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THE ABROGATION OF SOVEREIGN IMMUNITY IN MISSISSIPPI: THE LEGISLATIVE PROBLEM

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In *Pruett v. City of Rosedale*,[1] the Mississippi Supreme Court abolished the doctrine of sovereign immunity as to state government, counties, municipalities and all other local subdivisions of government. The court retained one segment of the doctrine, the concept of official immunity for discretionary acts of public officials including legislative, judicial and executive bodies. Recognizing the legislative problems presented, the court ordered that the decision become effective as to causes of action accruing on or after July 1, 1984.[1.5]

The purpose of this article is to examine, in part, the complexity of the problem presented to the Mississippi Legislature by this decision. Though Mississippi became the 45th state to judicially abrogate the doctrine,[2] the legislative answer is far more complex than generally thought. For the legislature to properly balance the competing interests and to develop a legislative approach that is both sound and politically pragmatic, will require a great deal of research, study and understanding. One of the major obstacles that the legislature will have to overcome is the simplistic approaches that will undoubtedly be offered but that will not really address the basic problems. Rather, the legislature should take this opportunity to determine the boundaries of governmental tort liability in Mississippi.

Though arguments have been made in favor of sovereign immunity,[3] the only argument that seems to have any real validity

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1. 421 So. 2d 1046 (Miss. 1982).

1.5 Such prospective overruling is constitutional. *See* Note, *Prospectively Overruling the Common Law*, 14 SYRACUSE L. REV. 53 (1962).

2. Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982). *Cf.*, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), which deals with actions brought against local municipalities and their officials for violation of 42 U.S.C.A. § 1983 (West 1981).

3. The policy reasons for and against governmental immunity are well summarized in Fleming, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 614-15 (1955) as follows:

> Governmental immunity has sometimes been defended on grounds of policy. The argument is fourfold: (1) funds devoted to public purposes should not be directed to compensate for private injuries; (2) 'the public service would be hindered, and the public safety endangered, if the superior authority could be subjected to suit at the instance of every citizen, and, consequently, controlled in the use and disposition of the means required for the proper administration of the government;' (3) that liability would involve the government 'in all its operations, in endless embrassments, and difficulties,

today is the saving of tax dollars.[4] Even this argument is without merit since the citizen should not be expected to bear the costs, individually in most instances, of government-caused injury. Large governmental bodies may be good risk distributors[5] while smaller entities can probably achieve the same result through insurance. Not only does continuance of a general immunity for governmental activities fly in the face of reasoned thought and experience,[6] the continuation of the doctrine, as in the past, would raise moral concerns as to whether the legislature was fulfilling its functions and accepting its responsibilities. This is not to say that the only moral or just course for a legislature is total or almost total abolishment. Rather, the legislature must carefully balance all the factors and seek essential fairness to its citizens and to the proper functioning of the government. This can be accomplished by examining and balancing the tort concepts, including the fault principles, and the essential duties and functions of government.

The citizenry is entitled to accountability from the government. The immunity doctrine works toward the opposite, that is, non-accountability, when government actions are immunized from liability. Thus, a restructuring or abolition of the doctrine should result in better government if, for no other reason, government will have an increased awareness of safety in order to reduce or minimize costs. Certainly, no one can argue against government, as well as the private sector, having an increased awareness and concern for safety.

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and losses, which would be subversive of the public interests'; and (4) that unlike private enterprise, the government derives no profit from its activities. To these arguments it may be answered in part (1) that since the public purposes involve injury-producing activity, the injuries thus caused should be viewed as a part of the activity's normal costs, and no one suggests that it is a diversion of public funds to pay the costs of public enterprise even if payment is made to private persons; (2) that while control of government activity by private tort litigation may be involved where the alleged tort is legislative action or the making of some high-level policy decision, no such thing is involved in ordinary accident cases; (3) that the direct cost of making compensation by the government will not exceed the sum of the losses suffered by the hapless victims of government activity and that it is better to distribute these losses widely among the beneficiaries of government than to let them rest on the individual victims; that the embarrassments and expenses incidental to defending accident suits are also a part of the just social cost of operations that cause injuries and have never stifled comparable private enterprises; and finally (4) that, though the government as an entity does not profit from its enterprises, yet (it is devoutly to be hoped) the taxpaying public does, and it is the taxpaying public which would bear the costs of government tort liability (footnotes omitted).

4. McMahon, *The State as Defendant: The Doctrine of Sovereign Immunity in Alabama,* 41 ALABAMA LAWYER 583, 584 (1980).

5. *See* Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957). In this case the Supreme Court notes the differences in risk distribution between the federal government and a small municipality.

6. *See* notes 2 and 3, *supra.* The following cases involve either a partial or complete abrogation: Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969); Cook v. County of St. Clair,

HISTORY OF THE DOCTRINE IN MISSISSIPPI

The development of the doctrine of sovereign immunity in the United States has been well documented elsewhere.[7] The doctrine was first mentioned, but not applied, in Mississippi in the 1844 case of *County of Yalobusha v. Carbry*.[8] In 1852, in *Anderson v. State*,[9] the court held that a county could not be sued since there was no statute expressly authorizing it. However, the court held that the tax collector could be sued individually.[10] A long line of cases then followed that continued to recognize the doctrine.[11]

In 1977 the court began hinting to the legislature that the legislature was not only the proper body to deal with the abolition of sovereign immunity but that the time might be near for it to do so.[12] In *Jones v. Knight*, a 1979 case, the court expressed itself in this manner: "Abrogation of sovereign immunity strongly appeals to the sentiments of us all, but, if it were done as sought

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384 So. 2d 1 (Ala. 1980); Lorence v. Hospital Bd. of Morgan County, 294 Ala. 614, 320 So. 2d 631 (1975); Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963); City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopt v. Corning Hosp. Dist., 35 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Evans v. Board of County Comm'rs, 174 Col. 97, 482 P.2d 968 (1971); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972); Klepinger v. Board of Comm'rs of County of Miami, 143 Ind. App. 155, 239 N.E.2d 160 (1968); Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529 (1965); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977); Johnson v. Municipal Univ., 184 Neb. 512, 169 N.W.2d 286 (1969); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Willis v. Department of Conservation, 55 N.J. 534, 264 A.2d 34 (1970); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973); Mayle v. Pennsylvania Dept. of Trans., 479 Pa. 384, 388 A.2d 709 (1978); Becker v. Beudoin, 106 R.I. 562, 261 A.2d 896 (1970); Ward v. County Court, 141 W. Va. 730, 93 S.E.2d 44 (1956); Holytz v. City of Milwaukee, 17 Wis. 26, 115 N.W. 2d 618 (1961).

7. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4-9 (1924).

8. 11 Miss. (3 S. & M.) 529 (1844).

9. 23 Miss. 459 (1852).

10. *Id.* at 474.

11. *See, e.g.*, Brabham v. Bd. of Sup'rs of Hinds County, 54 Miss. 363 (1877); State v. Vaughn, 77 Miss. 681, 22 So. 999 (1900); Rainey v. Hinds County, 79 Miss. 238, 30 So. 636 (1901); State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933); State Highway Comm'n v. Gully, 167 Miss. 631, 145 So. 351 (1933); Owens v. Jackson Mun. Separate School Dist., 264 So. 2d 892 (Miss. 1972); Berry v. Hinds County, 344 So. 2d 146 (Miss. 1977), *cert. denied*, 434 U.S. 831 (1977); Jones v. Knight, 373 So. 2d 254 (Miss. 1979); McKlemurry v. University Medical Center, 380 So. 2d 251 (Miss. 1980); Hattiesburg Realty Co. v. Mississippi Highway Comm'n, 406 So. 2d 329 (Miss. 1981). *See also* Monaco v. Mississippi, 292 U.S. 313 (1934).

12. Berry v. Hinds County, 344 So. 2d 146 (Miss. 1977), *cert. denied*, 434 U.S. 831 (1977).

by the appellant it would leave every state agency, institution or branch of government vulnerable to tort suits. We think abrogation, if ever accomplished, should be accompanied by legislation . . . ."[13] The *Jones* decision was based on a 7-2 split of the court. A strong dissent, arguing for immediate abrogation, was written by Justice Bowling, the author of the *Pruett* decision.

In *Davis v. Little*[14] the court faced the issue of whether a county supervisor driving a county-owned vehicle on county business was covered by an official immunity. Since the county had not been sued, the court pointed out that the doctrine of sovereign immunity was inapplicable. Mississippi, like the other states applying common law sovereign immunity principles, does not apply the doctrine of *respondeat superior* in governmental tort actions. As a result, the governmental entity is not legally responsible for the torts of its employees. Thus, the county supervisor faced personal liability. The court recognized an official immunity for the discretionary decision-making process. However, the court found that immunity to be inapplicable on the basis that driving a car on county business is a ministerial act.[15]

Municipalities in Mississippi have always been treated differently than the state or counties.[16] As a result, the municipalities have faced more liability exposure. This exposure has been based on a governmental-proprietary distinction which on application has often made no sense except, perhaps, from a historical perspective. For instance, the maintenance and repair of sidewalks,[17] streets,[18] sewers,[19] and traffic control devices[20] have been held to be proprietary.

As pointed out in *Pruett,* the Mississippi Legislature has enacted a number of provisions that allow certain agencies to be sued to the extent of insurance that was legislatively authorized. The court then indicates, without really analyzing the statutes, that the *Pruett* decision would have been unnecessary had the legislature

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13. Jones v. Knight, 373 So. 2d 254, 257 (Miss. 1979).
14. Davis v. Little, 362 So. 2d 642 (Miss. 1978).
15. *Id.* at 644.
16. *See* Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi,* 41 Miss. L.J. 289 (1970). The theory has been that counties are subdivisions of the state while municipalities are voluntary associations. Board of Sup'rs v. Payne, 175 Miss. 12, 23, 166 So. 332, 335 (1936).
17. City of Cleveland v. Threadgill, 246 Miss. 23, 148 So. 2d 670 (1963).
18. Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925).
19. Semple v. Mayor of Vicksburg, 62 Miss. 63 (1884); Thompson v. Winona, 96 Miss. 591, 51 So. 129 (1910).
20. White v. Thomason, 310 So. 2d 914 (Miss. 1975).

expanded this concept to all governmental agencies.[21] Though most of the statutes limit recovery to the insurance proceeds and also limit the agencies' liability to the payment of premiums, not all do. For instance, there are no such limitations of the authority of county boards and public school boards of education to purchase insurance to cover official actions,[22] the purchase by county supervisors of general liability coverage,[23] the purchase of casualty and public liability and property damage insurance by a municipal utility commission,[24] purchase of insurance, including malpractice, from a trust by certain hospitals,[25] insurance procured by a housing authority,[26] nor on insurance purchased for hunter safety programs.[27] In addition, the state highway commission, the Bureau of Narcotics, and counties are authorized to purchase liability insurance for motor vehicles, with recovery limited to the insurance proceeds. However, this authority is limited to $10,000 for the personal injury of any one person and $20,000 where two or more persons suffer injury in any one accident. Property damage is limited to $5,000.[28] Such limits, though they represent the coverage minimums required by the Motor Vehicle Safety-Responsibility law,[29] are grossly inadequate in modern times.[30] Even more disturbing is the limitation on accidents involving school buses operated by counties, the separate school districts, consolidated school districts and junior colleges. Here claims are limited to $10,000 for any one person and $50,000 for any one accident.[31]

The lack of any comprehensive legislative plan is further evidenced by examining the governmental entities and where the legislature has authorized insurance and limited recovery to the insurance proceeds, without specifying the amounts of coverage, while also limiting the agencies' liability to the insurance premiums. Included are school districts and junior colleges concerning motor

21. Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982).
22. MISS. CODE ANN. §§ 37-5-41 and 37-7-319 (Supp. 1982).
23. MISS. CODE ANN. § 19-7-8 (Supp. 1982).
24. MISS. CODE ANN. § 21-27-17 (Supp. 1982).
25. MISS. CODE ANN. § 41-13-101 (Supp. 1982).
26. MISS. CODE ANN. § 43-33-11 (1972).
27. MISS. CODE ANN. § 49-1-60 (Supp. 1982).
28. MISS. CODE ANN. § 65-1-8(p) (Supp. 1982) (The Commission's liability is actually limited to the insurance premiums); MISS. CODE ANN. § 19-7-8 (Supp. 1982) (County Board of Supervisors); MISS. CODE ANN. § 41-29-108 (Supp. 1982) (Bureau of Narcotics' liability limited to the premiums).
29. MISS. CODE ANN. § 63-15-3(j) (Supp. 1982).
30. Compare OKLA. STAT. ANN. tit. 47, § 157.1 (West Supp. 1982), which requires insurance on state motor vehicles of $100,000/$300,000.
31. MISS. CODE ANN. § 37-41-4 (1972 & Supp. 1982).

vehicles,[32] the official acts of board members and employees of junior colleges,[33] municipalities, including errors and omissions coverage,[34] the Mississippi Agricultural and Industrial Board and state port authority,[35] and county park commissions.[36] The agencies' liability being limited to the insurance premiums would only be of significance in case of insolvency of the insurance carrier.

THE LEGISLATIVE PROBLEM

A. Reinstatement of the Doctrine

The Mississippi Legislature will almost certainly face pressure from the governmental bodies to abrogate *Pruett* and perhaps to even extend the present immunities.[37] As has been pointed out previously, this would virtually amount to an abrogation of legislative responsibility and would be a definite disservice, in the long view, to the citizens of the state. Others may lobby for a complete abolition of any immunity with government treated the same as the private sector, as in New York[38] and Washington.[39] This approach, though simplistic, ignores the realities of governmental functions and duties and the essential differences that exist. For instance, government provides services that are not generally provided in the private sector such as fire suppression, law enforcement, welfare, streets, sewers, traffic control, and the various inspection services. The private sector determines the viability of services usually on an economic basis; government usually cannot evaluate its services and their continuance in this manner. In addition, especially as to the state, there is often great geographical diversity in the providing of governmental services.[40] Finally, the legislature must consider the many small governmental entities

32. MISS. CODE ANN. §§ 37-7-304(a), 37-29-85 (1972 & Supp. 1982). *See also* MISS. CODE ANN. § 37-41-41 (1972 & Supp. 1982) (school buses).

33. MISS. CODE ANN. § 37-29-85 (1972 & Supp. 1982). *See also* MISS. CODE ANN. § 25-1-47 (1972) which authorizes municipalities to defend officers, agents and employees and to pay settlements and judgments.

34. MISS. CODE ANN. § 21-15-6 (1972 & Supp. 1982).

35. MISS. CODE ANN. § 59-5-37 (1972 & Supp. 1982).

36. MISS. CODE ANN. § 55-9-89 (1972 & Supp. 1982).

37. This was the experience in Missouri. *See* Note, *Sovereign Immunity in Missouri: Judicial Abrogation and Legislative Reenactment*, 1979 WASH. L.Q. 865, 872 (1979). *See infra* notes 93 to 97 and accompanying text.

38. N.Y. JUD. PRAC. CT. OF CLS. § 9(2) (McKinney 1938).

39. WASH. REV. CODE ANN. § 4.92.030 (1962 & Supp. 1983).

40. *See* Henke, *Oregon's Governmental Tort Liability Law from a Natural Perspective*, 48 OR. L. REV. 95, 100-01 (1968).

41. Mississippi has always been a predominantly rural state. *See* R. HIGSHAW & C. FORTENBERRY, GOVERNMENT AND ADMINISTRATION OF MISSISSIPPI, at 328 (1954); *See also Meridian Ponders City's Future While Budget Cuts Made*, Clarion-Ledger (Jackson, Miss.) Dec.

and their limited resources that exist here in Mississippi.[41]

The largest number of potential injury claims are probably in the area of motor vehicle accidents and injuries caused by governmental property.[42] In general, immunity should not exist in either of these areas. As to motor vehicle accidents, the governmental unit should be responsible for the actions of its employees like the private sector. One method of reducing costs to the government, while insuring compensation to the injured person, would be to legislate that, regardless of any insurance policy language, any applicable insurance of the employee must be exhausted prior to invading the governmental funds or insurance.[43]

Another method to reduce costs would be to abolish the collateral source doctrine, which prohibits the defendant's use of benefits received by the plaintiff from third parties, as to government and its employees and limit recovery to those damages in excess of insurance proceeds, workers' compensation benefits, social security, governmental benefits, employer-paid sick leave and the like. To carry this out, subrogation actions against government should also be extinguished.[44] This would avoid double recovery by victims, the transfer of insurance costs to government, and thereby reduce costs to the government. Such an approach would appear to be a proper legislative means of balancing the interests of the citizens with those of government.

B. *Limit Recovery to Insurance*

A proposal that will probably be made, the predictability of which is based on the language of the *Pruett* case,[45] is simply to expand the concept of insurance as it already exists.[46] One method,

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26, 1982, at B1. Of Mississippi's 82 counties, 11 counties have a population of less than 10,000 while 70 are below 50,000. There is only one city with a population in excess of 50,000 (Jackson at 202,000). Eight cities have populations between 25,000-49,999. More than half of the state population lives in rural areas. *See* BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, GENERAL POPULATION CHARACTERISTICS—MISSISSIPPI, 26-7 to 26-10 (1980).

42. *See*, David & Frenc, *Public Tort Liability Administration: Organization, Methods and Expense*, 9 LAW & CONTEMP. PROBS. 348 (1942); Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW & CONTEMP. PROBS. 363, 365 (1942).

43. *See, e.g.*, N.C. GEN. STAT. § 143-300.6(c) (1983).

44. *Cf.* CAL. CIV. CODE § 3333.1(a) & (b) (West Supp. 1983) which provides that a medical malpractice defendant may introduce evidence of collateral source payments with plaintiff having the right to show costs. Any rights of subrogation are extinguished if the collateral source evidence is introduced. *See also* Ghiardi, *The Collateral Source Rule: Multiple Recovery in Personal Injury Actions*, 1967 INS. L.J. 457; Seidler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach* (Part I), 58 KY. L.J. 36 (1970), (Part II), 58 KY. L.J. 161 (1970). For the Mississippi law on collateral sources *see* Coker v. Five-Two Taxi Service, 211 Miss. 820, 52 So. 2d 356 (1951).

45. Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982).

46. *See supra* notes 20-34 and accompanying text.

already in limited use in Mississippi, would be to reenact immunity but authorize all governmental bodies to insure, limit the recovery of the injured party to the insurance proceeds, and limit the agencies' liability to the insurance premiums. The problem with this approach is that there is no guarantee of insurance purchase. If the agency does not purchase insurance, there is no recovery for the victim because of the immunity reenactment. Thus, for any such approach to work, the legislature would have to specify those governmental activities to be insured, require insurance or self-insurance, and designate the minimum acceptable limits. To do less would allow insurance policies to be manipulated by the governmental entities in such a way that coverage and dollar limits could be narrowed with the practical result of returning to the past.

One of the interesting things about *Pruett,* if not changed by legislation, is that the agencies given the authority to insure with recovery limited to the insurance proceeds prior to *Pruett* would now be the only agencies with limited liability.

Rather than basing the legislative scheme on insurance, insurance should be viewed as a means of funding the risk. The legislature should note that the insurance issue, especially from the standpoint of risk management, is much more complicated than is normally thought. This is especially true as to the smaller governmental units. As to these, there may exist a need for state assistance[47] or for the creation, with the necessary legislation, of a mutual insurance company made up of those governmental units that choose this method over that of the commercial insurers.[48] There is also no guarantee that the commercial insurance market will always provide the necessary coverages or that the coverages provided will be affordable.

C. *The Issue of Cost*

The legislature will probably not be able to make reasonable estimates of the financial impact of alternative proposals to be considered. However, a change in the doctrine will undoubtedly increase the number of claims and significantly increase costs.[49] The

47. *See* Warp, *Tort Liability Problems of Small Municipalities,* 9 LAW & CONTEMP. PROBS. 363 (1942).

48. *See, e.g.,* N.M. STAT. ANN. § 41-4-25 (1978).

49. *See* Note, *Sovereign Immunity in Missouri: Judicial Abrogation and Legislative Reenactment,* 1979 WASH. U.L.Q. 865, 891-92 (1979). It has been reported that the Louisiana legislature is faced with 15 million dollars of final judgments against state agencies and that some local governmental units are unable to pay judgments against them. It is also reported that legislative efforts to limit such suits were thwarted by the lobbying of the trial bar and organized labor. Times-Picayune, The States-Item (New Orleans, La.) June 10, 1983, at 1-22.

legislature must keep in mind that in the past these costs have, in the main, been borne unfairly by the injured citizen and not by the responsible governmental unit.

D. *The Discretionary–Ministerial Acts Dichotomy*

The *Pruett* decision retains the immunity for discretionary acts.[50] Such an immunity has been criticized in that it must be applied on a case by case basis[51] and thus lacks predictability. One commentator has noted that courts may have used the discretionary-ministerial dichotomy as a judicial tool to deny recovery.[52]

Discretionary exceptions are found in most of the statutory schemes of other states that have previously faced this problem. In fact, both New York and Washington, which purport statutorily to equate government tort liability with the private sector, have judicially created such exceptions to liability.[53]

Though subject to difficulty in application, there are valid policy reasons for immunizing discretionary acts. Discretionary decision-making on a government level probably should not be reviewable in a damage action since subsequent judicial or jury review may have a dampening effect on government officials resulting in a hesitation or refusal to act.[54] If the legislature does agree to immunize discretionary acts, it then faces the problems of whether the immunity should be unqualified, that is, applicable even in cases of misconduct, or qualified. The privilege has been qualified by most legislatures to apply only to those who act in good faith and without malice.[55] The legislature could also base the immunity on different concepts such as reasonableness or on a balancing of interests test such as suggested by Professor Jaffe.[56] In general, the other states have not followed these alternatives.

If the legislature does decide to legislate discretionary immunity, it then must determine whether to do so in a general manner

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50. Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982).

51. Kramer, *The Governmental Immunity Doctrine in the United States from 1790-1955*, 1966 U. ILL. L.F. 795, 817 (1966).

52. Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963).

53. *See* Creelman v. Svenning, 67 Wash. 2d 882, 410 P.2d 606 (1966); Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958).

54. Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919 (1966).

55. *See, e.g.*, FLA. STAT. ANN. § 768.28(7) (West Supp. 1982).

56. Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

as under the Federal Tort Claims Act[57] or to attempt to specifically enumerate certain areas of discretion as done in California.[58]

E. *Respondeat Superior*

Another issue that the legislature should consider is whether the governmental entities should be responsible for the actions of their employees and agents while performing within the confines of their employment or agency. In the private sector the doctrine of *respondeat superior* applies and holds the employer liable. One of the basic reasons for *respondeat superior* is that the employer should accept the burdens as well as the benefit of the relationships. *Respondeat superior* was not traditionally employed in the area of governmental immunity. Thus, the governmental body could be immune but the employee could be held personally liable.[59]

In reconsidering this area following abrogation, there seem to be no sound policy reasons for the legislature not to remedy this situation by specifically addressing the *respondeat superior* issue. Other legislatures have considered the problem and provided for the defense of employees acting within the scope of their employment.[60] Many also provide for either the indemnity of state employees[61] or authorize the procurement of insurance[62] for those employees within the course and scope of their duties. If the legislature opts for funding through insurance, it should make sure that the governmental officials and employees are specifically entitled to a defense and indemnity, unless their actions are outside of the scope of their duties or their actions render them guilty of serious misconduct.

F. *Other Immunities*

The legislature must decide whether to treat all the governmental agencies within the state in the same manner or whether to have different rules for the various governmental units. Though there is validity to a differentiation between the private and governmental sector, the validity of distinctions for liability purposes be-

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57. 28 U.S.C.A. § 2680(a) provides an immunity where the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . , whether or not the discretion be abused."

58. *See, e.g.*, CAL. GOV'T CODE § 818.2, 818.4, 850-850.8 (Deering 1973) (Legislators and law enforcement officials, licensing officials, fire protection services respectively).

59. *See, e.g.*, Jones v. Knight, 373 So. 2d 254 (Miss. 1979); Jackson v. Smith, 309 So. 2d 520 (Miss. 1975).

60. *See, e.g.*, IDAHO CODE § 6-903 (b) (1947); MINN. STAT. ANN. 3.736(9) (West 1974).

61. *See, e.g.*, NEB. REV. STAT. § 81-8.239.05 (1943); NEV. REV. STAT. 41.0349 (1957).

62. *See, e.g.*, MO. ANN. STAT. § 537.610(1) (Vernon 1951 & Supp. 1982); UTAH CODE ANN. § 63-30-29 (1953).

tween various governmental units is dubious, especially in view of the availability of insurance. Therefore, it is recommended that the legislature enact a legislative scheme which applies to all units of government.

The legislature should also review the functions of government within the state to determine if any particular activity of government should be immunized specifically. In making such an analysis the following should be observed:

1. Activities that are common to the private sector, foreseeably cause numerous injuries, and are commonly insured should not be immunized. An example of this is the operation of motor vehicles.
2. Activities of government that are uniquely governmental in nature and where one of the following also applies may be properly considered:
   a. The damage to the citizen is normally covered by private insurance. An example here is fire suppression services.[63]
   b. Where the risk of injury is not substantial and where the risk to the citizen should be reasonably apparent. Hiking trails, nature areas and unimproved public areas[64] may qualify.
   c. Where the imposing of potential liability may substantially curtail the providing of a governmental service that is of significant value to the general population.[65] In addition, if the risk of injury appears low, there is even more reason for potential immunity.[66]
   d. Where the governmental activity occurs in response to an unpredictable and seldom occurring stimulus, thus rendering the training and response to such stimuli difficult. Riot control is the most obvious example.[67]

Only by closely reviewing the functions of the various govern-

63. CAL. GOV'T CODE §§ 850-850.8 (West 1954).

64. CAL. GOV'T CODE § 831.8 (West 1954) (hiking, riding, fishing, and wilderness trails); MINN. STAT. ANN. § 3.736(3)(g) (West 1974) (unimproved public property); COLO. REV. STAT. § 24-10-106(e) (1973) (natural conditions of unimproved public property).

65. *E.g.*, CAL. GOV'T CODE § 831.8 (West 1954) (This section provides a limited immunity for reservoirs of public entities, and canals, conduits, and drains used by irrigation districts to distribute water).

66. This analysis is suggested in Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919 (1966).

67. *E.g.*, IDAHO CODE § 6-904(7) (1947) which immunizes governmental entities and employees where the employee is within the scope of his employment and there is no malice or criminal intent on the employee's part and where the claim arises out of riots, unlawful assemblies, public demonstrations, mob violence or civil disturbance.

mental entities can the legislature properly apply the balancing test and make the necessary legislative judgment.

G. *The Legislative Responses of Other States*

The legislature will undoubtedly want to review the actions of the other legislatures following judicial abrogation. This will highlight areas of concern of other legislative bodies that may be applicable in Mississippi and the approach taken to their solution elsewhere.

A review of the legislative response of a number of other states reveals two basic approaches.[68] First, a number of states have waived sovereign immunity and then created statutory immunities. These statutes generally immunize from claims the following: (1) due care execution of a statute or regulation, (2) discretionary functions, (3) activities arising out of the assessment or collection of taxes, (4) quarantine and, (5) intentional torts including assault, battery, false imprisonment, malicious prosecution, abuse of process, and defamation.[69] A variation on the first approach is taken in New York[70] and Washington[71] where abrogation is statutorily complete. However, the judiciary in both states has created an immunity for discretionary acts.[72] Arkansas has also basically waived sovereign immunity as to the state by agreeing to pay actual, but not punitive, damages caused by state officials and employees acting within the course and scope of their duties and without malice but has retained it as to counties, municipalities and other local governmental agencies.[73]

The second basic approach is for the state to have reinstated

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68. Professor Van Alstyne in a 1966 study suggested 5 basic approaches: (1) modified common law liability and immunity; (2) general immunity with specific statutory exceptions; (3) general tort liability within statutory damage limitations; (4) general liability with specific statutory exceptions; and (5) specifically defined liabilities and immunities. Van Alystyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 969-74 (1966).

69. ALASKA STAT. § 09.50.250 (1962); CAL. GOV'T CODE § 815, 816.6, 821.4, 855.6 (immunity for health and safety inspections), 818.2 (immunity for adopting or failing to enforce a law), 818.2 (immunity for legislation and law enforcement), 818.4 (immunity for decisions by licensing officials), 820.2 (discretionary functions immunity); 830-835.4 (liability of public entity for dangerous condition of property), 850-850.8 (immunity for fire protection services), 844-846 (care and rehabilitation of criminals) and 854-856.4 (public health and hospital services) (West 1980). FLA. STAT. ANN. § 768.28 (West Supp. 1982); IDAHO CODE § 6-903 (1947); MD. CTS. & JUD. PROC. CODE ANN. § 5-403 (1980); MASS. ANN. LAWS ch. 258, §§ 2-10 (Michie/Law Co-op 1980); MINN. STAT. ANN. § 3.736 (West 1980); NEB. REV. STAT. § 81-8, 209 (1981); NEV. REV. STAT. §41.031-41.0333 (1978). Placing California in this category is purely arbitrary.

70. N.Y. JUD. PRAC. CT. OF CLS. § 9(2) (McKinney 1938).

71. WASH. REV. CODE ANN. § 4.92.030 (1961 & Supp. 1982).

72. *See* Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965), and Creelman v. Svenning, 67 Wash. 2d 882, 410 P.2d 606 (1966).

73. ARK. STAT. ANN. §§ 12-3401 and 12-2901 (1979). Thus, the state has legislated responsibility for its state officers and employees who are within the course of their duties and acting

immunity and then created certain statutory exceptions. The exceptions are generally for motor vehicles and for dangerous and defective conditions of public property.[74] A variation on this second approach is employed in Michigan[75] and Utah[76] where the immunity only applies, with certain exceptions, to governmental functions.

On the issue of *respondeat superior,* the statutes studied commonly provide for the indemnification and defense of officials and employees acting in the course of their duties who are without serious misconduct.[77] Florida specifically provides that a public official or employee cannot be held personally liable or even named as a defendant unless acting "in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard of human rights, safety or property."[78]

A large number of the jurisdictions studied limit recovery. However, there is no general consensus as to the amounts. The range includes a limitation on personal injury and wrongful death of $150,000 per person and $400,000 per incident in Colorado;[79] $100,000/$300,000 in Florida,[80] Idaho[81] and Utah;[82] $300,000/$500,000 in Indiana[83] and New Mexico;[84] $100,000/$500,000 in Minnesota;[85] $100,000/$800,000 in Missouri;[86] individual claims of $50,000 in Kentucky;[87] $100,000 in Maryland;[88] and $100,000 per incident in North Carolina.[89] Many of these statutory limits do not apply if the entity has insurance in excess of the limits. Though such limitations in some circumstances will be unfair, they do have a valid basis in allowing governmental en-

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in good faith. No recovery could be had unless a state employee or officer could be sued indivdually. ARK. CONST. art. 5, § 320 provides that the state of Arkansas cannot be made a defendant in Arkansas courts. However, state subdivisions, including municipalities, are declared immune, ARK. STAT. ANN. § 12-2903, and an injured person can collect that amount. *See* Sturdivant v. Farmington, 255 Ark. 415, 500 S.W.2d 769 (1973).

74. *See, e.g.*, COLO. REV. STAT. § 24-10-106 (1973); IND. CODE ANN. § 34-4-16.5-3 (Burns 1971 & Supp. 1982); ME. REV. STAT. ANN. tit. 14, §§ 8103-8104 (1980); MO. ANN. STAT. § 537.600 (Vernon 1951 & Supp. 1982); N.M. STAT. ANN. § 41-4-4(A) (1978).

75. MICH. COMP. LAWS ANN. § 691.1407 (West Supp. 1982).

76. UTAH CODE ANN. § 63-30-3 - 63-30-10(1) (1953).

77. *See, e.g.*, IND. CODE ANN. § 34-4-16.5-5 (Burns 1971 & Supp. 1982).

78. FLA. STAT. ANN. § 768.28(9)(a) (West Supp. 1982).

79. COLO. REV. STAT. § 24-10-114 (1973).

80. FLA. STAT. ANN. § 768.28(5) (West Supp. 1982).

81. IDAHO CODE §6-926 (1947).

82. UTAH CODE ANN. § 63-30-29(b) (1953).

83. IND. CODE ANN. § 34-4-16.5-4 (Burns 1971 & Supp. 1983).

84. N.M. STAT. ANN. § 41-4-19 (1978).

85. MINN. STAT. ANN. § 3.736(4) (West 1980).

86. MO. ANN. STAT. § 537.610(2) (Vernon 1951 & Supp. 1982).

87. KY. REV. STAT. ANN. § 44.070(5) (Baldwin 1980).

88. MD. CTS. & JUD. PROC. CODE ANN. § 5-403(b) (1957).

89. N.C. GEN. STAT. § 143.291 (1978).

tities to put a cap on high verdicts and for acquiring sufficient insurance coverage.[90] Many disallow punitive damages.[91]

Most of the statutes authorize or even require the purchase of insurance.[92] Some allow public entities to form their own mutual insurance companies in order to provide coverage.[93] Others provide that any liability insurance of the employee will be primary.[94]

Which approach or combination of approaches the legislature adopts will depend on how it decides to approach the problems discussed and how firm a grip the legislature wishes to retain. Clearly the legislature is going to be concerned about cost. With the other suggestions contained in this article, it is suggested that regardless of the particular legislative scheme chosen, the legislature adopt statutory limits as to the size of any verdicts or settlements and provide for periodic payments in those cases where it appears appropriate to safeguard the interests of the injured person and the public entity involved.

THE 1983 REGULAR SESSION

The Mississippi Legislature in its first opportunity to deal with the *Pruett* decision, the 1983 Regular Session, failed to enact a comprehensive statutory scheme to address the problem of government entity liability. House Bill No. 904, which passed the House but was not enacted, would have more than restored the previous status quo. Section 2 of that bill declared that the state and its political subdivisions would be immune from "any wrongful or tortious act or omission . . ." regardless of the "governmental, proprietary, discretionary or ministerial nature . . ." of the act or omission.[95]

Had House Bill No. 904 been enacted, municipalities would have been immune from their previous exposure for proprietary activities.[96] In addition, the status and continued viability of those code sections authorizing certain governmental agencies to procure insurance and authorizing suit against them, some of which limited recovery to the insurance proceeds,[97] would be in question.

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90. *See* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 971 (1977).

91. *See, e.g.*, IND. CODE ANN. § 34-4-16.5-4 (Burns 1971 & Supp. 1982).

92. *See, e.g.*, IND. CODE ANN. § 34-4-16.5-18 (Burns 1971); MO. ANN. STAT. § 537.610.1 (Vernon 1951 & Supp. 1981).

93. MO. ANN. STAT. § 537.620 (Vernon 1982); *cf.*, N.M. STAT. ANN. § 41-4-25 (1978), which provides for the state to set up a public fund in the event that municipalities or counties cannot get commercial insurance or it becomes unreasonably expensive.

94. *See supra* note 41. *Cf.*, 16 R. ANDERSON, COUCH ON INSURANCE § 62.49 (2d ed. 1959).

95. H.B. 904, Miss. Leg., Reg. Sess. (1983).

96. *See* Comment, *supra* note 14 and note 18 and accompanying text.

97. *See supra* notes 20 to 34 and accompanying text.

Far more interesting were the provisions of House Bill No. 904 as originally introduced.[98] The original bill did attempt to address at least some of the issues presented by *Pruett*. Section 2 of the original bill, the broad reenactment of sovereign immunity, was identical to that of the bill approved. However, Section 3 of the original bill would have waived the immunity to the extent of the maximum coverage of insurance as certified by the Department of Insurance. Section 9 of the original bill imposed a maximum lid on recovery of $100,000 for property damage per single occurrence, $300,000 per person for all damages other than property damage per occurrence and $500,000 for all claims arising out of a single occurrence. Section 9 would apply even if the entity had insurance limits in excess of the stated amounts.

Section 10 of the original bill would have created a special Tort Claims Fund. Under this proposal, the state, and those political subdivisions that so desired, would participate in an insurance plan administered by the Department of Insurance. The Department of Insurance would determine what governmental activities were to be insured, based on an administrative determination of the entities' potential liability under the proposed bill. However, since liability under the proposal co-existed with insurance, the Department of Insurance would be determining administratively where governmental liability, except as specifically precluded, would exist. Such an administrative delegation seems unwise. As an alternative to the Tort Claims Fund, Section 10 would have further provided for a political subdivision to obtain its own insurance or self-insure with certification by the Department of Insurance. Though the proposed Section 10 provided for a loss of tax revenues to counties and municipalities for not obtaining the certificate of insurance coverage from the Department of Insurance, the proposed bill failed to deal with the problem of a non-complying political subdivision which did not have a valid certificate of insurance on the date of accrual of a citizen's cause of action. A literal reading of Section 3 would deprive that citizen of the waiver of immunity.

Section 4 of the original bill also contained provision for immunizing public employees for personal liability, though they could be joined as defendants with the governmental entity, so long as the employee's act or omission occurred while in the course and scope of his employment. The original bill also provided for indemnification and a defense for such employees.

98. H.B. 904, Miss. Leg., Reg. Sess. (1983) (as originally introduced).

Section 5 of the bill, prior to amendment, proposed 10 specific immunities. They would apply regardless of insurance though language of the bill did not so specify.[99] Many of the proposed immunities were similar to those enacted by other states. A number covered specific functions which are discretionary in nature and should be immunized.

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99. H.B. 904, Miss. Leg., Reg. Sess. § 5 (1983) (as originally introduced). The specific immunities proposed were:

(a) Arising out of a legislative or judicial action or inaction, or administrative action of a legislative or judicial nature;
(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;
(c) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation or by failing to enforce any statute, ordinance or regulation;
(d) Which is limited or barred by the provisions of any other law;
(e) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
(f) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order, or similar authorization where the governmental entity or employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked;
(g) Arising out of the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer;
(h) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;
(i) Of any claimant whose injury is covered by the Workmen's Compensation Law of this state;
(j) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including but not limited to any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USC 715, or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;
(k) Arising out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such a plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design, approved in advance of the construction or approved by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval;
(l) Arising out of an injury caused solely by the effect on the use of streets and highways of weather conditions;
(m) Arising out of the usual care and treatment, or lack of care and treatment, of any person at a state hospital or state corrections facility where reasonable use of available appropriations has been made to provide care;
(n) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;
(o) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;
(p) Arising out of or resulting from riots, unlawful assemblies, public demonstra-

In addition to House Bill No. 904, which was not enacted, Senate Bill No. 2454 was introduced and enacted.[100] This bill was obviously a stop-gap measure since it is repealed as of July 1, 1986. This bill amends Section 41-13-11 of the Mississippi Code and provides that counties, municipalities and their subdivisions, but not the state, are immune from liability for tortious acts or omissions arising out of the operation of hospitals, nursing homes, community hospital facilities and community health programs. The section is further amended to authorize the buying of insurance and, to the extent of available funds (whether insurance or governmental funds is meant is unclear), to indemnify agents, employees, trustees, officers and volunteers. The amended section also limits liability to the amount of the insurance proceeds. In addition, the bill waives immunity to the extent of $500,000 for all damages from any single occurrence. Hopefully, the next legislature will avoid this type of a piecemeal approach.

CONCLUSION

The legislature is now faced with the complex problem of restructuring the rules of governmental tort liability. To do this in a manner that represents essential fairness to the citizen and yet is affordable to all of the varied governmental entities in Mississippi is a challenging and complex problem. This article has attempted to explore some of these problems and suggest some solutions.

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tions, mob violence or civil distrubances; or

(q) Arising out of an injury caused by the condition of unimproved real property owned by the governmental entity, which means land that the governmental entity has not improved, and appurtenances, fixtures and attachments to the land that the governmental entity has neither affixed nor improved.

Subdivision (i), above, is a good example of the need for study and analysis of proposed immunities. If the immunity is a valid one because the claimant has received workers' compensation benefits, why limit immunity only to benefits received under the Workmen's Compensation Law of Mississippi. Any such provision is highly debatable since often such recoveries are inadequate. Allowing the governmental entity to take advantage of this collateral source by either allowing its introduction into evidence or providing for a credit, while avoiding immunity, may be far more equitable.

100. S.B. 2454, Miss. Leg., Reg. Sess. (1983).