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King Can Do Wrong - Maybe: Abolition of Court-Imposed Sovereign Immunity for Nondiscretionary Negligent Acts, The

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THE KING CAN DO WRONG—MAYBE: ABOLITION OF COURT-IMPOSED SOVEREIGN IMMUNITY FOR NONDISCRETIONARY NEGLIGENT ACTS

One of the more interesting developments in the law has been the struggle of state courts to come to grips with the doctrine of state sovereign immunity.[1] Although the definite trend in the courts is totally or partially to vitiate this anachronistic doctrine,[2] some state courts, for a variety of reasons, have continued to employ it as a shield to protect negligent acts of state and political subdivision employees.[3] Absent any clear legislative waiver, these courts continue to follow the twisted path of applying such concepts as the governmental-proprietory or ministerial-discretionary distinctions to determine if liability can be imposed.[4] This flury of court activity has been the genesis for a spate of law review articles examining both the history and the viability of the state sovereign immunity doctrine.[5]

MISSISSIPPI EMBRACES THE TREND

Until recently, Mississippi had neither adopted a state tort

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1. For a discussion of recent court decisions and legislative activity concerning the doctrine, see Roberts and Thronson, *A New Perspective—Has Utah Entered the Twentieth Century in Tort Law?* 1981 UTAH L. REV. 495; Taylor, *A Re-Examination of Sovereign Tort Immunity in Virginia,* 15 U. RICH. L. REV. 247 (1981); Note, *Governmental Liability: The Kansas Tort Claims Act [or the King Can Do Wrong]* 19 WASHBURN L.J. 260 (1980); Note:, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future,* 10 SUFFOLK U.L. REV. 521 (1976); Comment, *Sovereign Immunity in Connecticut: Survey and Economic Analysis,* 13 CONN. L. REV. 293 (1981); Comment, *A Case for Abrogation of Municipal Tort Immunity in Mississippi,* 41 MISS. L.J. 289 (1969-70); Note, *Survival of the Doctrine of Sovereign Immunity in Mississippi—Jones v. Knight,* 1 MISS. C. L. REV. 463 (1980).

2. *See generally,* Oliver, *Chasse v. Banas: The Eroding Doctrine of State Sovereign Immunity,* 21 N.H.B.J. 324 (1980); Olson, *Governmental Immunity from Tort Liability—Two Decades of Decline: 1959-1979,* 31 BAYLOR L. REV. 485 (1979). Justice Bowling in his dissent in Jones v. Knight, 373 So. 2d 254, 258 (1979) states "that over thirty states have completely abolished governmental immunity."

3. *See* Horton v. U.S., 622 F.2d 80 (4th Cir. 1980) (Applying S.C. Law); Sikes v. Candler County, 247 Ga. 115, 274 S.E. 2d 464 (Ga. 1981); Neal v. Donahue 611 P.2d 1125 (Okla. 1980); Lick v. Dahl, 285 N.W.2d 594 (S.D. 1979).

4. *See generally,* Hellerstein and Wells, *The Governmental-Proprietary Distinction in Constitutional Law,* 66 VA. L. REV. 1073 (1980); Comment, *The Discretionary Function Exception to Government Tort Liability,* 61 MARQ. L. REV. 163 (1977); Note, *Tort Law—Municipal Immunity—Replacement of a Stop Sign is a Governmental Function,* 42 MISS. L.J. 398 (1972).

5. *See generally,* Lambert, *Tort Law,* 36 ATLA L.J. 20 (1976); Leonard, *Municipal Tort Liability: A Legislative Solution Balancing the Needs of Cities and Plaintiffs,* 16 URB. L. ANN. 305 (1979); Note, *An Economic Analysis of Sovereign Immunity in Tort,* 50 S. CALIF. L. REV. 515 (1977); Note, *Torts—Abrogation of Sovereign Immunity—Scope of Retained Immunity,* 43 MO. L. REV. 387;(1978).

claims act nor judicially abolished state sovereign immunity.[6] Given the conservative fiscal nature of the legislature and recent Mississippi Supreme Court pronouncements,[7] it was unlikely that any wholesale abrogation of the doctrine would take place in the near future. Instead, it was predicted that any chipping away at the doctrine, much to the dismay of frustrated litigants, would occur in an incremental fashion by actions of the state supreme court and the legislature.

Utilization of this incremental approach was emphasized in two recent supreme court decisions concerning sovereign immunity, *CIG Contractors, Inc. v. Mississippi State Building Commission*[8] and *French v. Pearl River Valley Water Supply District.*[9] In *CIG,* the court held that legislative authorization for the State Building Commission to enter into contracts necessarily resulted in a waiver of sovereign immunity.[10] This was logically sound as a contract would not in essence be a contract if one side could breach it with impunity. The court in *French,* however, took a somewhat contrary position, holding that the Pearl River Valley District's purchase of an insurance contract without legislative authorization did not waive its protection from suit under the sovereign immunity doctrine.[11]

Plaintiffs in *French* were seeking $850,000[12] in property damages alleging that the District and its Board of Directors were negligent in maintaining the water level at the Ross Barnett Reservoir. According to the plaintiffs the water at the reservoir had been kept dangerously high to promote real estate development in the area.[13] When the torrential rains occurred during the 1979

6. The Mississippi Supreme Court has been wrestling with the doctrine throughout the nineteenth and twentieth centuries. In 1911 in City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329, a driver of a city garbage cart was deemed by the court to be providing a corporate, not a governmental function. Counties were first held to be immune in Brabham v. Board of Supervisors of Hinds County, 54 Miss. 363 (1877), and counties were held to possess the same degree of immunity as states in City of Grenada v. Grenada County, 115 Miss. 831, 76 So. 682 (1917). Mississippi cases recently decided upholding the doctrine include Jones v. Knight, 373 So. 2d 254 (1979) (State Immunity), Davis v. Little, 362 So. 2d 642 (1978) and Berry v. Hinds County, 344 So. 2d 146 (1977) (County Immunity), Nathaniel v. City of Moss Point, 385 So. 2d 599 (1980) and Warren v. City of Gulfport, 378 So. 2d 1098 (1980) (City Immunity–Governmental Function).

7. The Mississippi Supreme Court had repeatedly stated that any relief from the doctrine must emerge from the state legislature. *See* Jagnandan v. Miss. State Univ., 373 So. 2d 252, 254 (1979); Jones v. Knight, 373 So. 2d 254, 256 (1979); Berry v. Hinds County, 344 So. 2d 146, 151 (1977).

8. 399 So. 2d 1352 (Miss. 1981).

9. 394 So. 2d 1385 (Miss. 1981).

10. 399 So. 2d at 1355.

11. 394 So. 2d at 1387.

12. Brief for Appellant at 10.

13. *Id.* at 6.

Easter season, excess water had to be released from the reservoir which resulted in the flooding of the Pearl River and damage to the plaintiff's property. The case was dismissed at the circuit court level on appellee's demurrer claiming sovereign immunity.

On appeal, appellants argued that both the legislature and the District had waived sovereign immunity.[14] The legislature had waived immunity by an express grant to the District "to sue and be sued in its corporate name."[15] Although the words possess a clear meaning in the English language, the court held that they take on a convoluted aspect when translated to legalese.[16] Citing *Berry* v. *Hinds County,*[17] the court stated that a general grant of authority to sue or be sued was not in itself an express or implied waiver of immunity.[18] Concerning this holding, the court was on safe grounds judicially,[19] but certainly not semantically.

Plaintiff's second argument, whether the District's purchase of insurance constituted a pro tanto waiver of immunity, resulted in the court's writing on what heretofore had been a blank slate. Again following the general rule,[20] the court held that the District's purchase of insurance on its own volition did not waive immunity up to the limits of the policy.[21] Since the legislature was in the best position to limit liability and was also charged with the responsibility of finding the ways and means to pay judgments, the court concluded that immunity should be waived only by express legislative fiat.[22] Even though the doctrine in Mississippi was judicially created,[23] the court in *French* continued to show great deference to the legislature under this separation of powers theory.[24]

Unpredictably, such deference was severely curtailed in *Pruett* v. *Rosedale.*[25] Although Justice Bowling, the author of the court's

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14. 394 So. 2d at 1386.
15. *Id.*
16. *Id.*
17. 344 So. 2d 146 (Miss. 1977).
18. 394 So. 2d at 1386. The specific statute is found at MISS. CODE ANN. § 51-9-121 (j) (1972).
19. The seminal Mississippi case restricting liability even though there is a general grant of authority to sue is State Highway Commission v. Gully, 167 Miss. 631, 145 So. 351 (1933); *Accord,* State v. Woodruff, 170 Miss. 744, 766, 150 So. 760, 762 (1933).
20. The general rule is stated in 68 A.L.R. 2d 1473 (1959).
21. 394 So. 2d at 1388.
22. *Id.* at 1387.
23. Jones v. Knight, 372 So. 2d 254, 265 (Miss. 1979).
24. A persuasive discussion of the problems of legislative abrogation is found in Justice Bowling's dissenting opinion in Jones v. Knight, 373 So. 2d at 265.
25. 421 So. 2d 1046 (Miss. 1982). The only issue presented to the court was the sovereign immunity doctrine. Since the doctrine was set aside for the instant case, the case was remanded to the Bolivar County Circuit Court. At this writing, the liability of a policeman for a ministerial act had not been decided.

opinion in *Pruett,* had written a powerful dissent in *Jones,*[26] few persons expected that the court would overrule one hundred years of precedent.[27] Also it was unexpected that four justices would switch their votes.[28] This switch in voting combined with the votes of the new justices on the court—Justices D. Lee, Hawkins, and Prather—resulted in a unanimous decision.

The timing of the *Pruett* mandate was also surprising given the economic recession gripping the state and the nation. As the late Chief Justice Earl Warren observed, justices are neither "monks nor scientists" and are sensitive to political and economic events taking place within society.[29] Supposedly, one of the major reasons for the recalcitrance of the legislature in removing sovereign immunity was the fear that such suits would injure the state's treasury. *Pruett* was handed down at a time when the state was experiencing a shortfall in tax revenue and federal monies while demands for state services were accelerating.

Finally, the court had just confronted the legislature in the battle over the new rules of civil procedure.[30] Although the court in *Pruett* carefully mapped out a role for the legislature in drawing the boundaries where the state can be sued, it did reverse itself on the issue of who should be the initiator in striking down the doctrine.

ANALYSIS OF THE *Pruett* Decision

There were sound reasons, however, to abolish the doctrine. As Justice Bowling noted in *Pruett,* the doctrine had become somewhat of an anachronism as all but six states had substantially modified their immunity doctrines.[31] In an age of insurance and concern with spreading risks, the doctrine had fallen prey to the maxim "cessante ratione legis cessat ipsa lex."

Second, the procedure allowing parties injured by the state to receive legislative redress by the passage of private and local

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26. 373 So. 2d at 257.

27. A listing of the long line of cases overruled is listed in Appendix A of the opinion. 421 So. 2d at 1052.

28. Chief Justice Patterson and Justice Bowling had dissented in recent sovereign immunity cases. *See e.g.*, Jones v. Knight, 373 So. 2d 254, 257 (Miss. 1979). Justices Sugg, Walker, Broom and R. Lee were evidently persuaded to change their stance. Justices D. Lee, Hawkins, and Prather were squarely addressing the issue for the first time.

29. Warren, "The Law and the Future," 52 Fortune 106 (1955).

30. On May 26, 1981, the Mississippi Supreme Court adopted new rules of civil procedure. The new rules will take precedent over the statutorily imposed rules and some scholars would argue that the court usurped legislative power in promulgating the new rules. *See* Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi,* 3 MISS. C. L. REV. 1 (1982).

31. 421 So. 2d at 1047.

bills simply was not a viable mechanism for relief.[32] It is hard to conceive of a more inefficient procedure. Legislators should be much too busy to handle bills of this nature and in some instances it costs more to process the bill than the amount awarded to the injured party.[33] Also, in some instances amounts are paid that would not be paid if litigated, and, more seriously, in some situations the amounts awarded are insufficient. Plus, the private bill remedy is subject to all the vagaries of the political process.[34] An injured party must know of the process, have access to a legislator or intermediary and the bill must survive cumbersome legislative procedures. As a remedy, the private bill was as erratic as the legislative waivers of immunity that were contained in the state code.[35]

Third, the sovereign immunity doctrine was clearly unfair to parties who happened to be injured by the negligence of a person operating in the public sector vis-a-vis a party injured by the negligence of a person acting in the private sector. In the latter situation various statutory protections and the doctrine of respondeat superior could apply to provide a path to a remedy. With the shield of sovereign immunity in place, the opportunity for a remedy in many cases was effectively blocked. Also, the termination of the doctrine requires that the state must exercise the same cautions in procedures and the hiring of personnel as the private sector. Besides giving protection to the citizens of the state, abolition also prevents the harm of unredressed citizen grievances. In fact, the failure of the state to allow a remedy causing the individual to absorb the loss could be more costly to the state in the long run.[36]

Recognizing the above, the court correctly abolished the sovereign immunity doctrine in *Pruett* with the cessation, except for the instant case, to take place July 1, 1984.[37] The prospective

32. An examination of the House and Senate Journals from 1971-1982 indicates the legislature approved a total expenditure of $687,963.21 to compensate injured citizens. The yearly range was $29,888.49 (1973) to $162,289.06 (1977).

33. The range of compensation per bill during the ten-year period was from $4.50 to $82,500.00.

34. Taylor concludes the private bill remedy is subject to political favoritism and is a financial and administrative burden on state legistatures. Taylor, *supra* note 1 at 260.

35. MISS. CODE ANN. §§ 55-9-89 (Supp. 1982) (county park commissioners), 59-5-37 (Supp. 1982) (State Port Authority), 59-17-31 (Supp. 1982) (State Inland Port Authority), 61-3-15 (Supp. 1982) (airport authorities), 41-29-108 (1972) (State Bureau of Narcotics), 21-15-6 (Supp. 1982) (municipalities), 19-7-8 (Supp. 1982) (counties), 41-55-5 (1972) (public ambulances), 49-19-117 (Supp. 1980) (State Forestry Commission), 47-5-75 (1972) (State Board of Corrections).

36. For a discussion of the harm of unredressed citizen injuries, *see* Comment, *Sovereign Immunity in Connecticut, supra* note 1 at 311-15.

37. 421 So. 2d at 1052.

application of the decision was to allow the legislature to take the necessary action to establish the boundaries for bringing suits against the state.

The court rested its arguments for abrogation on three grounds: (1) precedent in sister jurisdictions and related immunity cases, (2) due process, and (3) fairness. The scope of the decision is broad, applying to all state, county and local governmental activities deemed to be nondiscretionary in nature.[38]

As noted above, abundant precedent existed from other states which had abolished or severely restricted the sovereign immunity concept. It seemed particularly persuasive to the court that three states in close proximity to Mississippi—Florida, Louisiana and Alabama[39]—had abolished sovereign immunity. The court in *Pruett* also drew heavily on the reasoning used to abolish the doctrine in opinions from the Supreme Courts of Minnesota, Missouri, Pennsylvania, West Virginia and Kansas, often citing long excerpts from these opinions.[40] Plus, the court had precedent from within the state that could be used to support *Pruett*. Finding charitable immunity no longer to be a viable doctrine, the court in 1951 concluded that it should be abolished.[41] Perhaps even more inferential, but no less persuasive, the well-known products liability case of *Dr. Pepper Bottling Co. of Miss.* v. *Bruener* was cited by the court[42] to emphasize the general rule that there exists a "natural inherent duty" for a person performing an act to act sensibly and intelligently to avoid injury or be held "accountable at law."[43] Logically, the court saw no reason why this rule should not be applied to the state in its widespread operations as well as to the private sector.

To give constitutional underpinnings to its due process argument, the court cited Article III of the 1890 Mississippi Constitution. Article III mandates: "All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice shall be administered, without sale, denial, or delay."[44] Interpreting this constitutional clause broadly, the court concluded that regardless of the source of the injury, every aggrieved person should have the opportunity to seek a remedy in court. This argu-

38. *Id.*
39. 421 So. 2d at 1047.
40. 421 So. 2d at 1048-1051.
41. Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951).
42. 245 Miss. 276, 148 So. 2d 199 (1962).
43. *Id.* at 282, 148 So. 2d at 201.
44. MISS. CONST. art. III, § 24.

ment, although much more benign in its application here, is similar to the economic due process arguments posited in the late nineteenth century. That is, a remedy is not really a remedy unless the controversy has been adjudicated in a court of law. The court found ample support for this "day in court" theory in decisions stemming from Florida,[45] Minnesota[46] and Missouri.[47]

The third major thrust of the court's opinion was that the doctrine was inherently unfair: unfair to persons injured by negligent actions of the state and to employees of the state on whom, given the shield provided the state by the immunity doctrine, the suit would necessarily be focused. Employees of private firms could be protected by the doctrine of respondeat superior or by the employee's insurance coverage, but many state employees would be left to pay the judgment out of their own resources. Thus, inequity could result in that the injured party would be unable to reach a financial cache sufficient to fund a judgment. The state's attempt to ameliorate the harshness of the doctrine by statutorily approving the purchase of insurance by some state agencies only exacerbated the unfairness of the situation before *Pruett*.[48] Whether one could recover was dependent on which state agency was guilty of tortious conduct.

THE PRESENT STATUS OF THE DOCTRINE

At the end of the first major section of the opinion the court cleverly aborts a judicially created doctrine by passing the responsibility for supervision of the doctrine from the courts to the legislature.[49] The wording of this particular passage suggests that the court is really shedding power rather than taking action that the legislature is reluctant to take itself.[50] In *Pruett* the court in fact forced the legislature to take some legislative action.

Furthermore, the mandate of *Pruett* provided legislative guidance. Its reach included sovereign immunity at all levels of state government but gave the legislature two sessions to enact a state tort statute. More importantly, following the model of the Federal Torts Claims Act, *Pruett* maintains the immunity for state

45. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
46. Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975).
47. Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. 1977).
48. *See supra* note 35.
49. 421 So. 2d at 1051.
50. Three actions relating to sovereign immunity were introduced in the 1982 Mississippi legislative session. Only H.B. 1022, An Act to Authorize the Establishment of Trusts for the Payment of Certain Claims Against Hospitals, passed. The other two, a general waiver statute (H.B. 595) and an act to require liability insurance on state-owned vehicles (H.B. 794), failed to get out of committee.

employees in the executive, legislative and judicial branches when they are performing discretionary acts.[51] While maintenance of such immunity is common in order that public officials not be inhibited in rendering policy-making decisions, often whether an act is discretionary or ministerial is the subject of court determination. There will remain, therefore, a role for the Mississippi courts in resolving sovereign immunity controversies.

CONCLUSION

There is no doubt that the doctrine of sovereign immunity is on the wane in America. As our society continues to embrace the concept that there should be a remedy for every injury, sovereign immunity, like its legal cousins parental, spousal and charitable immunities, will decline as a protective shield for negligent conduct. In *Pruett* the Mississippi Supreme Court correctly gave the doctrine a strong push down a slippery slope. It remains to be seen what path the state legislature will take either to support or to negate the impact of the decision.

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51. 421 So. 2d at 1052.