executive) in a comfortably explicit way. The new standard clarifies and elaborates on the type of governmental actions which will be given immunity. "Planning functions" leading to a "basic policy decisions" characterized by a "high degree of official judgment or discretion" are the acts the court will find immune. This differs somewhat from the old standard in that the new standard seems to require that the negligent act be made at a high level in order to be given immunity. Lower level or operational mistakes will be actionable. Furthermore, the new standard clearly points out that the negligent performance of an act will be actionable while the negligent plan will be immune.[100]

CONCLUSION

Despite the purportedly clear abrogation of sovereign immunity in Ohio, there remain several issues yet to be determined by future case law. How high a degree of official judgment is required before the act is immune? At what level must the negligence occur to be actionable? How broad and far-reaching must a decision be before it is classified as a "policy" decision? Notwithstanding these areas of uncertainty, the body of future case law should prove this new standard to be significantly easier to apply than the former governmental-proprietary function dichotomy.

While the court has retired an uncomely relic of legal history, its abrogation of the doctrine of sovereign immunity with retroactive effect has had short term detrimental effects on the unprepared municipalities and political subdivisions. In the process, the court adopted a new rule of governmental liablity that rendered moot over fifty years of legal struggles with the governmental-proprietary function distinction. While these changes were not easily accommodated, they are workable and should eventually benefit the Ohio legal community as well as Ohio's citizens.

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[98] PROSSER, *supra* note 21, at 131, at 979.

[99] Bernitsky v. United States, 620 F.2d 948, 951 (3d Cir. 1980), *cert. denied*, 449 U.S. 870 (1980).

[100] *Enghauser*, 6 Ohio St. 3d at 36, 451 N.E.2d at 233.