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SOME RECENT TRENDS IN STATE LIABILITY FOR TORT

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There is perhaps no legal doctrine which has received more criticism than that of sovereign immunity. As far back as 1934 one eminent authority listed over 35 articles or writings which for the most part are critical of the rule,[1] and the Florida Supreme Court in a 1957 case,[2] suggested that the number of adversely critical law review articles written on the subject since 1900 was in excess of 200. Simply stated, the general rule is that neither the United States nor any of the several states may be sued by a private citizen without its consent.[3] This rule, the doctrine of sovereign immunity, prevails generally throughout the United States and is well established in spite of the criticism against it by courts and legal writers alike.[4]

The reason for the criticism becomes obvious when consideration is given to the oftentimes cruel results. This was recognized so poignantly in an old North Dakota case in which a parent sued a school board for negligently causing the death of her child in a playground accident, where the court said:

> "It is regrettable, indeed, that William Anderson lost his life in the circumstances mentioned; that his mother has sustained an irreparable loss, and that while it is a maxim of law that for every wrong there is a remedy, that maxim does not seem to hold true in this and similar cases. While the plaintiff's loss is a real one and the damages suffered by her, no doubt substantial, the law affords her no remedy. The law, in effect says to her: You alone must bear this burden; that even if substantial damages might in some small measure assuage the great burden imposed upon you, through no fault of yours, nevertheless, in order to protect the public, you, widowed though you be, must bear the burden alone."[5]

It is familiar history that the doctrine of sovereign im-

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1. Borchard, **State and Municipal Liability in Tort,** 20 A.B.A.J. 747, 748 (1934).
2. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 131 (Fla. 1957).
3. PROSSER, LAW OF TORTS, 770 (2d Ed. 1955).
4. See Dougherty v. Vidol, 37 N.M. 256, 21 P.2d 90, 91 (1933).
5. Anderson v. Board of Education of the City of Fargo, 49 N.D. 181, 189, 190 N.W. 807, (1922).

munity, developed in England from feudal notions and later from a belief in the divine right of kings, was borrowed in this country and applied to the federal and state governments.[6] Apparently, the principal reasons for the doctrine are: That the "King can do no wrong" or in modern terms, that the state, being the sovereign cannot be sued without its consent; and, that public policy to protect the public funds has decreed that monies devoted to governmental purposes should not be diverted to the payment of tort judgments.[7] One of the leading proponents of the doctrine has been Mr. Justice Holmes who reasoned: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but upon the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[8] According to the Holmes' view there can be no "tort" by the state when there is no remedy against the state.[9] This has been compared to the argument that there can be no disease for which medical science has no cure.[10]

It is not the purpose of this paper either to criticize or defend the rule of sovereign immunity, for in spite of all the criticism which it has received, the fact remains that for the most part the doctrine is alive and breathing today, albeit with a large variety of limitations. The mutual problem of a plaintiff's lawyer whose client has been injured by the state and of the state lawyer defending against such claims is: "Is sovereign immunity a defense in this particular case?" As might be expected, where legal authorities and the public generally agree that a particular rule is unfair, incongruous results are reached,[11] and some courts have gone a long way toward providing exceptions for the rule[12] and in other situations legislatures have set aside the rule. It is not the intention here to attempt a complete discussion of the case law pertaining to the subject or the infinite variety of statutes pertaining to the matter. It should suffice here to point out

6. James, **Inroads on Old Tort Concepts,** 14 NACCA L.J. 226, 238 (1955).
7. See Thomas v. Broadlands Community Consol. School Dist. 348 Ill. 567, 109 N.E.2d 636, 639 (1952).
8. Kawananakoa vs. Polyblank, 205 U.S. 349, 353 (1907).
9. See The Western Maid, 257 U.S. 419, 433 (1921); see Borchard, **Governmental Responsibility in Tort,** 36 Yale L.J. 1, 32 (1926).
10. Borchard, **Governmental Responsibility in Tort,** 36 Yale L.J. 1, 32 (1926).
11. V.T.C. Lines v. City of Harlon 313 S.W.2d 573, 578 (Ky. 1958).
12. See **e. g.** Hargrove v. Town of Cocoa Beach, **supra.** note 2, Overruling precedent to hold city liable for negligence of police officers within scope of governmental duties.

some of the current trends and developments in this subject, to show that more and more states are becoming responsible for their torts, and to illustrate some of the ways through which this responsibility occurs. Four years ago Professor Davis observed: "Of all deserving tort claims against federal, state and local governmental units, probably far more are paid today than are unpaid, despite the persistence of the basic doctrine that the sovereign cannot be sued without its consent."[13] This conclusion of Professor Davis may or may not be true, however, it is apparent from a reading of the literature pertaining to this subject that there is, as has been recognized by the Supreme Court of the United States, "a steadily growing policy of governmental liability" and "expanding conceptions of public morality regarding governmental responsibility."[14]

It is with some limited aspects of these trends with which this paper is concerned. No attempt will be made to discuss the Federal Tort Claims' Act[15] or the various state tort claims' acts, nor any of the special state legislation bearing on the subject of prosecuting tort claims against the state.[16] Nor will we consider indemnification through private legislative enactment either in Congress or in the legislatures of the various states, although that possibility is frequently and successfully resorted to.[17]

THE EFFECT OF INSURANCE UPON THE RULE

By far the most significant development in the state tort field in recent years is the use of liability insurance both as a substitute for and a supplement to governmental liability.[18] In recent years many states have enacted statutes which authorize or require state agencies or subdivisions to procure

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13. Davis, **Tort Liability of Governmental Units,** 40 Minn. L. Rev. 751 (1956).
14. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 396 (1939).
15. 28 U.S.C. § § 1346, 2671-78, 2680 (1952).
16. For an excellent symposium on state and federal tort claims see 29 N.Y.U. L. Rev. 1321-1461 (1954); Note: **State Liability Acts,** 6 Baylor L. Rev. 135 (1953); Note: **Tort Claims Against The State of Illinois and Its Subdivisions,** 47 N.W. U.L. Rev. 914 (1953); Note: **Claims Against the State In Minnesota,** 32 Minn. L. Rev. 539 (1948).
17. See Gellhorn & Lauer, **Congressional Settlement of Tort Claims Against the United States,** 55 Col. L. Rev. 1 (1955); Davis, **Tort Liability of Governmental Units, supra** note 13.
18. Leflar & Kantrowitz, **Tort Liability of the States,** 29 N.Y.U.L. Rev. 1363, 1413 (1954); For an excellent discussion of the general topic see Note: **The Effect of Insurance On The Tort Immunity of a Governmental Subdivision,** 34 Neb. L. Rev. 78 (1954).

public liability insurance.[19] Even without a statute requiring the purchase of liability insurance some governmental subdivisions have taken it upon themselves to purchase such insurance. In the absence of a statute, however, it has been held that a governmental unit has no authority to insure a risk for which it is not legally liable.[20] It appears to be the majority rule that a governmental unit lacks the power by the purchase of liability insurance to either waive sovereign immunity,[21] or to estopp itself from asserting its immunity from tort liability.[22] It is likewise true that the mere enactment of a statute authorizing the procurement of insurance does not amount to a waiver of immunity,[23] for sovereign immunity is not waived unless the waiver appears by express provisions of the statute or necessary inference therefrom.[24] In a case arising out of an accident occurring after an enactment authorizing purchase of insurance, one court has reasoned that where liability insurance is procured prior to an authorizing statute such procurement does not effect a waiver of immunity while engaged in governmental activities, but that it was intended only to insure against negligence arising out of proprietary functions.[25] Some states have statutes authorizing the purchase of insurance which are interpreted as continuing the defense of sovereign immunity but allowing suit on the claim directly against the insurer.[26 1] The typical form of the statutes, and policies issued thereunder, provide that the insurer may not set up sovereign immunity as a defense.[26 2] But even such a provision does not necessarily mean

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19. See **e. g.** Cal. Acts 1955, c. 105; N.D. Laws 1955, c. 261; Ore. Laws 1955, c. 288; Ga. Laws 1955, No. 237; N. J. Laws 1955, c. 152; N.C. Sess. Laws 1955, c. 911.

20. Hartford Acc. & Idem. Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328 (1933).

21. Lambert v. New Haven, 129 Conn. 647, 30 A.2d 923 (1943); Holland v. Western Airlines Inc., 154 F. Supp. 457 (D.C. Mont. 1957); Taylor v. State, 73 Nev. 151, 311 P.2d 733 (1957); Stethenson v. Raleigh, 232 N.C. 42, 59 S.E.2d 195 (1950); Mann v. County Board of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957); Boice v. Board of Education, 111 W.Va. 95, 160 S.E. 566 (1931); Price v. State Highway Commissioner, 62 Wyo. 385, 167 P.2d 309 (1946).

22. **E. g.** Utz v. Board of Education, 126 W.Va. 823, 30 S.E.2d 342 (1944); Pohland v. Sheboygan, 251 Wis. 20, 27 N.W.2d 736 (1947).

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

24. Mead v. State, 303 Mich. 168, 5 N.W.2d 740 (1942); Hummer v. School City of Hartford City, 124 Ind. App. 30, 112 N.E.2d 891 (1953); McGraft Building Company v. Bettendorf, 248 Iowa 1386, 85 N.W.2d 616 (1957); Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957); Rittmiller v. School Dist., 104 F. Supp. 187 (D.C. Minn. 1952).

25. Ford v. Caldwell, 79 Idaho 499, 321 P.2d 589 (1958).

662 (1956); Earl W. Baker & Co. v. Lagaly, 144 F.2d 344 (10th Cir. 1944), (Oklahoma law).

26./1 Aetna Casualty & Surety Co. v. Brashears, 226 Ark. 1017, 297 S.W.2d 662 (1956); Earl W. Baker & Co. v. Lagly, 144 F.2d 344 (10th Cir. 1944).

26./2 See **e. g.** Spielman v. State, **supra,** note 23; see Taylor v. Knox County Board of Education, **infra,** note 32.

that the insurance company will be liable, for the court may disregard the provision and hold that the sovereign is nevertheless immune.[27]

The minority rule seems to have made its debut in Tennessee in 1933, in the case of *Marion County v. Cantrell.*[28] It appeared there that a county school board was sued for the negligent operation of a school bus and on appeal it was contended for the first time in the lawsuit that a judgment rendered against the county was invalid because of governmental immunity. The Court rejected that argument and held that that point was not available since it appeared that the county had taken out a liability policy to cover operation of the bus and that the defense to the action was being conducted by the liability company. Furthermore, an agreement had been entered into with the liability company by which the plaintiff convenanted to waive any recovery in excess of the policy limits in consideration of an undertaking that the defense of governmental immunity would not be pleaded. The Court held that since governmental immunity was not raised in the courts below, it could not be raised on appeal, even if it could have been raised, in view of the agreement by the company not to raise it.

That case was closely followed by what appears to be the leading case in Tennessee on the subject, *Rogers v. Butler.*[29] In that case the Court reasoned that one of the reasons for sovereign immunity was the preservation of public funds and that where there was no danger of their depletion by reason of the liability insurance protecting them, there was no reason for the rule and, hence, sovereign immunity was waived to the extent of the policy limits. The decision of the *Rogers* case has subsequently been followed in a long line of Tennessee cases.[30]

As has already been pointed out Kentucky is another jurisdiction which has permitted liability insurance to avoid the harshness of sovereign immunity. The rationale of the Kentucky rule, however, as illustrated in *Taylor v. Knox County*

27. See Pohland v. City of Sheboygan, **supra,** note 22; Livingston v. Regent of New Mexico Col. of A&M A, **supra.**
28. 166 Tenn. 358, 61 S.W.2d 477 (1933).
29. 170 Tenn. 125, 92 S.W.2d 414 (1936).
30. **E. g.** Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W.2d 648 (1945); Williams v. Morristown, 32 Tenn. App. 274, 222 S.W.2d 607 (1949); Wilson v. Maurey County Bd. of Education, 42 Tenn. App. 345, 302 S.W.2d 502 (1957).

Board of Education,[31] is somewhat different than that which was advanced in Tennessee. While Tennessee says that sovereign immunity is waived to the extent of the policy limits, Kentucky in effect says that sovereign immunity is not waived, but that for purposes of getting at the proceeds of the policy, the sovereign may be sued, thereby being used as a conduit for recovery. The court in the *Taylor* case said that the liability policy there in issue was for the benefit of injured third parties who might sue the insurer when the amount of liability has been determined by final judgment against the insured. In this connection it is important to note the distinction which has been made between immunity from suit and immunity from liability.[32] Here, the Kentucky court holds the state immune from liability, but not from suit.

The reasoning of the Tennessee cases was, however, employed in what is now considered a leading case standing for the proposition that the presence of liability insurance to the extent that it protects public funds removes the reason for immunity of a sovereign to suit. That is the Illinois case of *Thomas v. Broadlands Community Consol. School Dist.*[33] The agreed facts of that case showed that the plaintiffs sought to recover for the loss of sight in one eye of a minor child who was negligently injured in a school playground accident. The defendant's motion to dismiss on the grounds of sovereign immunity was granted and on appeal the court was confronted with the question of whether, if sovereign immunity existed, the carrying of liability insurance would remove the immunity either completely or to the extent of such coverage. The plaintiff's complaint, based on negligence, had alleged the carrying of liability insurance sufficient to pay any judgment recovered and offered to limit collection of any judgment to the extent of insurance proceeds.

The appellate court concluded without any difficulty that the school district was a quasi municipal corporation, engaged in a government function of educating children and was, therefore, not liable, for injuries resulting from tort. It then considered the effect of insurance upon that rule and relied upon the analogy presented in an earlier Illinois case,[34] which

31. 292 Ky. 767, 167 S.W.2d 700, 145 A.L.R. 1333 (1942).
32. See State v. Manion, **infra**, note 98; People v. Superior Court, **infra**, note 92.
33. 348 Ill. App. 567, 109 N.E.2d 636 (1952).
34. Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).

found that the immunity of a charitable institution from tort claims was waived by the purchase of liability insurance covering the tort. Sovereign immunity, the court said, is comparable to charitable immunity, in that the immunity exists in each case for the purpose of protecting the trust funds or public funds. To the extent that the danger of dissipation of such funds becomes obviated through the purchase of liability insurance, there is no reason to retain the rule, and thus, it reversed the lower court. In so doing, the defendant's contention that there was no statute authorizing the purchase of liability insurance was considered by the court as an attempt to take advantage of its own illegal act. The court expressly declined to hold whether or not the insurance policy amounted to a waiver but contented itself by merely holding that the rule of immunity vanishes to the extent of the available insurance. While the *Thomas* case appears to have reached a logical and popular result, and is now no doubt a well established law of Illinois, it has been severely and effectively criticized in *Maffei v. Incorporated Town of Kemmerer*[35] as amounting to nothing more than sheer judicial legislation. While the criticism might be answerable, the fact is that no new inroads have been made in this manner upon the governmental immunity doctrine since the *Maffei* case. However, there appear to be several jurisdictions in which the question might be raised and in at least one of them the courts have practically issued an invitation to submit the question of waiver where the statute is present and insurance is pleaded.[36]

While there seems to be an absence of a trend toward holding that sovereign immunity is waived to the extent of existing insurance, there are, in summary, several important points to be recognized.

(1) As previously indicated, there is a persuasive, if small, minority which holds that sovereign immunity is nullified to the extent that liability insurance is present, or that the state has waived its sovereign immunity to the extent that it purchases liability insurance, and the question remains an open one in some jurisdictions. (2) There is a view that liability insurance covers liability for torts committed during the

35. 80 Wyo. 33, 338 P.2d 808 (1959).
36. See Spielman v. State, **supra**, note 23, at p. 630.

carrying out of proprietary functions, and one case says that the fact of the presence of liability insurance may be persuasive in a determination of whether the particular function is proprietary or governmental.[37] (3) The fact that the sovereign may be immune will not necessarily prevent recovery in those cases where the act is carried out by an agent of the state who is not shielded by the doctrine of sovereign immunity who is a named insured on a policy purchased by the state.[38] (4) There is also a view that whenever the policy itself or ordinance in compliance with which it is issued provides that the policy shall enure to the public benefit, the insurer may be joined as a defendant.[39] In about the same vein lies a view that where insurance is present the governmental unit may be sued, and although it would not be liable, a judgment would in effect determine liability on the policy.[40]

One interesting speculation is, what might be the result in a suit against the insurer in tort or contract for raising the defense of sovereign immunity in violation of the terms of the policy, thereby defeating plaintiff's recovery against the sovereign.

TORT CLAIMS UNDER EMINENT DOMAIN CONCEPTS*

It frequently happens that a government may inflict property damage upon one of its citizens. Under such circumstances, the citizen may have a cause of action against that government under a constitutional or statutory provision, in spite of the fact that the particular government holds itself immune from its torts.[41] Such actions may be termed inverse or reverse condemnation actions. Although it appears that legal indexes have allowed no formal heading for such actions and there is but a paucity of literature on the subject, they are becoming increasingly more prevalent and thus represent a serious inroad upon the traditional concept of sovereign immunity. The term "inverse or reverse condemnation" con-

37. See Revis v. Ashville, 207 N.C. 237, 176 S.E. 738 (1934).
38. Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky. 1952).
39. Rittmiller v. School Dist. No. 84, **supra,** note 24; see James v. Young, 77 N.D. 451, 43 N.W.2d 692, 20 A.L.R.2d 1086 (1950); Connell v. Clark, 38 Cal. App. 2d 941, 200 P.2d 26 (1948).
40. Taylor v. Knox County Board of Education, 292 Ky. 767, 167 S.W.2d 700, 145 A.L.R. 1333 (1942); Aetna Cas. & Sur. Co., v. Brashears, **supra,** note 26; Earl W. Baker Co. v. Lagaly, **supra,** note 26.
*"This portion is reprinted from the 1960 Belli volume of TRIAL & TORT TRENDS, published by Matthew Bender & Company, Inc., Albany 1, New York."
41. See Davis, note 13, **supra,** at 766; see also Note: **Reverse Eminent Domain: A New Look and Redefinition,** 47 Ky. L.J. 215 (1959).

templates the situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made.[42] One theory upon which such an action is brought is that since a taking, which is otherwise lawful, would be a violation of due process of law if done without compensation, it must be presumed that the taker intends to pay for the property condemned.[43] Another view is that since the constitution guarantees the right to compensation for property taken or damaged in the public use, that obligation in effect is an implied contract on the part of the state to compensate for damage which it may cause,[44] and sovereign immunity is unavailable as a defense because the state has consented to be sued in cases arising upon contract which include implied as well as express contracts.[45]

While many states have statutory provisions under which an owner can compel a condemnation action,[46] many courts have taken the position that the constitutional provision that just compensation must be paid for the taking or damaging of property is a self executing provision that does not require statutory implementation.[47] In New Mexico however, it has been held that although the constitutional provision for just compensation is generally self executing, that is not true in a suit against the state acting through its highway commission and in the absence of a statute authorizing suit against the state, the plaintiff could not bring such an action even though he had suffered damages within the meaning of the constitutional provisions.[47/1] The New Mexico court in that case admitted that plaintiff had a right to compensation, and in withholding judicial relief recommended that he seek redress by legislation, which the court says, "after all, is the sole recourse of the citizen in many cases."[47/2]

It has been said that the constitutional provision providing

42. State of California v. U.S. District Court, 213 F.2d 818, 821 (9th Cir. 1954).
43. **Ibid.**
44. United States v. Lynah, 188 U.S. 445 (1903); Jacobson v. State, 68 N.D. 259, 278 N.W. 652 (1938).
45. Jacobson v. State, **supra**, note 44.
46. See cases collected in NICHOLS, EMINENT DOMAIN, sec. 28, 21 (2)n. 60 (3rd Ed. 1953).
47. **E. g.**, County of Mohave v. Chamberlain, 78 Ariz. 422, 281 P.2d 128 (1955); Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1943); Renninger v. State, 70 Ida. 170, 213 P.2d 911 (1950); Tomasek v. State Highway Commissioner, 196 Ore. 120, 248 P.2d 703 (1952); Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, 157 S.E. 842 (1931).
47./1 Dougherty v. Vidol, 37 N.M. 256, 21 P.2d 90 (1933).
47./2 **Id.** at 92.

for just compensation amounts to a waiver of the state's immunity or constitutes a consent to be sued.[48] Under the view that such a provision raises an implied contract, it is said that the injured landowner has the option of waiving the tort and suing on the contract.[49] In considering this theory it should be noted that over half the states have consented to suit in contract.[50]

Under reverse condemnation theories, recoveries for property damage may be made for a large variety of torts, including: maintenance of a city dump so as to permit rain to wash its contents upon plaintiff's adjoining land;[51] removal of lateral support;[52] damages caused to a chicken farm on account of low flying military aircraft;[53] pollution of stream through dumping of sewage;[54] cutting off of ingress and egress by construction of an underpass;[55] the closing of a mine under the order of the War Production Board;[56] the taking of possession of a coal mine by the government during a strike;[57] the tearing down of a condemned building so as to leave an interior wall exposed thereby requiring tying in and weatherproofing;[58] the cutting off of a lien holder by failing to give notice in a condemnation suit;[59] obstruction of a public highway by flooding;[60] overflow of a storm drain ditch;[61] causing foul air and noxious odors to invade plaintiff's premises;[62] destruction of a water supply by dynamiting in a spring;[63] flooding of private lands caused by highway construction;[64] and, crop damage caused by aerial spraying.[65]

A major barrier to recovery for property damage under an eminent domain theory in some jurisdictions has been that the property was not taken for a public use. In a recent Ken-

48. Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955); Chick Springs Water Co. v. State Highway Dept., **supra,** note 47.
49. Schilling v. Carl Township, 60 N.D. 480, 235 N.W. 126 (1931); Hunter v. Mobile, 244 Ala. 318, 18 So. 2d 656 (1943).
50. Note: **The Sovereign Immunity of the States,** 40 Minn. L. Rev. 234, 258 (1956).
51. Patrick v. City of Bellevue, 164 Neb. 196, 82 N.W.2d 274 (1957).
52. City of Atlanta v. Kenny, 83 Ga. App. 823, 64 S.E.2d 912 (1951).
53. United States v. Causby, 328 U.S. 256 (1946).
54. Lewis v. City of Potosi, 317 S.W.2d 623 (Mo. 1958), **Rev'd on other grounds.**
55. Cerniglia v. City of New Orleans, 234 La. 730, 101 So. 2d 218 (1958).
56. Idaho Mines Corp. v. U.S., 104 F. Supp. 576 (Ct. Cl. 1952).
57. United States v. Pewee Coal Co., 341 U.S. 114 (1951).
58. Webster Thomas Co. v. Commonwealth, 336 Mass, 130, 143 N.E.2d 216, (1957).
59. Wilson v. Beville, 47 Cal. 2d 852, 306 P.2d 789, (1957).
60. Stewart v. Southerland County, 196 Tenn. 63, 264 S.W.2d 217 (1953).
61. Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955).
62. Donaldson v. City of Bismarck, 71 N.D. 592, 3 N.W.2d 808 (1942).
63. Briswold v. Town School District, 117 Vt. 224, 88 A.2d 829 (1952).
64. Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161 (1942).

tucky case the court denied recovery to a bus company for alleged damage to the diesel engines of its buses consisting of loss by abrasive dust settling upon them as a result of a sand blasting operation carried on by the city while cleaning their nearby swimming pool.[65] The court simply reasoned that the property involved in the case was not of the type which was susceptible to a public use and, therefore, was not within the contemplation of the constitutional mandate requiring the payment of just compensation. The Kentucky court held that such an action more properly fell within the category of negligent acts of a city rather than inverse condemnation and since the city was acting in its governmental capacity it was immune from suit under the doctrine of sovereign immunity. A similar result has been reached in the United States Supreme Court where recovery was denied for repair of a bridge pier damaged by the government while improving navigation, on the grounds that the act complained of was tortious and did not amount to a taking.[67]

While some states have allowed recoveries in reverse condemnation cases regardless of whether the damage was caused by negligence[68] it appears that the majority rule is that recovery may not be had for mere negligence.[69] However, if the negligence is responsible for the creation of a nuisance it would probably be compensable.[70]

In California, the most recent cases have made a distinction between negligence which occurs when a public agency is carrying out a deliberate plan with regard to the construction of public works, and negligence resulting from damage arising out of the operation and maintenance of public works.[71] Under the California rule, it appears that if there is

65. Benson v. Dallas County Flood Control Dist., 301 S.W.2d 729 (Tex. Civ. App. 1957).
66. V.T.C. Lines Inc. v. City of Harlan, 313 S.W.2d 573 (Ky. 1958).
67. Keokuk & H. Bridge Co. v. United States, 260 U.S. 125 (1922).
68. Kinnischtzke v. City of Glen Ullin, 79 N.D. 495, 57 N.W.2d 588 (1953); Logan County v. Adler, 69 Colo. 290, 296, 194 Pac. 621, Gwinnett County v. Allan, 56 Ga. App. 753, 194 S.E. 38 (1937); Milhous v. State Highway Dept., 194 S.C. 33, 8 S.E.2d 852 (1940).
69. **E. g.** Neff v. Imperial Irrig. Dist., 142 Cal. App. 2d 755, 299 P.2d 359 (1956); Harris v. United States, 205 F.2d 765 (10th Cir. 1953); St. Francis Drainage District. v. Austin, 227 Ark. 167, 296 S.W.2d 668 (1956); Rabin v. Lakeworth Drainage Dist., 82 So. 2d 353 (Fla. 1955); V.T.C. Lines Inc., v. Harlan, **supra,** note 66; Texas Highway Dept. v. Weber, 147 Tex. 628, 219 S.W.2d 70 (1949); Erikson v. Anderson, 195 Va. 655, 79 S.E.2d 597 (1954); Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 87 N.W.2d 144 (1958).
70. Eller v. Board of Education, 242 N.C. 584, 89 S.E.2d 144 (1955); Messer v. City of Dickinson, 71 N.D. 568, 3 N.W.2d 241 (1942); Lewis v. City of Potosi, **supra,** note 54.
71. Hayasi v. Alameda County Flood C&W Conserv. Dist., 167 Cal. 2d 584, 334 P.2d 1048, (1959).

negligence occuring in the carrying out of a deliberate plan of construction of public works it is compensable under the inverse condemnation theory, whereas if the negligence occurs in the operation and maintenance of the public works and not according to a planned course of action it is not compensable under reverse condemnation.[72] Approximately the same test is reached in other jurisdictions where it is held that the damage is compensable only if it is necessarily incidental to the public work.[73] Furthermore, even where the doctrine of inverse condemnation obtains it does not necessarily preclude application of the rule of damnum absque injuria, for if the government acted only as a private citizen might legally have acted, and if under such circumstances a private citizen would not be liable then neither is the government liable.[74]

In some states courts have permitted recoveries for temporary damages, as distinguished from a permanent impairment of the value of the real estate.[75] However, other courts have held that damage caused by an occasional activity not likely to be repeated is not a taking in the constitutional sense which would justify an award under a reverse condemnation theory.[76] In a case where the injury to property is permanent the measure of damages is the difference between the value of the land before and after the taking or damaging, but where the injury is only temporary, the rule is that damages are measured by the cost of restoring the premises to their value at the time of the damaging.[77] It should be observed that the constitutions of some states, and the 5th Amendment of the Federal Constitution prohibit a "taking" of property without just compensation, whereas the state constitutions of most states prohibit a "taking or damaging" without the payment of just compensation.[78] Damage which is only temporary in nature might amount to "damage" under a "taking and damaging" constitutional provision and thus be recoverable but

72. **E. g.** Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955); (negligent planning and construction of a drainage ditch, recovery allowed) Hayashi v. Alameda County Flood C.&W. Conserv. Dist. **supra,** (recovery denied for negligent failure to repair break in levee.)

73. State Road Dept. v. Darby, **supra.**

74. Wilkening v. State, 54 Wash. 2d 692, 344 P.2d 204 (1959); Anderson v. County of Santa Cruz, 174 Cal. App. 151, 344 P.2d 421 (1959).

75. Conlon v. City of Dickinson, 72 N.D. 190, 5 N.W.2d 411, 142 A.L.R. 525 (1942); Patrick v. City of Bellevue, 164 Neb. 196, 82 N.W.2d 274 (1957); **Cf.** United States v. General Motors Corp., 323 U.S. 373 (1945).

76. Harris v. United States, 205 F.2d 765 (10th Cir. 1953).

77. Harkoff v. Whatcom County, 40 Wash. 2d 147, 241 P.2d 932 (1952). See NICHOLS, EMINENT DOMAIN, sec. 6.44 (3rd Ed. 1953).

78. Wisconsin P.&L. Co. v. Columbia County, **supra,** note 69.

would not amount to a "taking" within the meaning of the 5th Amendment.[79]

While there appears to be numerous inconsistencies in the many cases dealing with the subject of inverse condemnation, there is one area within which all courts seem to agree. That point is that personal injuries may not be compensated for under an eminent domain theory. One of the more ingenious attempts to collect on such a claim appears in the case of *Commers v. United States.*[80] In that case it appeared that the plaintiff had served as an army draftee during World War II and as a result suffered injuries which reduced his earning capacity. Subsequent to his discharge he sued the government to recover for his reduced earning capacity alleging that his service in the army was in violation of the 13th Amendment prohibiting involuntary servitude, and that his body was injured, and being private property such was prohibited without payment of just compensation under the 5th Amendment of the constitution. His theory was one of implied contract. The court rejected all of his contentions in reasoning that the human body is not private property within the meaning of the 5th Amendment to the constitution, at least since the adoption of the 13th Amendment, because the taking contemplated by the 5th Amendment was not limited to times of war, and to say that the plaintiff was entitled to just compensation would be to admit that the government might at any time take his body subject only to the requirement that it pay such compensation. The prospect of such action on the part of the government seemed to the court to be contrary to our entire theory of government.[81]

An even more convincing argument was made out in the California case of *Brandenburg v. Los Angeles Flood Control Dist.*[82] In that case parents sued for the alleged wrongful death of their minor son who was claimed to have been injured through the negligence of the flood control district. It was conceded that the district was a public agency immune from action for negligently caused damages under the rule of sovereign immunity. However, it was claimed by the plaintiff that the district in causing the child's death was engaged in

79. See County of Mohave v. Chamberlain, **supra,** note 47, 281 P.2d at 133.
80. 66 F. Supp. 943 (D. Mont. 1946).
81. Commers v. United States, 66 F. Supp. 943 (D. Mont. 1946).
82. 45 Cal. App. 2d 306, 114 P.2d 14 (1941).

an authorized public project and that under the constitution property was taken subject to the requirement of just compensation. Furthermore, although the plaintiff conceded the child was not a chattel and that the parents had no property right in such a child, it was contended that a statutory cause of action enduring to a parent for wrongful death was such a property right as would entitle the parents to just compensation. The Court rejected this claim of the parents reasoning that the property right in the cause of action for wrongful death did not arise until the death of the minor child and, therefore, it was not the property of the parents which was taken at the death of the child.[83] It is interesting to speculate, however, what a court might hold under facts similar to those in this case and in a jurisdiction which permits recovery under an eminent domain theory for a single negligent act if the parents had sued for the taking of this property right in the services of the child rather than for their property right in the statutory cause of action arising out of his death.

While it does not appear that any courts have allowed recovery for personal injuries under an eminent domain theory, there seems to be no reason why damage to or a taking of personal property could not be recovered just as easily as those to real property,[84] although some courts would impose the requirement that the personal property be of the type customarily subject to condemnation for public use.[85]

The important thing is that reverse or inverse condemnation, both of which are misnomers,[86] represent an important theory for the recovery of property damage tortiously inflicted by a governmental unit. It is not a new theory, but until recent times it has been seldom employed, perhaps because of the unfamiliarity of the tort lawyer with the law of eminent domain from which the theory stems, and perhaps from the fact that there has been little literature on the subject and the cases have been indexed under such nondescript headings as "property owners' remedies". It would not be surprising to see this theory of tort recovery become increasingly more prevelant.

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83. Brandenburg v. Los Angeles Flood Control Dist., **supra**, note 82.
84. See NICHOLS, EMINENT DOMAIN, § 1313 (3rd ed. 1953).
85. V.T.C. Lines v. City of Harlon, **supra**, note 67.
86. Does it make any difference whether the condemnation proceedings are upside down, **i. e.** "inverse", or merely turned around, **i. e.** "reverse".

GOVERNMENTAL—PROPRIETARY DISTINCTION APPLIED TO SOVEREIGN IMMUNITY OF STATE

Although most of the substantial inroads on governmental immunity which have been made in recent years are attributable to legislative action, the courts too have moved in that direction.[87] One of those areas in which the courts are whittling away at the doctrine of sovereign immunity is in their application of the rule which distinguishes governmental and proprietary functions. The central idea in the law of municipal tort liability is that a municipality is liable for its torts in the exercise of proprietary but not governmental functions.[88] In recent years there appears to have developed a growing trend toward applying the same distinction to tort claims against the state with the result that recoveries have been made in cases in which it was previously thought that sovereign immunity would be a bar.

California seems to be the leader in this respect. In 1947 it was held in *People v. Superior Court*,[89] that where the state of California in the operation of a State Belt Railroad as a public carrier for hire, but without profit, along 5 miles of San Francisco waterfront, it was engaged in a commercial or business enterprise so as to render the state liable for negligence in the operation of the railroad. The case arose when the plaintiff worker was negligently thrown from the platform on top of a tank car while testing contents of the car and was injured. There was on the books at the time a statute providing that any person having a claim on express contract or for negligence against the state must present the claim to the State Board of Control and if it was not allowed he was authorized to bring suit against the state. In an earlier case the court had held that such a statute did not create liability on the part of the state where none existed before but that it merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted.[90] In other words the statute merely waived immunity from suit, not immunity from liability. It was the latter issue which was not before the court. The court relying on the leading case of *Green v. State*,[91] which recognized the distinction between

87. James, **Immunity Ironds on Old Tort Concepts**, 14 NACCA L.J. 226, 238 (1955).
88. See Davis, **supra** note 13 at 773; see Maguire, **State Liability for Tort**, 30 Harv. L. Rev. 20 (1916).
89. 29 Cal. 2d 754, 178 P.2d 1 (1947).
90. Denning v. State, 123 Cal. 316, 55 Pac. 1000 (1899).
91. 73 Cal. 29, 11 Pac. 602, 14 Pac. 610 (1887).

governmental and proprietary functions, overruled a previous decision[92] and held that where the state is engaged in a business for the benefit of commerce not for profit and where it appeared that the primary burden would be upon industry and commerce and that it is a type of undertaking usually carried on by private persons and not by government it is held not to be a governmental function, but rather to be a commercial or business enterprise in the negligent operation of which the state may be held liable. Subsequently the California court has gone on to hold that the state is liable for its negligence in the operation of a state fair (thus overruling an earlier decision),[93] and for its negligence in the operation of a housing authority.[94] Furthermore, it has recognized the distinction in other cases, while denying liability because the particular act involved arose out of a governmental function.[95] In *Muses v. Housing Authority* it was said that when the state steps down from its all supreme position as a ruler and competes with industry or labor, then, so far as tort liability is concerned it must be held to be acting in a proprietary capacity to be subject to the same liability for its torts as private individuals.[96]

The California rule would also seem to obtain in Michigan,[97] where it has been recognized that there is a distinction between sovereign immunity from suit and immunity from liability. It was held there, that sovereign immunity from liability was a defense to torts arising out of governmental functions, of which the operation by the Highway Department of a ferryboat was one. Apparently, however, the door has been left open to contend that there is no immunity from liability for proprietary functions, and since immunity from suit has been waived by statute, recovery may in such cases may be had.

In New York the courts have said in a dictum pronouncement that under the common law the state was subject to lia-

92. Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754, 253 Pac. 173 (1927).
93. Guidi v. State, 41 Cal. 2d 623, 262 P.2d 3 (1953) overruling Melvin v. State, 121 Cal. 16, 53 Pac. 416 (1898).
94. Muses v. Housing Authority, 83 Cal. App. 2d 489, 189 P.2d 305 (1948).
95. Talley v. Northern San Diego County Hospital Dis., 41 Cal. 2d 33, 257 P.2d 22 (1953) operating a hospital district; Gillespie v. City of Los Angeles, 114 Cal. 2d 513, 250 P.2d 717 (1953) maintenance of public highway; Bettercourt v. State, 123 Cal. 2d 60, 266 P.2d 201 (1954) operation of a toll bridge.
96. **Id.** at 502, 189 P.2d at 312.
97. Manlon v. State Highway Commissioner, 303 Mich. 1, 5 N.W.2d 527, **Cert. Den.** 317 U.S. 677 (1942).

bility when exercising corporate or proprietary functions but immune from liability while exercising governmental functions.[98]

In Georgia,[99] it was held that a municipal housing authority created under a state housing act was subject to suit in tort by a tenant for injuries caused by negligence of the authority. That case revolved primarily around the "sue and be sued" clause of the housing act, which the plaintiff claimed was a waiver of immunity. The defendant contended that the State Highway Department, a county, and municipalities also have legislative authority to sue and be sued, but that they have nevertheless been held to be immune from damage suits resulting from injury negligently inflicted while in the performance of a governmental function. The court answered the argument by saying that in each of those cases the defendant's negligence occurred while in the performance of a purely governmental function, while in the suit against the housing authority the defendant was negligent in the performance of a remunerative business transaction, and it thereby recognized the difference between governmental and proprietary functions.

New Jersey has reached approximately the same conclusion as the California and Georgia courts.[100] There, in a recent case, it appeared that the highway authority had filed a declaration of taking of a multi-family dwelling and before it had taken possession of the building a guest of one of the tenants was injured in a fall from a common stairway in the building. He sued the authority for his injuries allegedly caused by negligence. The court held that the authority had taken possession in legal contemplation and had actual control of the premises and, therefore, was responsible for the injury. The court recognized that the authority while engaged in the maintenance of the state highway system would be entitled to the same sovereign immunity as the state while it was engaged in carrying out that governmental function. It reasoned, however, that the creation of authorities such as the defendant and the delegation to them of functions which necessitated

98. Brown v. Board of Trustees, 303 N.Y. 484, 488, 104 N.E.2d 866, 868, 34 A.L.R.2d 720, 723 (1952).
99. Knowles v. Housing Authority of the City of Columbus, 212 Ga. 729, 95 S.E.2d 659 (1956).
100. Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313, (1956).

a relationship comparable to those ordinarily existing between private parties and the presence of a sue or be sued clause in the authority's charter justified a holding that although the authority might continue to be immune from the carrying out of governmental functions, but that here it was engaged in a proprietary function for which it would be liable.

Minnesota has said in the case of *State v. Bently,* that the question of suing the state without its permission does not arise in connection with a situation wherein the state acquires title to land outside of its territorial limits. In such cases it is acting in a proprietary capacity and cannot claim sovereign power or immunity from suit.[101] That case, while it might more properly be referred to as a reverse condemnation case was predicated not only upon the Minnesota constitutional provision requiring the payment of just compensation for the taking or damaging of property but also upon the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

There is some authority that the governmental or proprietary distinction is inapplicable in determining state tort liability for the state always acts in sovereign governmental capacity and, therefore, is always immune from tort liability in the absence of a waiver of such immunity.[102] The majority of jurisdictions however, have at least recognized the distinction between governmental and proprietary functions and since they have exempted the sovereign on the grounds that it was acting in a *governmental* capacity they seemingly would be open to the argument that the state would not be immune for its torts while engaged in a proprietary function.[103]

The government-proprietary distinction has been criticized in its application to municipal tort liability[104] as being unsatisfactory and confusing. In the hairsplitting over classifying various functions, ridiculous conclusions have been reached.[105] The fact remains, however, that where the distinction is

101. 216 Minn. 146, 12 N.W.2d 347 (1944).
102. See Riddoch v. State, 68 Wash. 329, 123 Pac. 450 (1912).
103. Phoenix v. Lane, 76 Ariz. 240, 263 P.2d 302 (1953); Deleware Liquor Store Inc. v. Wilmington, 46 Del. 461, 75 A.2d 272 (1950); Nordby v. Department of Public Works, 60 Ida. 475, 102 P.2d 789 (1930); State v. F. W. Fitch Co., 236 Iowa 208, 17 N.W.2d 380 (1945); Chargois v. Grimmett & James, 36 S.2d 390 (La. App. 1948); Richardson v. Hannibal, 330 Mo. 398, 50 S.W.2d 648 (1932); Blackman v. Cincinnati, 66 O. App. 495, 35 N.E.2d 164, Aff'd. 140 Oh. St. 25, 42 N.E.2d 158 (1940); Commonwealth v. Lundberg, 50 Pa. D&C 221 (1943); Christ v. Sims, 134 W.Va. 173, 58 S.E.2d 657 (1950).
104. Davis, **Governmental Tort Liability,** 40 Minn. L. Rev. 751, 773 (1956).
105. **Id.** at 774.

drawn in cases involving municipal liability it often has the effect of limiting liability, while when it is applied to actions against the state the almost inevitable result is to expand state liability.[106] It is reasonable to believe that as state governments continue to expand into fields which were formerly matters of private business only, courts will increasingly apply the distinction to hold the state liable for its torts in the same manner in which a private entrepreneur would be liable.

THE LAW—A PARADOX

"Reason is the life of the law; nay, the common law itself is nothing else but reason . . . The law which is the prefection of reason."

SIR EDWARD COKE

"The life of the law has not been logic it has been experience."

OLIVER WENDELL HOLMES, JR.—Common Law

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106. See James, **Inroads on Old Tort Concepts,** 14 NACCA L.J. 226, 239 (1955).