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Torts - Sovereign Immunity - The Government's Liability for Tortious Conduct Arising from Proprietary Functions

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TORTS—SOVEREIGN IMMUNITY—THE GOVERNMENT'S LIABILITY FOR TORTIOUS CONDUCT ARISING FROM PROPRIETARY FUNCTIONS

Wayne C. Carroll was injured in a drilling operation accident on November 19, 1964. He was rushed to the University of Kansas Medical Center where a team of doctors replanted his partially severed left arm. In the early morning hours of November 27, 1964, while in a drugged and confused state, the patient, who had been progressing satisfactorily after his operation, ripped off the bandages and splints from his arm The night resident surgeon rewrapped the arm and replaced the splints. Approximately forty-eight hours later, on November 29, 1964, the patient was discovered sitting on the edge of his bed, apparently having again ripped off all the bandages and reopened the wound. The damage was so extensive that the arm had to be amputated.

Carroll was a private patient occupying a single room and paying the full rate. The University of Kansas Medical Center, under the control of the Board of Regents of the State of Kansas, was a general hospital offering a highly and specially trained service to the public. The patient's physician was a staff doctor of the hospital, and while he did treat private patients at the hospital, he was, at all times in his treatment of Carroll, acting as the agent, servant and employee of the University Medical Center.

Carroll filed an action against both the doctor treating him and the Board of Regents of the State of Kansas seeking damages of $150,000, for the defendant's negligence. The District Court of Wyandotte County sustained the defendant's motion to dismiss the action. The Supreme Court of Kansas reversed the dismissal of the plaintiff's action, and in so doing, held that the doctrine of sovereign immunity for torts was abolished with respect to the proprietary functions conducted by the state or its governmental agencies. *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969).

This note will discuss the varying theories of immunity from liability prevelant in American jurisprudence with regard to torts committed by a governmental unit. In order to accomplish this, it will be necessary to draw distinctions between the functions of the governmental units, trace the origin of the theories, and attempt to place these theories in the perspective of today's status of the law.

The doctrine of governmental immunity from tort liability stems from the English common law notion that the "King can do no wrong."[1] The King's Bench in 1788 in *Russell v. Men of Devon*[2] held that an unincorporated town was not liable for its torts. Because the action was in effect brought against the citizens of the town in their individual capacity, the court held that recovery could not be had since there was no common fund from which damages could be awarded—the plaintiff was, in a sense, suing himself, and could not recover. The *Russell* case serving as a guideline, this principle was introduced into American jurisprudence in 1812[3] by the Massachusetts courts. The distinguishing characteristic in this case is that it was an *unincorporated* governmental unit that was held immune from tort liability.

The concept of immunity from tort did not originate from the idea of sovereign immunity, but it arose in connection with cases dealing with the liability of local government. While this rule—immunity from tort for governmental units—has continued to be followed by the majority of courts in the United States, England has meanwhile repudiated the theory. The concept of liability for torts while engaged in a proprietary function, has

1. The court in the *Carroll* case was not of the opinion that this theory could be traced to this medieval concept. They, in effect, make the observation that the American Revolution was fought to eradicate all rights of the sovereign.

2. 100 Eng. Rep. 359 (K.B. 1788). This was an action upon the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the wagon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county. The court held that the action would note lie because: (a) To permit it would lead to an "infinity of actions;" (b) there was no precedent for attempting such a suit; (c) only the legislature should impose liability of this kind; (d) even if defendants are to be considered a corporation or quasi-corporation, there is no fund out of which to satisfy the claim; (e) neither law nor reason supports the action; (f) there is a strong presumption that what has never been done cannot be done; and (g) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is "that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Spanel v. Mounds View School Dist., 264 Minn. 279, 281 (1962).

3. Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63 (1812). The court denied recovery to plaintiff for damage to his horse, caused by a fall on a defective city bridge. The court stated: "*(q)uasi* corporations, created by the legislature for purposes of public policy are subject by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute." *Id.* at 249, 6 Am. Dec. at 63. The court in Hargrave v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) takes notice of the fact that Russell v. Men of Devon was decided twelve years after our Declaration of Independence, a document which severed all our ties with the "King." Mr. Justice Traynor came to the same conclusion as he observed: "Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's court was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the

been adhered to since 1890 in the United States.[4] Through the process of legal evolution, the American courts have found themselves in the paradoxical situation of adhering to the tenents of a doctrine which has been refuted by the source from which it was derived.[5]

In attempting to free themselves from the harshness of the governmental immunity doctrine, American courts have drawn a distinction between "governmental" and "proprietary" functions of the government. In essence, this distinction can be reduced to the difference between immunity and liability, as stated in *Stadler v. Curtis Gas, Inc.*:

> [t]he rationale behind the "governmental-proprietary" dichotomy is that when a public entity is involved in a governmental function, it is immune from tort liability, but when involved in a proprietary function, it loses the cloak of immunity. . . . The terms "public, sovereign, political, state, mandatory, essential, discretionary, legislative" have been used interchangeably with governmental. . . . "private, non-governmental, nonessential" are interchangeable with proprietary.[6]

The court recognizes, in the above quote, the dual function of a government, its primary function being inherent and deriving its authority from the people, and its secondary or extra-governmental activities being undertaken on its own behalf, *e.g.*, T.V.A.[7]

The immunity of officials engaged in a governmental function is premised on the dictates of public policy that officials of all branches of government should remain immune from liability in the performance of their duties imposed by law.[8] A parallel can, at this point, be drawn with the Federal Tort Claims Act,[9] which denies liability for torts committed by

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mysteries of legal evolution." Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924).

4. Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 215, 359 P.2d 457, 459 (1961).

5. Crisp v. Thomas, 63 L.T.N.S. 756 (1890). The court held that an English school district is subject to suit in tort for personal injuries on the same basis as a private individual or corporation. Tort claims against the Crown were expressly authorized by the Crown Proceedings Act of 1947, 10 & 11 Geo. 6, c. 44.

6. Justice McCown concurring in Stadler v. Curtis Gas Inc., 182 Neb. 6, 21, 151 N.W.2d 915, 923 (1967).

7. *See* Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

8. Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926). This court placed immunity of government officials in all branches of government on grounds of public policy. Other cases which have expanded this holding include Smith v. O'Brien, 88 F.2d 769 (1937); Lang v. Wood, 67 App. D.C. 287, 92 F.2d 211 (1937); and Mellon v. Brewer, 57 App. D.C. 126, 18 F.2d 168 (1927). The basis for so holding is that the basic policy decisions of government are non-tortious.

9. 28 U.S.C.A. § 2680 (1964), withholding liability of the United States for damage arising out of assault, battery, false imprisonment, false arrest, abuse of process, libel, slander, misrepresentation, deceit and performance or failure to per-

any agent engaged in a discretionary capacity of his governmental duties. This proposition as applied to all levels of government can seek additional support in agency law.[10] Public officers have no authority to bind the sovereign—in the case of American democracy, the whole people—except as is given by the specific constitutional or statutory provisons creating their offices.[11] To hold officials liable for performing their delegated duties, those of carrying on the ends of government, would be inconsistent with the public interest. The government is free to engage in many activities that might result in harm to others as long as such activities are not tortious. "It is not a tort for government to govern."[12] Under the American system of government, the legal sovereignty rests in the people, and the people in the exercise of their governmental power, working through the states, do not wish to be sued and harassed in carrying out their governmental functions.[13] Where the exercise of these functions encroach upon or are in competition with the private sector, then the "wish" for immunity should yield to those laws that dictate the responsibilities and liabilities that regulate that private sector. It is at this point of time that the government is said to be engaged in a "proprietary" function.

The government engages in a proprietary enterprise when it "embarks on an enterprise which is commercial in character or which is usually carried on by private individuals or private companies."[14] The test relied upon the court in the *Carroll* case was:

> [w]hen there is an activity or function in a private or proprietary capacity for the special or *immediate profit, benefit, or advantage of the city or town, or people who compose it,* rather than for the public at large, then the city or town is in competition with private enterprise. . . .[15]

The competitive aspect of the particular activity seems to best crystallize the distinction: private enterprise cannot compete with a true governmental activity; it is in the reverse situation, government competing with private enterprise, where the proprietary function appears.

If the state is engaged in a proprietary function, as determined by

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form a discretionary function or duty, whether or not the discretionary power was abused or not.

10. Doctrine of *Respondeat Superior,* does not apply in relations between state officers and their subordinates, unless the superior participates or the directs act. People v. Standard Accident Insurance Co., 42 Cal. App. 2d 409, 108 P.2d 923 (1941).

11. Brown v. City of Craig, 350 Mo. 836, 841, 168 S.W.2d 1080, 1082 (1943).

12. Brief of Appellant at 15.

13. Carroll v. Kittle, 203 Kan. 841, 847, 457 P.2d 21, 27 (1969).

14. *Id.* at 849, 457 P.2d at 28, quoting from *Stadler, supra* note 6.

15. *Id.* at 850, 457 P.2d at 28, quoting from Stolp v. Arkansas City, 180 Kan. 197, 202, 303 P.2d 123, 127 (1956).

application of the court approved test, it is inconsistent to restrict the state's liability via the doctrine of immunity, when other private participants, engaged in the same operations of business as is the state, are held strictly to the tort principles which govern the field. Nevertheless, the doctrine of sovereign immunity has historically shielded not only the governmental functions of the state, but also the proprietary functions. In order to fully appreciate the adherence to the total immunity concept, it is necessary to examine the arguments and rationale in support of this doctrine.

The earliest and most often employed argument for the continuation of total immunity doctrine is that there is no fund designated[16] or available out of which claims against the state can be paid. The state consistently contends that any and all funds to which it has access have been earmarked and collected through taxation for a specific and defined purpose.[17] Justice Davis, dissenting in *Molitor v. Kaneland Community Unit Dist.*, stated this position as follows:

> The reason, as often expressed, is one of public policy, to protect public funds and public property. "Taxes are raised for certain specific governmental purposes; and if they could be diverted to the payment of damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed."[18]

Impairment of public funds is concededly an important consideration in the operation of the governmental body, but liability insurance can today remove the threat of depletion of the public coffers.[19] It is this same type of insurance that all members of the private sector employ as protection and to use the words of Justice Davis, while some business men have been "impaired," few, if any, have been "totally destroyed" by resorting to these less than drastic means. This liability insurance could provide protection to the state and its agencies at a moderate cost which could be budgeted in advance.[20] Private concerns engaged in enterprises with greater risk exposure than that to which the state would be subject, have had to bear the cost of insurance without any noticeable loss to their operational suc-

16. This theory was the basis for denying recovery in Russell v. County of Devon, *supra* note 2, which most American courts have adhered to as precedent.

17. Brown v. City of Craig, *supra* note 9.

18. 18 Ill. 2d 11, 32, 163 N.E.2d 89, 100 (1959) quoting 18 McQUILLIN, § 53.24.

19. For a discussion of plans available to governmental agencies *see* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, DUKE L.J. 588 (1959).

20. Muskopf v. Corning Hospital District, *supra* note 4 at 216, 359 P.2d at 460; Molitor v. Kaneland Community Unit Dist., *supra* note 18 at 18, 163 N.E.2d at 96; Hargrove v. City of Cocoa Beach, *supra* note 3 at 133; Spanel v. Mounds View School Dist., *supra* note 2 at 290, 118 N.W.2d at 804.

cess and there is no reason to surmise that the state could not do likewise.[21] The underlying rationale is founded on the exclusive nature of the funds entrusted to government in the promotion of its operations; liability payments for negligence would evidently deter this end. The adherence to this doctrine of "protection of the public funds" is in derogation of the fundamental concept in the common law of torts; namely, that liability follows negligence.[22] Liability is the general rule; immunity is the exception that can lead to unconscionable results.[23] This situation concerned the Minnesota court in *Spanel v. Mounds View School District No. 621* which abrogated the immunity doctrine on grounds of its inequality and outdatedness. In the parlance of the court:

> [t]he 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 justly belongs.*[24]

By continuing to allow the government to remain immune from tort liability, the courts have, in effect, persecuted the injured citizen, which the government is charged with protecting—certainly a contradiction in application.

The courts which have abolished the doctrine of governmental immunity with respect to proprietary functions have been cognizant of the "protection of the public funds" theory by granting only prospective abrogation of the immunity doctrine.[25] While allowing recovery in the case before the court and postponing application to future cases, the courts have allowed the legislature ample time to make provisions so as to alleviate the "hardship to those who have relied upon prior decisions of the court."[26] A ruling of this nature is essentially a mandate to the legislature to either establish immunity by statute,[27] or acquire insurance so as to

21. Williams v. City of Detroit, 364 Mich. 231, 259, 111 N.W.2d 1, 24 (1961).
22. *Supra* note 12, at 24.
23. Muskopf v. Corning Hospital District, *supra* note 4 at 217, 359 P.2d at 462; Molitor v. Kaneland Community Unit Dist., *supra* note 18 at 14, 163 N.E.2d at 93; Noel v. Menninger Foundation, 175 Kan. 751, 762, 267 P.2d 934, 942 (1954).
24. Spanel v. Mounds View School Dist., *supra* note 20 at 288, 118 N.W.2d at 801, quoting from Barber v. City of Sante Fe, 47 N.M. 85, 88, 136 P.2d 480, 482 (1943) (emphasis added).
25. Carroll v. Kittle, *supra* note 13 at 850, 457 P.2d at 29; Molitor v. Kaneland Community Unit Dist., *supra* note 18; Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
26. Carroll v. Kittle, *supra* note 13 at 850, 457 P.2d at 29.
27. Illinois, after the *Molitor* case, passed a number of such statutes limiting

afford protection for their negligent acts. The occurrence of this type of decision, the prospective application, leads us into the question of the proper body to abrogate the immunity doctrine—the judiciary or the state legislature?

Most courts, when confronted with the problem of holding a governmental unit liable for its tortious conduct, have avoided the issue by claiming lack of jurisdiction because the state legislature is the proper body to abrogate or amend the existing substantive law.[28] The most emphatic statement of this judicial dodge was enunciated by the Florida Court of Appeals when it ruled that:

> [a] proper administration of justice invites respect for the admonition of Alexander Hamilton, who once wrote that courts "must declare the sense of the law and if they should be disposed to exercise *will* instead of *judgment,* the consequences would equally be the substitution of their pleasure to that of the legislative body." If, therefore, a change in the long established rule of immunity prevailing in this State is to be made, it must come . . . by the constitutional amendment, or by enactment of appropriate legislation, or both.[29]

Contrary to the view that legislative action is necessary in the abolition of governmental immunity, other courts have reasoned "that they should be alive to the demands of justice and . . . see no necessity for insisting on legislative action in a matter *which the courts themselves originated.*"[30]

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liability to certain amounts and in other cases allowed immunity to prevail. For a general discussion of the approach in Illinois *see* Baum, *Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act,* 54 NW. U. L. REV. 588 (1959); also, Comment, *Governmental Immunity in Illinois: The Molitor Decision and Its Legislative Reaction,* 9 DePaul L. Rev. 39 (1959).

28. McCoy v. Board of Regents, 196 Kan. 506, 413 P.2d 73 (1966), reversed by the *Carroll* case; Boyer v. Iowa High School Athletic Association, 256 Iowa 337, 127 N.W.2d 606 (1964); Urow v. District of Columbia, 316 F.2d 351 (Cir. 1963); Clark v. Ruidoso-Hondo Valley Hospital, 72 N.M. 9, 380 P.2d 168 (1963); McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959); Buck v. McLean, 115 So. 2d 764 (Fla. App. 1959). The rationale of those courts which have refused to take the initiative is best expressed by Chief Justice Price, dissenting in *Carroll,* he states: "This decision is another example of the wave of 'judicial activism' that has been sweeping this country in recent years. . . ." The doctrine—for good or for bad —has been recognized and applied since statehood. As such, it has become so deeply imbedded as to be the 'public policy' of this state. If the public policy of this state is to be changed I think that it should be accomplished by the people of this state acting through their duly elected legislature—and not by this court. The power of this court is enormous, but about the only check upon the exercise of that power is our own sense of self-restraint."

29. Buck v. McLean, *supra* note 28, at 768.

30. Hargrove v. City of Cocoa Beach, *supra* note 3, at 132. Justice Pomeroy, dissenting in Laughner v. Allegheny County, 261 A.2d 607 (1970), adheres to the philosophy that the courts can change the existing law, if the need arises. He states: "Growth and flexibility no less than stability and predictability are essential to any

The question of whether the action is proper subject matter for the legislature has posed a problem to those courts which have taken it upon themselves to abolish the doctrine.[31] A reading of the opinions will reveal such hesitancies as:

> [w]e would suggest that the legislature is in a much better position than this court to restrict the application of the doctrine . . . .[32]

> [w]e readily concede that the flexibility of the legislative process—which is denied the judiciary—makes the latter (legislative) avenue of approach more desirable.[33]

While attempting to evade a judicial reversal of the doctrine of soverign immunity, but evidencing interest in the implications of such adherence to the concept, some courts have found refuge in the dictates of *stare decisis.* By adherence to previous rulings handed down by the same tribunals and paying service to their inception in the public policy of the state,[34] the courts have respected the dictates of *stare decisis.* To regard *stare decisis* as a "principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable,"[35] should be the function of the court. Circumstances change with the times and the decisions of the court must meet those new conditions. "The law is not static, but consists of fundamental principles and reasons and the substance of rules as illustrated by the reasons on which they are based."[36] It is the duty of the courts to correspond the changing concepts of justice and rights to the rules which they dictate; adherence to precedent, when the conditions as they presently exist no longer relate, is employing *stare decisis* as a rule rather than a policy.[37] With the emergence of the state as an active parti-

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living legal system, and the courts are equally charged with preserving both elements and with accommodating their occasionally competing demands."

31. Carroll v. Kittle, *supra* note 13; Molitor v. Kaneland Community Unit Dist., *supra* note 18; Spanel v. Mounds View School Dist., *supra* note 20; Muskopf v. Corning Hospital Dist., *supra* note 4; Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); Colorado Racing Commission v. Brush Racing Association, 136 Colo. 279, 316 P.2d 582 (1957); Kamau v. Hawaii County, 41 Ha. 527 (1957).

32. Carroll v. Kittle, *supra* note 13 at 848, 457 P.2d at 27.

33. Spanel v. Mounds View School Dist., *supra* note 20, at 803.

34. Nelson v. Maine Turnpike Authority, 157 Me. 174, 170 A.2d 687 (1961).

35. Kamau v. Hawaii County, *supra* note 31, at 550.

36. Kamau v. Hawaii County, *supra* note 31, at 552.

37. Molitor v. Kaneland Community Unit Dist., *supra* note 18. *See* Littlefield, *Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity*, 9 ST. LOUIS U.L.J. 56. The court in *Carroll* heeded this duty when it failed to follow the dictates of *stare decisis.* In refusing to apply precedent, the court stated: "It is suggested that we are violating the rule of *stare decisis.* We are insofar as we are eliminating discrimination between certain governmental agencies. Although we have great respect for the rule and recognize its desirability from the stand-point of certainty and stability, it does not follow that we are required to perpetuate a doctrine that is no longer applicable because of changes in

cipant in the competitive market of the private sector, an occurrence that the early courts, in laying down the general principles of immunity from tort liability of the sovereign in the exercise of its functions, did not experience, the law as it relates to a government's tort liability must change. In response to the judiciary's refusal to act, either because of intrusion into the legislature's sphere or due to *stare decisis*, the Florida court offers a constitutional argument, stating:

> If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed. . . .[38]

Does reliance on decisions involving factual situations not applicable to the present concept of justice, in effect, close the courts for the redress of grievances?[39] Is dismissal of an injured party's cause of action, when the injury was caused by the state operating in a proprietary function, an invidious discrimination" violative of the Equal Protection Clause[40] of the United States Constitution? Is denial of recovery an infringement of the Due Process Clause?[41] In short, is strict adherence to outmoded legal concepts implicitly protected by *stare decisis*, in conflict with explicit, fundamental guarantees of the Constitution? The courts, if the trend in the majority of states prevails, will find themselves faced with these constitutional issues—issues which they will have to answer.

The states that have abrogated the doctrine have done so without relying upon the constitutional arguments. Most states have disposed of the doctrine on the grounds that it "is mistaken and unjust,"[42] "anachoristic [*sic*] not only to our system of justice but to our traditional concepts of

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economic and social conditions. The rule should not be followed to such an extent that errors be perpetuated or grievous wrongs result. We are of the opinion that when reason for a rule no longer exists, the rule itself should be abandoned." Carroll v. Kittle, *supra* note 13 at 847, 457 P.2d at 27-28.

38. Hargrove v. City of Cocoa Beach, *supra* note 20, at 132.

39. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and *to petition the Government for a redress of grievances.*" (Emphasis added)

40. U.S. CONST. amend. XIV, § 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added)

41. U.S. CONST. amend. XIV, § 1.

42. Muskopf v. Corning Hospital Dist., *supra* note 4, at 213; Molitor v. Kaneland Community Unit Dist., *supra* note 18, at 25.

democratic government"[43] or no "longer applicable because of changes in economic and social conditions."[44] In a separate opinion in *Williams v. City of Detroit*, Justice Black comes right to the point as he observes:

> Little time need be spent in determining whether the strict doctrine of immunity from tort liability should be repudiated. All this is old straw. The question is not "Should we?"; it is "How may the body be interred judicially with nondiscriminatory last rites?"[45]

It is this view, that the doctrine in respect to proprietary activities is no longer justified, that seems to be gaining momentum and support. Eight states since 1957 have abrogated the doctrine by judicial decree.[46] Kansas in the *Carroll* case reversed the position they had affirmed as recently as 1966.[47]

What the courts which have discarded the doctrine are recognizing is the dual character of the governmental unit. On the one hand the tradition function of government in policy and decision-making[48] is carried on and duly protected by immunity and on the other is the participation of government agencies in competition in the public marketplace. It is the latter role that these courts have exposed to the hazards of the marketplace, that is liability for wrongdoing. It is this duality in its most pronounced form that can no longer be cloaked in the expensive garment of sovereign immunity. There is a constitutional line between the "state as government and the state as a trader."[49] When that line is transgressed, the cloak should be dropped and the state should be held to the same liabilities

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43. Hargrove v. City of Cocoa Beach, *supra* note 20, at 132.
44. Carroll v. Kittle, *supra* note 13, *Syllabus of the Court* 5.
45. Williams v. City of Detroit, *supra* note 21, at 241.
46. Arizona (1962) Hernandez v. County of Yuma, 91 Ariz. 35, 369 P.2d 271; Florida (1957) Hargrove v. City of Cocoa Beach, *supra* note 20; Illinois (1959) Molitor v. Kaneland Community School Dist., *supra* note 18; Indiana (1969) Perkins v. State, 251 N.E.2d 30; Kansas (1961) Carroll v. Kittle; Michigan (1961) Williams v. City of Detroit, *supra* note 21; and Minnesota (1962) Spanel v. Mounds View School District, *supra* note 20. For a general discussion of status of the governmental unit with respect to liability for tortious conduct, *see* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919 (1966).
47. McCoy v. Board of Regents, *supra* note 28.
48. Justice Pomeroy, in Laughner v. Allegheny County, *supra* note 30 recongizes this duality and the need for immunity in the "governmental function," he observes: "It should be noted that the abandonment of the rule of immunity as it is presently applied would not put an end to all immunities. 'No one today urges that a judicial remedy be given for all the injuries that may result from mistaken governmental action, or that the courts should decide when governmental action of a political nature is mistaken. The proper sphere of governmental immunity will remain a vital question even under systems which relax the indefensibly broad immunity which still prevails.'" Laughner v. Allegheny County, *supra* note 30, at 619, quoting from Hargrove v. City of Cocoa Beach, *supra* note 20, at 133.
49. New York v. United States, 326 U.S. 572, 578 (1946).

as are those with whom they are competing. As the activities of the state and its agencies are constantly expanding, so should the law which governs and the courts which interpret; the court should be heedful of the words of Justice Cardozo, as he stated:

> Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth.[50]

The Kansas Supreme Court in the *Carroll* decision has heeded the words of Justice Cardozo. By holding the state and its agents liable for torts committed while engaged in a proprietary function, the court applied the law as it should be, rather than as it was. The court has taken previous decisions as a means rather than an end and has, through a proper application of the doctrine of *stare decisis*, allowed the law to grow. Hopefully, other states will take their bearings from the *Carroll* court and allow law to continue on its journey to justice.

James Kemp

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50. CARDOZO, THE GROWTH OF THE LAW 19-20 (1924).