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# COMMENTS

## GOVERNMENTAL IMMUNITY FROM TORT LIABILITY: PENNSYLVANIA'S TREND TOWARD ABOLITION

*It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.*

Oliver Wendell Holmes,  
Collected Legal Papers, p. 187.

### INTRODUCTION

The doctrine of governmental immunity from tort liability historically stems from the concept that "the King can do no wrong," and that a vassal could not be heard to complain against his master.

The first case to extend the state immunity doctrine to a municipality was *Russel v. Men of Devon*.<sup>1</sup> In that case, the population of an unincorporated county was held to be immune from suit for damages caused by a defective bridge. The principal ground for the decision was the lack of corporate funds from which satisfaction could be obtained. And, therefore, the court would not permit the action to be maintained against the population of the whole county.

Pennsylvania approved this doctrine in the early case of *Carr v. The Northern Liberties*,<sup>2</sup> and it is still in effect today.<sup>3</sup> In the *Carr* case, the court pointed out that inherent in the administration of government are many evils and many wrongs incapable of being remedied; and the people must suffer for the mistake of choosing incompetent officers.

However, the court in *Carr* did state that there could be recovery "in some special cases."<sup>4</sup> These "special cases" have contributed enormously to the current confusion in Pennsylvania with respect to the tort liability of municipalities. However, it is not surprising to find confusion in this area of the law. In dealing with this problem, the courts have been searching for a middle ground between conflicting policy considerations.<sup>5</sup> In determining the liability or non-liability of a municipality, the courts have

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1. 2 T.R. 667, 100 Eng. Rep. 359 (1788).

2. 35 Pa. 324 (1860).

3. See *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960).

4. *Carr v. The Northern Liberties*, 35 Pa. 324, 329 (1860).

5. On one side there is the common law concept of immunity, and on the other there is the belief that the risk of wrongful injury should not be borne by the individual, but by society as a whole.

held the controlling factor to be whether the municipality was engaged in a governmental or proprietary function. The unsatisfactory status of the law is a result of the distinctions between proprietary and governmental function. This distinction led Justice Cohen to conclude that "the attempt to determine whether liability exists when a state or municipal activity is conducted negligently by the test of whether it is a governmental or proprietary function has resulted in complete confusion."<sup>6</sup>

Even the criteria for determining whether the municipality is engaged in a governmental or proprietary function is by no means settled. In the case of *Bell v. Pittsburgh*,<sup>7</sup> the plaintiff sustained injuries in the City-County Building as a result of a negligently operated elevator. The court held the municipality liable irrespective of the fact that the primary use of the building was in a governmental function. The rationale of the *Bell* case was that in this instance the municipality was conducting a business activity.

On the other extreme, in *Scibila v. Philadelphia*,<sup>8</sup> the municipality was held immune from liability where the plaintiff was injured by a city-owned truck which was used in hauling ashes to the city dump. The basis for the *Scibila* decision was that this was an exercise of the municipality's police power for the protection of the public health. The court held this activity to be a governmental function notwithstanding the fact that a fee was charged for the hauling thus producing incidental revenue.

The *Bell* and *Scibila* cases are two of the many cases which illustrate the confusion of Pennsylvania's law on municipal tort liability. The purpose of this paper is to support the need for a change in the existing Pennsylvania law and to examine a few recent Pennsylvania decisions which indicate the eventual abrogation of this doctrine.

## THE DOCTRINE SHOULD BE ABOLISHED IN PENNSYLVANIA

For over four decades noted legal scholars have rejected the doctrine and have urged its abolition.<sup>9</sup> The basic criticism of the doctrine is that it is outmoded and indefensible in light of our present concepts of justice, and that it permits our legal system to foster inequities and perpetuate injustices. Needless to say, the chief complaint is well taken. It is apparent that Pennsylvania's modern cities, such as Pittsburgh and Philadelphia,

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6. *Stouffer v. Morrison*, *supra* note 3, at 505, 162 A.2d at 382.

7. 297 Pa. 185, 146 Atl. 567 (1929).

8. 279 Pa. 549, 124 Atl. 273 (1924).

9. PROSSER, *TORTS* 1004, 1010-1013 (3d ed. 1964); Borchart, *Government Liability in Tort*, 34 *YALE L.J.* 129 (1924); Borchart, *Governmental Responsibility in Tort*, 36 *YALE L.J.* 757 (1926); Borchart, *Governmental Responsibility in Tort*, 28 *COLUM. L. REV.* 577 (1928); Fuller, *Municipal Tort Liability in Operation*, 54 *HARV. L. REV.* 437 (1941); Leflar and Kantrowitz, *Tort Liability of the States*, 29 *N.Y.U.L. REV.* 1363 (1954); Shapo, *Liability for Police Torts*, 17 *U. MIAMI L. REV.* 475 (1963).

are not unincorporated and unfunded as was Devon. Pennsylvania's modern cities have substantial sums of money available to either pay claims or obtain liability insurance.<sup>10</sup> Obviously, the rationale in *Men of Devon* does not justify Pennsylvania's retention of the doctrine in the Twentieth Century.

A most cogent argument for the retention of the doctrine was advanced by Professor Carlos C. Cadena.<sup>11</sup> Professor Cadena stated that:

Public agencies engage in activities of a scope and variety far and beyond that of any known private business, and these activities affect a much larger number of the public than do the activities of private enterprise. Many of the activities carried on by government are of a nature so inherently dangerous that no private entity would undertake the risk of performing them. Activities such as law enforcement, fire fighting and the keeping of jails are so important to the health, safety, and welfare of the public that they could not possibly be abandoned.<sup>12</sup>

Although this is the strongest argument given for the continuation of the doctrine, it by no means justifies its retention. The fact that a municipality is under a duty to protect the public while performing various functions cannot justify its execution of these duties in a haphazard or negligent manner. As stated by Justice Musmanno in a dissenting opinion:

The government may be sued for breach of contract, for failure to properly maintain the highways, for negligence in the manner of running its public parks, and for many other derelictions. *Why may it not be sued for negligence in hiring men obviously unsuited for police work or retaining them after it has been irrefutably established that they are a harm rather than a protection to the public?*<sup>13</sup> [Emphasis supplied.]

The majority of injuries sustained as a result of the negligence of municipal employees is due to the hiring and retention of employees unfit or unqualified for the particular employment. This is especially true of police departments. This generalization can best be illustrated by reviewing the records of police officers accused of police brutality. More often than not, these records reveal that the accused officer has been suspended from the force a number of times for a variety of reasons. This "harm" to the public, as Justice Musmanno stated it, must be eliminated. By making municipalities liable for *all* of the torts of their employees, long-needed "pressure" will be applied; and the municipalities will then be forced to use discretion in their hiring and firing practices.

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10. The estimated revenue for the City of Pittsburgh in 1966 is \$67,648,907.00. City of Pittsburgh Budget—1966, p. 80.

11. Address by Professor Cadena to Texas City Attorney's Association, July 3, 1963.

12. *Ibid.*

13. *Stouffer v. Morrison*, *supra* note 3, at 505, 162 A.2d at 382.

The Pennsylvania Supreme Court will have little difficulty finding outside support for the doctrine's abolition. Besides the attack by Professor E. M. Borchard and other legal writers,<sup>14</sup> in the last ten years judicial attitude has taken an about face in a number of states. The trend began with the landmark case of *Hargrove v. Town of Cocoa Beach*.<sup>15</sup> The Supreme Court of Florida held that an action could be maintained against a city for the death of a prisoner left in jail during a fire. In declaring the doctrine anachronistic, the court stated:

The modern city is in a substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.<sup>16</sup>

Similar decisions were handed down in the cases of *Simpson v. Miami*<sup>17</sup> and *City of Miami Beach v. Nye*.<sup>18</sup>

In discarding the doctrine, the California Supreme Court, speaking through Mr. Justice Traynor, stated: "After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust."<sup>19</sup>

In a case similar to the Pennsylvania case of *Bell v. Pittsburgh*,<sup>20</sup> the Supreme Court of Michigan, without resorting to the confusing test of governmental versus proprietary function, allowed recovery where a man fell to his death in an elevator shaft located in a municipally owned building.<sup>21</sup> In overruling the doctrine of governmental immunity, that court stated:

In this case, we overrule preceding *court made law* to the contrary. We eliminate from the case law of Michigan an ancient

14. See authorities cited, *supra* note 9.

15. 96 So. 2d 130 (Fla. 1957).

16. *Id.* at 133.

17. 155 So. 2d 829 (Fla. 1963).

18. 156 So. 2d 205 (Fla. 1963).

19. *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 213, 359 P.2d 457, 458 (1961), where an action was allowed against a hospital staff for negligence in their treatment of injuries; see also *Jones v. City of Los Angeles*, 30 Cal. 124, 215 Cal. App. 2d 155 (1963) and *Chromiak v. City of Los Angeles*, 33 Cal. 359, 219 Cal. App. 2d 860 (1963), where the holding of the *Muskopf* case has been affirmed.

20. *Scibila v. Philadelphia*, *supra* note 8.

21. *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961).

rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing we join a *major trend in this country* toward the righting of an age-old wrong.<sup>22</sup> [Emphasis supplied.]

By the use of similar language several other states have also repudiated the doctrine,<sup>23</sup> and a number of recent decisions have begun the movement toward the doctrine's abolition in other states.<sup>24</sup>

The courts that have taken it upon themselves to eliminate this age-old doctrine from their common law realize that a law or a doctrine cannot be stagnant. Laws must be dynamic, and therefore they must change with the times.<sup>25</sup> When a law does not undergo slight variations as circumstances change, the day arrives when the law is outdated and its application too often results in injustice. Such is the status of the law of governmental immunity in Pennsylvania today.

### THE ABOLITION OF THE DOCTRINE IS A JUDICIAL FUNCTION

One of the most common reasons given by courts reluctant to make an abrupt change in existing law is that the task is one for the legislature.<sup>26</sup> If Pennsylvania is ever going to rid herself of the governmental immunity doctrine, it will have to be done by the Pennsylvania Supreme Court. In Pennsylvania, an apathetic legislature has ignored the pleas of its highest court. As early as 1959, Mr. Justice Cohen appealed to the legislature to rectify the injustices and confusion that existed as a result of the judicial decisions on governmental immunity.<sup>27</sup> Two years later, in the *Stouffer*<sup>28</sup>

22. *Id.* at 250, 111 N.W.2d at 20 (dissenting opinion).

23. See *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964), where the drowning death of a minor occurred in a city-operated swimming pool; *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963), where death and injuries resulted from the negligence of the State Highway Commission; *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962), where decedent's asphyxiation was caused by negligence with respect to fire fighting; *aff'd* in *Scheele v. City of Anchorage*, 385 P.2d 582 (Alaska 1963), where injuries arose out of police brutality; *Spanel v. Moundsview School Dist. No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962), where a defective slide in a kindergarten classroom caused plaintiff's injuries; *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962), where a minor was injured at a playground when a trap door was negligently left open by a city employee; *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), where a child was injured because of a negligently operated school bus.

24. See *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); *McAndrews v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960); *Colorado Racing Comm'n v. Brush Racing Ass'n*, 316 P.2d 582 (Colo. 1957).

25. *Fox v. Snow*, 6 N.J. 12, 76 A.2d 877 (1950) (Vanderbilt, C.J., dissenting).

26. See *Morris v. Mt. Lebanon Twp. School Dist.*, 393 Pa. 633, 144 A.2d 737 (1958) (Cohen, J., concurring); *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960) (Cohen, J., concurring).

27. *Morris v. Mt. Lebanon Twp. School Dist.*, 393 Pa. 633, 144 A.2d 737 (1958).

28. *Stouffer v. Morrison*, *supra* note 3.

case, Mr. Justice Cohen, in a concurring opinion in which Mr. Justice Benjamin R. Jones joined, renewed his request for legislative action in this area. Eight years have passed since Mr. Justice Cohen's first appeal to the legislature and there has been no response. Therefore, there is little reason to expect legislative activity in this area in the future.

The doctrine of governmental immunity is of judicial origin. The result in the *Men of Devon* case was not based upon a legislative prohibition. It was a court-made law. And since that time, the courts have perpetuated this doctrine without assistance from the legislature. Accordingly, there need be no legislative intervention to repudiate this rule of law.

The task with which the Pennsylvania Supreme Court is now faced is not unique.<sup>29</sup> Other courts have been faced with the argument that the repudiation of the doctrine is a legislative function. The courts that have overturned the doctrine have advanced reasons which are favorable to judicial action in this area. The court in *Stone v. Arizona Highway Comm'n*<sup>30</sup> met the traditional argument on these terms:

It has been urged by the adherents of the sovereign immunity rule that the principle has become so firmly fixed that any change must come from the legislature. In previous decisions . . . this court concurred in this reasoning. Upon reconsideration, we realize that the doctrine of sovereign immunity was originally judicially created. We are not convinced that a court-made rule, when unjust and outmoded, does not necessarily become with age invulnerable to judicial attacks. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process.<sup>31</sup>

In *Haney v. City of Lexington*,<sup>32</sup> the Kentucky court advanced another reason for a judicial assumption of the burden of abolishing the doctrine:

It seems to us that an equally reasonable assumption is that the legislature might expect the courts themselves to correct an unjust rule which was judicially created. The very machinery of the short biennial session of the general assembly denies to it the time or, for that matter, the inclination to examine the various doctrines and theory of common law torts. A great number of the legislators are not lawyers nor are they interested in the details of the law.<sup>33</sup>

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29. The Pennsylvania Supreme Court is again faced with the governmental immunity problem in the case of *Graysneck v. Heard*, No. 23 March Term, 1966, which was argued in Pittsburgh during March of 1966.

30. 93 Ariz. 384, 381 P.2d 107 (1963).

31. *Id.* at 393, 381 P.2d at 113.

32. 386 S.W.2d 738 (Ky. 1964).

33. *Id.* at 741.

The legislative function argument was recently considered by the Pennsylvania Supreme Court. In *Flagiello v. Pennsylvania Hospital*,<sup>34</sup> Mr. Justice Musmanno, speaking for a majority, abolished the doctrine of charitable immunity in Pennsylvania. The language of Mr. Musmanno is applicable to the governmental immunity problem:

The appellee and the *amicus curiae* insists that if the charity immunity doctrine is to undergo mutation, the only surgeon capable of performing the operation is the Legislature. We have seen, however, that the controverted rule is not the creation of the Legislature. This court fashioned it, and, what it put together it can dismantle. When the Supreme Court of Washington was considering the very question, it said, in the case of *Pierce v. Yakima Valley Hospital Ass'n*, 260 P.2d 765: "We closed our court room doors without legislative help and we can likewise open them."<sup>35</sup>

There is no logical reason why the words of Mr. Justice Musmanno cannot be used to rebut the proponents of the doctrine's inevitable defense.

It is very possible that one of the reasons the Pennsylvania Supreme Court has been hesitant to abolish the governmental immunity doctrine is the consequent increase in litigation. And since this litigation will be of great variety, specific procedures and limits on these actions must be set forth. Admittedly, legislative action would be the best way to establish the necessary limits. However, this is unlikely in Pennsylvania since the legislature continues to remain inactive on the subject.

The Pennsylvania Supreme Court should not be overly concerned with the impact of a decision abolishing the doctrine. A judicial decision abrogating governmental immunity will not restrict the legislative branch of the state from taking action if it so desires.<sup>36</sup> "The legislature still has the last word and may restore the court abolished rule if it determines public policy so requires."<sup>37</sup> It is admitted that some restraints are necessary for the protection of public funds and that many problems will arise as a result of such a decision. However, a decision abrogating the doctrine in Pennsylvania is needed to motivate the legislature.

Pennsylvania's present situation is similar to that which existed in California prior to the decision of *Muskopf v. Corning Hospital District*.<sup>38</sup> In *Muskopf*, the court abolished the doctrine in California and, as a result, numerous suits and complicated problems arose. However, because of this decision, the California legislature was forced to take the long-

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34. 417 Pa. 486, 208 A.2d 193 (1965).

35. *Id.* at 503, 208 A.2d at 201, 202.

36. See *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

37. *Id.* at 43, 115 N.W.2d at 627 (concurring opinion).

38. 55 Cal. 2d 211, 359 P.2d 457 (1961).



needed action.<sup>39</sup> Therefore, inasmuch as eight years have passed since the first judicial request for legislation, it is quite clear that the judiciary must be the moving force to rid Pennsylvania of this archaic rule of law.

### RECENT DECISIONS INDICATING A TREND TOWARD ABOLITION

The only possible way to justify the doctrine of governmental immunity today is to rely solely on *stare decisis*, thus ignoring the countless and compelling reasons for a change which have arisen since the rule was first enunciated almost two hundred years ago. As to the present role of *stare decisis*, the Pennsylvania Supreme Court, in *Griffith v. United Air Lines, Inc.*,<sup>40</sup> stated: ". . . it is of utmost importance that our court re-examine its position in this field of law and make certain that our rules are in harmony with the realities of this age."<sup>41</sup> The court then proceeded to say:

. . . we must not perpetuate an absolute rule by blind adherence to the principal of *stare decisis*. Although adherence to that principal is generally a wise judicial action, it does not rigidly command that we follow without deviation earlier pronouncements which are unsuited to modern experience and which no longer adequately serve the interest of justice. Surely, the orderly development of the law must be responsive to new conditions and to the persuasions of superior reasoning.<sup>42</sup>

In *Flagiello*, Mr. Justice Musmanno put the final nail in the coffin of *stare decisis* when he stated:

A rule that has become insolvent has no place in the active market of current enterprise. When a rule offends against reason, when it is at odds with every precept of natural justice, and when it cannot be defended on its own merits, but has to defend alone on a discredited genealogy, courts not only possess the inherent power to repudiate, but, indeed, it is required, by the very nature of judicial function, to abolish such a rule.<sup>43</sup>

When the words of Mr. Justice Roberts<sup>44</sup> and Mr. Justice Musmanno<sup>45</sup> are applied to the governmental immunity doctrine, its death is inevitable.

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39. After *Muskopf*, the 1963 session of the California legislature provided for a ninety day moratorium on tort actions brought against public agencies. The purpose of the moratorium was to give the legislature time to fully consider the problems involved and to proscribe legislation.

40. 416 Pa. 1, 203 A.2d 796 (1964).

41. *Id.* at 11, 203 A.2d at 801.

42. *Id.* at 23, 203 A.2d at 806.

43. *Flagiello v. Pennsylvania Hospital*, *supra* note 34, at 513, 208 A.2d at 206.

44. *Supra* notes 40 and 41.

45. *Supra* note 43.

The cases of *Doyle v. South Pittsburgh Water Co.*<sup>46</sup> and *Malter v. South Pittsburgh Water Co.*<sup>47</sup> illustrate a recent change in the Pennsylvania Supreme Court's position on the status of governmental immunity. These cases were distinguished from those which previously held that a mere failure to supply water does not constitute a breach of duty owed to the injured party by the water company or the municipality. *Doyle* and *Malter* held that the duty involved was one requiring reasonable care in the maintenance of a water system. As was pointed out by Mr. Justice Jones in his dissent, this was a change in the law and eliminated municipal tort immunity for misfeasance in the performance of governmental functions. These decisions, for the first time in a hundred years, increased the liability of municipalities.

The *Griffith*, *Flagiello*, *Doyle* and *Malter* cases clearly illustrate a trend toward the modernization of Pennsylvania's law. *Stare decisis* no longer influences modern judges to the extent that it did in the past.

### CONCLUSION

As previously mentioned, the Pennsylvania Supreme Court once again has the opportunity to abolish the governmental immunity doctrine.<sup>48</sup> The facts of *Graysneck v. Heard*,<sup>49</sup> which was argued in the Western District during the March Term, present an ideal situation for a landmark case in this area. In this case a City of Pittsburgh police officer, who had been suspended from the force on eleven different occasions for various reasons, negligently shot and killed the plaintiff's decedent while he was performing his "duty" as a police officer. A demurrer to plaintiff's complaint, which was sustained in the lower court, was based on the doctrine of governmental immunity. A fact situation such as this clearly demonstrates the great injustice that the doctrine promulgates and the reason this case is ideal is that there is a clear-cut case of negligence against both the police officer and the City of Pittsburgh.

Now is the time for the Pennsylvania Supreme Court to realize that its legislature will not legislate in this area unless they are coerced. The motivating force should be the court's decision in the *Graysneck* case.

*John W. Latella*

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46. 414 Pa. 199, 199 A.2d 875 (1964).

47. 414 Pa. 231, 198 A.2d 85 (1964).

48. *Supra* note 29.

49. *Ibid.*