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The Rise and Fall of Sovereign Immunity in Ohio

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Supreme Court of Ohio

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ARTICLES

THE RISE AND FALL OF SOVEREIGN IMMUNITY IN OHIO

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I. INTRODUCTION

The doctrine of sovereign immunity for municipal corporations has long reigned in Ohio. Although the judiciary and the General Assembly have imposed limitations, the doctrine has survived as a principle of Ohio law for over 140 years. However, the Supreme Court of Ohio reversed the trend and abrogated the doctrine in a series of cases in December 1982 and in the spring of the 1983 term. This comment examines the historical development of sovereign immunity for tort claims in Ohio, the limitations subsequently imposed on the immunity and its abrogation in those recent supreme court cases.

II. HISTORICAL DEVELOPMENT

A. *Liability Imposed*

Municipal corporations have not always been protected by sovereign immunity in Ohio. Instead, early cases held municipalities subject to ac-

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tion in tort as a matter of basic justice.

Goodloe v. City of Cincinnati[1] is one example of liability imposed on municipalities. That case involved the city's alteration of the grade of a street and the resulting damage to abutting property.[2] The Supreme Court of Ohio reasoned:

> When the corporation of a town grades the streets, the object is the benefit of the whole town. If an individual is injured, it is right he should have redress against all upon whose account the injury was perpetrated. There is no justice in sending him to seek redress from an irresponsible agent. There is no propriety in compelling the injured party to look for compensation to the mere agent, who acted in good faith, according to the directions of his employers. And, when the agent is made responsible, leave him, for indemnity, to the discretion of the corporation.
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> All corporations act by agencies and those agencies, are composed of men who may be influenced by reprehensible motives, or tempted to do acts not warranted by law. In this case, the act is charged in the declaration to have been illegal and malicious. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is the plain dictate of justice, and we see no technical rule of law that forbids us to act upon it.[3]

Another early property damage case, *Rhodes v. City of Cleveland*,[4] involved the "cutting [of] ditches and water-courses in such a manner as to cause the water to overflow and wash away the plaintiff's land."[5] The court believed "that justice and good morals require that a corporation should repair a consequential injury, which ensues from the exercise of its functions."[6] Continuing, the court held that "corporations are liable like individuals, for injuries done, although the act was not beyond their lawful powers."[7]

Similarly, the issue presented in *McCombs v. Town Council of Akron*[8] was "whether a municipal corporation can be made liable for an injury resulting to the property of another, by an act of such corporation, strictly within the scope of its corporate authority, and unattended by

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[1] 4 Ohio 500 (1831).

[2] *Id.* at 501.

[3] *Id.* at 514 (footnote omitted); *see also* Smith v. City of Cincinnati, 4 Ohio 514 (1831) (applying the same principle as *Goodloe*, except that the act complained of was not charged as malicious).

[4] 10 Ohio 159 (1840).

[5] *Id.* at 160.

[6] *Id.* at 161.

[7] *Id.* at 162.

[8] 15 Ohio 474 (1846).

any circumstances of negligence or malice."[9] Relying on *Rhodes*, the court concluded that liability could be imposed on the municipality.

Thus, the early Ohio cases imposed liability on municipal corporations in tort claims. A concern for basic justice was the underlying rationale of the courts.

B. The Rise of Sovereign Immunity

Historically, the doctrine of sovereign immunity in England was based on the idea that the "King can do no wrong."[10] After the Revolutionary War, the application of this concept was questioned in the United States. However, in some instances sovereignty resided with the individual states, and in others it rested in the federal government.[11]

The doctrine of sovereign immunity was first applied in Ohio in 1840. In *State v. Franklin Bank*,[12] the court did not discuss its reasons and merely concluded that a judgment could not be rendered against the state.[13] Two years later, the concept again appeared in *Miers v. Zanesville & Maysville Turnpike Co.*[14] The court stated:

> To so much of the bill as assumes to compel the state to pay arrearages of its subscription, it is plain that no answer need be made; it is enough to say the state is not, in fact, a party, and is not capable of being made a party defendant.[15]

In summarily stating its conclusions in these cases, the court did not discuss the rationale for changing the law and adopting immunity in actions against the state.[16] No constitutional provision or act of the General Assembly was cited as the basis for protecting the state. Thus, the concept was judicially created with no explanation. Subsequent cases have recognized that it is a judicially-created doctrine.[17]

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[9] *Id.* at 480.

[10] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970 (4th ed. 1971).

[11] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419 (1793).

[12] 10 Ohio 91 (1840).

[13] *Id.* at 100.

[14] 11 Ohio 273 (1842).

[15] *Id.* at 274.

[16] Although not stated in these cases, an English case in 1788 has been credited with setting forth the rationale behind governmental immunity in tort cases. In Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Rep. 359 (1788), the immunity was based upon 1) the fact that there was no fund from which the judgment could be paid because the group was unincorporated, and 2) "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng. Rep. at 362. It is agreed that the idea that immunity of the state could be extended to a municipal corporation originated in this case. However, Dayton v. Pease, 4 Ohio St. 80 (1854), which extended the state's immunity to municipalities, does not mention Russell v. Men of Devon. See *infra* text accompanying note 71, for Ohio's current view of these justifications for such immunity.

[17] *See* Thacker v. Board of Trustees of Ohio State Univ., 35 Ohio St. 2d 49, 67-68, 298

C. Governmental-Proprietary Distinction

Both *Franklin Bank* and *Meirs*, which applied the concept later known as sovereign immunity, concerned the liability of the state. About a decade later, the doctrine was expanded to include municipal corporations, in *Dayton v. Pease*.[18] The sovereign immunity of the state was extended to municipal corporations as subdivisions of the state. The court concluded that a municipal corporation could not be liable for the exercise of public, judicial or legislative powers.

In addition to extending the reach of sovereign immunity to municipal corporations, *Dayton* is significant because the court made a distinction between governmental and proprietary functions for tort liability. It stated that a line "divides the exercise of public, or merely judicial or legislative powers, conferred upon a corporation, from those ministerial or executive, and municipal in their nature and character."[19]

In 1861, the court discussed further the immunity based upon the governmental-proprietary distinction. In *Western College of Homeopathic Medicine v. City of Cleveland*,[20] it noted that a difference exists between the powers of a municipal corporation to preserve the peace and protect

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N.E.2d 542, 552 (1973) (Brown, J., dissenting); Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857, 862 (1963) (Gibson, J., concurring); Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375 (1861).

[18] 4 Ohio St. 80 (1854); *see supra* note 16.

[19] 4 Ohio St. at 99.

The court explained the distinction:

> In the exercise of the first class, the corporation can not be made responsible for the misconduct of those intrusted with their execution. It embraces all that description of duties, involving judgment and discretion in their exercise, and resulting in prescribing the rules by which the conduct of individuals is to be regulated, or works, either public or municipal, are to be accomplished. And the immunity from responsibility to individuals is grounded upon the same public policy, that protects the judge or legislator in the exercise of his duties, and is designed to remove discretion. It also includes, so far as the liability of the corporation is concerned, the accomplishment of purposes merely public, devolved upon the corporation as a public officer or agent of the state, with no power to decline their performance. In such cases, the immunity of the state is transferred to its officer or agent, and he only is liable for his own direct misconduct. The power of prescribing rules and regulations is sometimes called judicial and sometimes legislative. It would perhaps be more accurate to say that it partakes of the nature of those powers, and therefore is attended with the same protection to those who exercise it; since it is perfectly clear that the legislature is incompetent to devolve any portion of its legislative power upon a corporation, or take from the judicial tribunals any part of the judicial power of the state, where the constitution has lodged it. . . . In such cases, the corporation exercises a wholly subordinate function, and rather gives detailed application to legislation, than originates new rules; while its by-laws are to be deemed in the nature of compacts between the corporators, rather than acts of legislation.

Id. at 99-100 (citation omitted).

[20] 12 Ohio St. 375 (1861).

persons and property, and those exercised for the improvement of the territory within the limits of the corporation and its adaptation to the purposes of residence or business.[21] Because the municipal corporation represents the state in the first classification of powers, the court concluded that the municipality was similarly immune. However, the court stated that the municipal corporation represented the pecuniary and proprietary interests of individuals in the second classification, and thus the rules of liability of individuals were applied.[22]

Subsequently, in *Wheeler v. City of Cincinnati*,[23] the court held that fire-extinguishment was within the city's public duties and no liability for resulting property damages attached.[24] Similarly, in *Frederick v. City of Columbus*,[25] the city was charged with neglect in the management of fire-extinguishment apparatus.[26] The court held in the syllabus that "[a] municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department, or any of its members."[27]

As indicated by these cases, the governmental-proprietary distinction became ingrained in Ohio law. However, as early as 1885, the court noted that in any given case there is difficulty in determining the classification of the activities of a municipal corporation.[28]

The distinction became less clear in 1919 when the court decided another case concerning the liability of a municipal corporation for the negligent driving of a fire truck. In *Fowler v. City of Cleveland*,[29] the court overruled *Frederick*, holding in the syllabus that:

> [W]here a wrongful act which has caused injury was done by the servants or agents of a municipality in the performance of a purely ministerial act which was the proximate cause of the injury without fault on the part of the injured person *respondeat superior* applies and the municipality is liable.[30]

The court in *Fowler* concluded that the provision of fire protection services was ministerial, unlike the earlier cases of *Frederick* and *Wheeler*,

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[21] *Id.* at 377. The question involved in this case was whether the city of Cleveland was liable for having neglected its duty in not preventing the destruction of the plaintiff's property by a rioting mob.

[22] The governmental-proprietary distinction had been identified earlier by other courts. Bailey v. Mayor of New York, 3 Hill 531 (1842), cited by the court in *Western College*, is frequently referred to as the first case to set forth this distinction.

[23] 19 Ohio St. 19 (1869).

[24] *Id.* at 22.

[25] 58 Ohio St. 538, 51 N.E. 35 (1898).

[26] *Id.* at 545, 51 N.E. at 35.

[27] *Id.* at 538, 51 N.E. at 35.

[28] Robinson v. Greenville, 42 Ohio St. 625, 629 (1885).

[29] 100 Ohio St. 158, 126 N.E. 72 (1919).

[30] *Id.* at 158, 126 N.E. at 72-73.

which classified fire protection as a governmental function. Moreover, the court noted that once the municipality decided to provide fire protection, an exercise of that governmental function, operation of the fire truck, was a ministerial function. It was performed by agents who had no part in the decision or determination of the sovereign will.[31]

After almost sixty-five years during which municipal corporations had enjoyed the protection of sovereign immunity, the court in *Fowler* returned to its earlier position and imposed liability. Although the vote in *Fowler* was decisive,[32] the court once again changed its position and overruled *Fowler* just three years later. In *Aldrich v. City of Youngstown*,[33] the court reinstated the principle that a municipality is not liable for the exercise of its governmental functions.[34] It returned to the position set forth in *Frederick* and *Wheeler*. The court held in the syllabus that:

> 1. The creation and maintenance of a police department by a municipality are done in the exercise of its governmental functions. The performance of an act by an official of such department is not the performance of a ministerial act for which a municipality becomes liable under the maxim, *respondeat superior*.
> 2. A municipal corporation is not, in the absence of a statutory provision, liable in damages to one injured for the negligent acts of its police department, or any of its members. (*Fowler, Admx., v. City of Cleveland*, 100 Ohio St., 158, overruled; *Frederick, Admx., v. City of Columbus*, 58 Ohio St., 5398, and *Wheeler v. City of Cincinnati*, 19 Ohio St., 19, followed and approved.)[35]

The court reasoned that agencies employed by the municipality for the preservation of peace and property merely exercise the delegated power of the state. Thus, the court concluded that the sovereign immunity of the state also applies to the municipality.[36]

The functional approach to governmental immunity for municipal corporations has been adhered to by Ohio courts since *Aldrich* was decided in 1922.[37] The governmental-proprietary dichotomy provides that a mu-

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[31] *Id.* at 166, 126 N.E. at 75.

[32] In *Fowler*, the vote to impose liability was five for the majority, one concurring, and one dissenting.

[33] 106 Ohio St. 342, 140 N.E. 164 (1919).

[34] *Id.* at 342, 140 N.E. at 164.

[35] *Id.*

[36] *Id.* at 346, 140 N.E. at 165.

[37] Professor Prosser described municipal corporations

> as having a rather curious dual character, which has given the courts a great deal of difficulty, and has left the law in a tangle of disagreement and confusion. On the one hand they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other, they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and relations, not shared by the

nicipality is liable for the negligent acts of its agent when performing a proprietary function, but is not liable for performing a governmental function. The rationale for this distinction has been explained by the courts in various ways. For example, in *City of Wooster v. Arbenz*,[38] the court stated:

> In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary.
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> Another familiar test is whether the act is for the common good of all the people of the state, or whether it relates to special corporate benefit or profit. In the former class may be mentioned the police, fire, and health departments, and in the latter class utilities to supply water, light, and public markets.[39]

Thus, the governmental-proprietary distinction reflects the dual character of a municipality. A municipal corporation has been characterized as being both a subdivision of the state and a corporate entity. When functioning as an extension of the state in performing duties for the public benefit, it is protected by an extension of the state's sovereign immunity.[40] Conversely, when operating as a corporation in performing activi-

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> state at large. They are at one and the same time a corporate entity and a government. The law has attempted to distinguish between the two functions, and to hold that in so far as they represent the state, in their "governmental," "political," or "public" capacity, they share its immunity from tort liability, while in their "corporate," "private," or "proprietary" character they may be liable.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 977-78 (4th ed. 1971).

[38] 116 Ohio St. 281, 156 N.E. 210 (1927).

[39] *Id.* at 284-85, 156 N.E. at 211-12.

[40] Activities considered governmental include operation of a fire department, Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919); garbage collection, Broughton v. City of Cleveland, 167 Ohio St. 29, 146 N.E.2d 301 (1957); construction and maintenance of a park and swimming pool, Selden v. City of Cuyahoga Falls, 132 Ohio St. 223, 6 N.E.2d 976 (1937); and construction of sewers, Hutchinson v. City of Lakewood, 125 Ohio St. 100, 180

ties for the comfort or convenience of its citizens, it is subject to tort actions on the same basis as other private corporations or individuals.[41]

III. Erosion of Sovereign Immunity

A. *Immunity of the State*

In 1912, the Ohio Constitution was amended to allow suits to be brought against the state. Section 16, article I of the Ohio Constitution was amended to provide:

> All courts shall be open and every person for an injury done him in his land, goods, person, or reputation, shall have 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.[42]

The last sentence was the amended portion adopted on September 3, 1912.

The Supreme Court of Ohio construed the amendment five years after it was adopted. In *Raudabaugh v. State*,[43] it was argued that the amendment gave consent and that suits could be brought against the state without further legislative consent. However, the court did not accept this argument. Instead the court announced, as a fundamental principle of law, that the state, as a sovereign, could not be sued in its own courts without its express consent, and unanimously held that the amendment is "not self executing, and that legislative authority by statute is required as a prerequisite to the bringing of an action against the state."[44]

The court interpreted the "as may be provided by law" language in the amendment as a qualification on the consent given to bring suits against the state. It concluded that legislative authority by statute was required to bring such an action.[45]

Five years after the amendment was adopted, the General Assembly created the Sundry Claims Board.[46] The board was empowered to receive

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N.E. 643 (1932).

[41] Activities characterized as proprietary include management of public grounds and buildings, State v. City of Cleveland, 125 Ohio St. 230, 181 N.E. 24 (1932); and maintenance and repair of sewers after construction, City of Portsmouth v. Mitchell Mfg. Co., 113 Ohio St. 250, 148 N.E. 846 (1925).

[42] Ohio Const. art. I, § 16.

[43] 96 Ohio St. 513, 118 N.E. 102 (1917).

[44] *Id.* at 518, 118 N.E. 103.

[45] *Id.* The court has adhered to this position in subsequent cases. *See* Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959); State v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); Palumbo v. Industrial Comm., 140 Ohio St. 54, 42 N.E.2d 766 (1942).

[46] 1917 Ohio Laws 532. The Board was composed of the Budget Commissioner, the Auditor of the State, the Attorney General, and the Chairmen of the Senate and House Fi-

claims against the state for which no monies had been appropriated. It was authorized to investigate claims, to approve or reject them, and to make recommendations to the chairman of the House Finance Committee.[47] Compensation was dependent upon the passage of an appropriation bill. Thus, a successful claimant may have had a considerable wait before receiving compensation. As a result, the General Assembly amended the section in 1945 to enable the Board to authorize payments of $200 or less.[48] Subsequently, the amount was raised to $1,000.[49]

In 1975, the Sundry Claims Board was replaced by the Court of Claims, which has a broader jurisdiction. In creating the Court of Claims, section 2743.02(A) of the Ohio Revised Code provided that:

> 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. . . .[50]

The act was construed in *McCord v. Division of Parks & Recreation*[51] as placing "the state upon the same level as any private party."[52] In *Schenkolewski v. Metroparks System*,[53] the court stated that "the Act expressly waived the sovereign immunity of the state of Ohio, its departments, boards, offices, commissions, agencies, institutions and other instrumentalities, and granted consent to have the liability of such entities determined in a Court of Claims."[54]

The Court of Claims Act specifically provided for the waiver of immunity and granted consent for the state to be sued.[55] This express consent

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nance Committees.

[47] *Id.*

[48] 1945 Ohio Laws 190.

[49] 1961 Ohio Laws 451.

[50] OHIO REV. CODE ANN. § 2743.02(A) (Page 1981). This chapter became effective January 1, 1975.

[51] 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978).

[52] *Id.* at 74, 375 N.E.2d at 52.

[53] 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981).

[54] *Id.* at 33-34, 426 N.E.2d at 786.

[55] However, the Act specifically excluded political subdivisions. Section 2743.01 of the Ohio Revised Code provides that:

> As used in this Chapter:
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> (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 politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

satisfied the *Raudabaugh* requirement.[56]

Thus, sovereign immunity of the state was waived by the Court of Claims Act and the Constitutional Amendment of 1912. The General Assembly has also passed other legislation which gives consent to be sued in more limited situations.[57]

B. Immunity of Political Subdivisions

The Court of Claims Act specifically excluded political subdivisions from the waiver of the state's immunity.[58] The General Assembly did not enact similar legislation waiving sovereign immunity for political subdivisions. Therefore, the principle set forth in *Raudabaugh*, that the constitutional amendment waiving the state's immunity was not self-executing, continued to be applied in actions against political subdivisions.[59]

However, *Raudabaugh* was the subject of criticism[60] and sixty-four years after it was announced, the Supreme Court of Ohio overruled it in a four-to-three vote in *Schenkolewski*.[61] The court adopted Justice William B. Brown's reasoning as stated in his dissent in *Thacker v. Board of Trustees of Ohio State University*:

> Whether the amendment is construed as self-executing, or not self-executing, . . . does not affect a decision of this court to abolish governmental immunity. If the amendment was intended to be self-executing, the court would merely be achieving the same effect that was intended 50 years ago when the immunity amendment was ratified. If, on the other hand, the amendment was not intended to be self-executing and merely informed the General Assembly that it was empowered to abolish governmental immunity, the court's decision to abolish governmental immunity would merely execute the abolition by an alternative method—for

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OHIO REV. CODE ANN. § 2743.01 (Page 1981).

[56] *See* Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).

[57] *See, e.g.* OHIO REV. CODE ANN. § 5301.24 (Page 1981) (state may be made a party in a foreclosure or other proceeding to sell real estate or marshal liens in which state has a claim); *id.* § 115.46 (creditor or judgment creditor of employee or officer of the state is entitled to sue the state in an action for attachment, garnishment or in aid of execution); *id.* § 111.19 (suit may be brought against the state for fees paid under protest to the secretary of state).

[58] *See id.* §§ 2743.01, 2743.02.

[59] *See* Thacker v. Board of Trustees of Ohio State Univ., 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959); Palumbo v. Industrial Comm., 140 Ohio St. 54, 42 N.E.2d 766 (1942).

[60] For examples of this criticism, see Thacker v. Board of Trustees of Ohio State Univ., 35 Ohio St. 2d 62, 298 N.E.2d at 545 (dissent of Justice Corrigan); *Id.* 72, 298 N.E.2d at 552 (dissent of Justice W. Brown).

[61] *See* 67 Ohio St. 2d at 36, 426 N.E.2d at 787.

the court has authority to change a judicially-created rule.[62]

In *Schenkolewski*, the court concluded that "it is within our constitutional authority to modify or abrogate common law doctrines of governmental or sovereign immunity. To the extent that previous decisions of this court imply or hold that the immunity doctrine is not subject to judicial modification or abrogation, those decisions are overruled."[63]

Although it was suggested in previous cases,[64] that the court has the authority to modify or abrogate the common-law doctrine of governmental or sovereign immunity, *Schenkolewski* is significant for stating it expressly.[65] Having concluded that the immunity could be abrogated, the court held that a board of commissioners of a park district was subject to suit for proprietary acts.[66] The court adopted the governmental-proprietary dichotomy long applied to municipal corporations when it denied the park district the defense of governmental or sovereign immunity. Thus, it was an initial step in the judicial abrogation of sovereign immunity for political subdivisions.

Acts of the General Assembly have also abrogated the doctrine of sovereign immunity of political subdivisions. For example, section 701.02 of the Ohio Revised Code imposes liability on a municipal corporation for the negligent operation of motor vehicles by police officers and firefighters.[67] Section 723.01 imposes a duty on a municipality to keep streets in good repair and free from nuisance.[68] Similarly, section 305.12

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[62] 35 Ohio St. 2d at 77-78, 298 N.E.2d at 558.

[63] 67 Ohio St. 2d at 36, 426 N.E.2d at 787.

[64] *See, e.g.*, Sears v. City of Cincinnati, 31 Ohio St. 2d 157, 285 N.E.2d 732 (1972).

[65] Judge Whiteside suggests that "*Schenkolewski* left intact that portion of the second paragraph of the syllabus of *Raudabaugh* which held Section 16, Article I, not to be self executing." Strohofer v. City of Cincinnati, 6 Ohio St. 3d 118, 122-24 (1983) (Whiteside, J., concurring). He contends that "there is nothing in the convention proceedings suggesting that the amendment was made only to authorize the general assembly to abolish sovereign immunity which is the import of the *Raudabaugh* holding. See Proceedings and Debates, Constitution Convention of Ohio, 1431-1432 and 1919-1920." *Id.* at 124.

[66] 67 Ohio St. 2d 31, 38, 426 N.E.2d 784, 789 (1981). The plaintiff was injured in a fall due to a piece of pipe which was sticking three inches above the surface on the walk at the entrance of the Cleveland Metropark Zoo. *Id.* at 32, 426 N.E.2d at 785.

[67] Section 701.02 provides in part that:

> Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicles upon the public highways of this state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.

OHIO REV. CODE ANN. § 701.02 (Page 1976).

[68] Section 723.01 provides that:

> Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, side-

imposes liability on county commissioners for negligence in keeping roads and bridges in proper repair.[69] In instances when statutory duties are imposed on a governmental unit, it is not protected by sovereign immunity.[70]

IV. Judicial Abrogation of the Doctrine

The Supreme Court of Ohio again had the opportunity to examine the doctrine of sovereign immunity about one and one-half years after *Schenkolewski*. In *Haverlack v. Portage Homes, Inc.*,[71] the court reiterated that the doctrine was judicially created and considered the doctrine in light of present policy.

> Many innocent injured victims have been precluded from recovering damages from municipalities because of sovereign immunity from liability for their negligence in the performance or nonperformance of governmental functions. Clearly, the municipality is better able to bear the cost of an injury it causes than the individual victim. The municipality should be run with the same care and circumspection as a business, protecting itself in the same manner from liability incurred by its servants. A municipality is able to obtain liability insurance and is able to spread the cost among the taxpayers.[72]

The court dismissed the justifications which have traditionally sup-

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walks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance. *Id.* § 723.01.

[69] Section 305.12 provides that:

> The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity, involving an inquiry to any public, state, or county road, bridge, ditch, drain, or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county, or any money or other property due the county. The money so recovered shall be paid into the county treasury, and the board shall take the county treasurer's receipt therefor and file it with the county auditor.

Id. § 305.12 (Page 1979).

[70] *See, e.g.*, counties: *Id.* § 955.42 (Page 1968) (recovery of medical costs by person bitten by a rabid animal), *Id.* § 955.29 (recovery of value of farm animals injured or killed by another's dog), *Id.* § 3761.02 (Page 1982) (person taken from officers of justice by a mob and injured may recover damages); townships: *Id.* § 5571.10 (Page Supp. 1982) (trustees liable for damages due to its negligence); boards of education: *Id.* § 3313.17 (Page 1980) (a school board may sue and be sued).

[71] 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

[72] *Id.* at 29-30, 442 N.E.2d at 752.

ported the doctrine.[73] Furthermore, the court found "*[s]tare decisis* alone is not a sufficient reason to retain the doctrine which serves no purpose and produces such harsh results."[74]

In a four-to-three vote, the *Haverlack* opinion, written by Chief Justice Frank D. Celebrezze, concluded that "we join with the other states in abrogating the doctrine."[75] Paragraph two of the syllabus stated that "[t]he 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 plan."[76]

Several cases concerning sovereign immunity followed shortly after *Haverlack*. In *Dougherty v. Torrence*,[77] the concurring opinion of Chief Justice Celebrezze pointed out that sovereign immunity for a municipal corporation was abolished in *Haverlack*.[78]

In the spring of the 1983 term, the court was presented with several questions on the viability of sovereign immunity. Two cases concerned a municipality's duty to keep its streets safe under section 723.01 of the Ohio Revised Code. In *Dickerhoof v. City of Canton*,[79] the court noted that *Haverlack* had abrogated the doctrine of sovereign immunity of municipal corporations in a negligence action.[80] Because no statute provided immunity, the court considered whether the municipality had a duty, imposed by common law or statute, to keep the shoulder of a highway in repair and free from nuisance.[81] Similarly, in *Strohofer v. City of Cincinnati*,[82] the court repeated that the doctrine of sovereign immunity had

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[73] *See supra* note 16.

[74] 2 Ohio St. 3d at 30, 442 N.E.2d at 752.

[75] *Id.* Only five states adhere to the traditional common-law doctrine of sovereign immunity for local government units. They are Delaware, Maryland, South Carolina, South Dakota, and Utah.

[76] *Id.* at 26, 442 N.E.2d at 749. Plaintiffs brought a suit against the city of Aurora and other defendants for damages allegedly caused by a sewage treatment plant. The complaints alleged, inter alia, injuries caused by odor and noise from the sewage treatment plant located adjacent to their properties (within two hundred and four hundred feet of the Haverlacks' and the Richners' residences, respectively) and sought damages for both past and future injuries and an injunction against the alleged nuisance. *Id.* at 27, 442 N.E.2d at 750.

[77] 2 Ohio St. 3d 69, 442 N.E.2d 1295 (1982).

[78] *Id.* at 72, 442 N.E.2d at 1297 (Celebrezze, C.J., concurring).

[79] 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983).

[80] *Id.* at 129, 451 N.E.2d at 1194.

[81] The complaint alleged that when the decedent swerved to miss an object in the roadway and began to travel on the shoulder, his motorcycle hit a chuckhole approximately eighteen feet two inches long, sixteen inches wide and six inches deep, situated immediately abutting the roadway. *Id.* at 128, 451 N.E.2d at 1194. The issue was whether a complaint seeking to impose liability on a municipal corporation for injuries allegedly resulting from its negligence in failing to keep a shoulder of a highway in repair and free from nuisance states a claim for which relief can be granted. *Id.* at 129, 451 N.E.2d at 1194.

[82] 6 Ohio St. 3d 118, 451 N.E.2d 787 (1983).

been abrogated in *Haverlack*.[83] The court concluded that section 723.01 imposed a duty on municipalities under the facts presented in both cases and the causes were remanded to the trial courts for further proceedings.[84]

It is important to note that the abrogation of the doctrine of sovereign immunity in *Haverlack* was "in the absence of a statute providing immunity."[85] The court applied this principle in *King v. Williams*[86] and concluded that section 701.02 provided immunity to a fire department whose ambulance was on an emergency call.[87]

In *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*,[88] the city of Lebanon, appellee, argued that sovereign immunity had not been abrogated in *Haverlack* and that the limitation on the doctrine was confined to the facts set forth in the syllabus.[89] In response, the Ohio Supreme Court laid to rest any question about the viability of the doctrine and held in paragraph one of the syllabus that:

> The judicially created doctrine of municipal immunity is, within certain limits, abolished, thereby rendering municipal corporations subject to suit for damages by individuals injured by the negligence or wrongful acts or omissions of their agents or employees whether such agents and employees are engaged in proprietary or governmental functions. (*Dayton v. Pease*, 4 Ohio St. 80, and its progeny overruled; *Haverlack v. Portage Homes, Inc.*,

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[83] *Id.* at 120, 451 N.E.2d at 789. The issue presented was whether a claim against a municipality for damages arising from the allegedly tortious design and placement of traffic control devices is barred by sovereign immunity. The decedent was fatally injured in a collision at an intersection when traffic lights for the southbound and westbound lanes were both green.

[84] However, the court concluded in Strunk v. Dayton Power & Light Co., 6 Ohio St. 3d 429, 453 N.E.2d 604 (1983), that section 723.01 does not impose a duty on municipalities with respect to a light pole off the roadway. Citing *Dickerhoof*, the court stated that in the absence of a legal duty, the appellant could not recover against the city even though the defense of sovereign immunity is not available. *Id.* at 431, 453 N.E.2d at 606.

[85] 2 Ohio St. 3d at 30, 442 N.E.2d at 752.

[86] 5 Ohio St. 3d 137, 449 N.E.2d 452 (1983).

[87] *Id.* at 140, 449 N.E.2d at 455.

[88] 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

[89] *See supra* text accompanying notes 75-76. Although not cited by appellee, the syllabus rule has been stated thus:

> It is, of course, true that the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio. However, that pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the court.

Williamson Heater Co. v. Radich, 128 Ohio St. 124, 126, 190 N.E. 403, 404 (1934).

As of March 1, 1983, the rule holds that "[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." SUP. CT. R. REP. OPS. 1(B), 3 Ohio St. 3d xxi.

2 Ohio St. 3d 26, followed and extended.)[90]

Although the doctrine was abrogated, the court, in an opinion written by Justice William B. Brown, set forth a new rule of immunity. The court ruled in *Enghauser* that municipal corporations would not be liable in "the exercise of a legislative or judicial function, or . . . 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."[91] The opinion stated that acts which are the essence of governing continue to be protected by sovereign immunity in order to prevent judicial second-guessing or harassment by the threat of litigation. Although the activities in the exercise of judgment and discretion which represent planning and policy-making are protected, sovereign immunity does not apply to those functions which involve implementation and execution of governmental policy or planning. Therefore, the rules of tort liability applicable to private individuals and entities govern when the conduct claimed to be tortious involves the implementation of established policies or plans.[92] This approach of retaining limited immunity follows that of other jurisdictions.[93]

The last case decided in the spring of the 1983 term concerning sovereign immunity was *Carbone v. Overfield*,[94] which involved another subdivision of the state. The court held that the defense of sovereign immunity was not available to a board of education in an action seeking damages for injuries allegedly caused by the negligence of the board's employees.[95] The opinion noted that elimination of governmental immunity to all public bodies within the state is consistent with accepted tort principles and the reasonable expectations of the citizenry with respect to its government.[96] The court followed *Haverlack*, *Enghauser*, *Strohofer*, and *Dickerhoof*, and concluded that boards of education were liable for tortious acts in the same manner as private individuals.[97] Thus, the court was con-

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[90] 6 Ohio St. 3d at 31, 451 N.E.2d at 229.

[91] *Id.* at 36, 451 N.E.2d at 232. Enghauser Manufacturing Company alleged that the city had negligently planned, designed, and constructed a new bridge and roadway which proximately resulted in the flooding of appellant's abutting industrial property.

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

[93] *See* Spencer v. General Hosp. of D.C., 425 F.2d 479, 488 (D.C. Cir. 1969) (Wright, J., concurring); Hurley v. Hudson, 112 N.H. 365, 368-69, 296 A.2d 905, 907 (1972); Smith v. Cooper, 256 Ore. 485, 475 P.2d 78 (1970); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[94] 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983).

[95] *Id.* at 213, 451 N.E.2d at 1230. While at school, a six-year-old student sustained second- and third-degree burns when boiling water, used for hot chocolate, was spilled on him.

[96] *Id.*

[97] *Id.* Section 3313.17 of the Ohio Revised Code provides, inter alia, that a board of education is "capable of suing and being sued, ..." *See supra* note 69. The court stated that "the General Assembly has granted boards of education the authority to purchase liability insurance in order to protect themselves." 6 Ohio St. 3d at 214, 451 N.E.2d at 1230.

sistent with the previous cases concerning municipal corporations when it extended the abrogation of the defense of sovereign immunity to boards of education in *Carbone*.[98]

V. Conclusion

The doctrine of sovereign immunity has come full circle in Ohio. Initially, liability was imposed on municipal corporations in tort claims as a matter of basic justice.[99] Subsequently, the doctrine which protected the state was extended to municipal corporations in 1854.[100] Although the doctrine reigned for over a century, it was gradually eroded.

A constitutional amendment in 1912 allowed suits to be brought against the state. However, the Ohio Supreme Court declined to interpret the amendment as self-executing and required further statutory authority.[101] In 1974, the Court of Claims Act expressly waived the state's immunity and gave consent to be sued.[102] Because the Act did not apply to political subdivisions, the common law continued to uphold sovereign immunity for governmental functions for these entities. However, classification of activities according to the governmental-proprietary dichotomy was problematic.

In a series of cases in Demember 1982 and in the spring of the 1938 term, the Supreme Court of Ohio abrogated the doctrine of sovereign immunity for various political subdivisions of the state, municipal corporations, and boards of education.[103] Again, the policy reflects a concern for justice, similar to the rationale in the early 1800's when liability was imposed.

The court retained sovereign immunity for municipal corporations in the exercise of a legislative or judicial function, but not for the implementation and execution of governmental policy or planning.[104] Thus, it remains to be seen how this new form of protection will be implemented and whether it is easier for classification purposes than the governmental-proprietary distinction it replaced. Future cases will also determine

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[98] The initial vote to abrogate the doctrine in *Haverlack* was four (Chief Justice Frank D. Celebrezze, joined by Associate Justices William B. Brown, A. William Sweeney, and Clifford F. Brown) to three (Associate Justices Ralph S. Locher, Robert E. Holmes, and Blanche Krupansky). In the subsequent cases, the vote was five to two when the court followed *Haverlack* and imposed liability. *See* Dickerhoof v. City of Canton, 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983); Stohofer v. City of Cincinnati, 6 Ohio St. 3d 118, 451 N.E.2d 787 (1983); Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 45 N.E.2d 228 (1983). Similarly, in Carbone v. Overfield, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983), the vote was five to two; however, Justice William B. Brown concurred in the judgment only.

[99] *See supra* text and accompanying notes 3-9.

[100] *See supra* text accompanying note 18.

[101] *See supra* text accompanying notes 43-45.

[102] *See supra* text accompanying note 50.

[103] *See supra* text and accompanying notes 70-96.

[104] *See supra* text accompanying note 89.

whether sovereign immunity will be abrogated or retained for other political subdivisions.