COMMENTS

THE DOCTRINE OF GOVERNMENTAL IMMUNITY IN NEBRASKA

I. INTRODUCTION

This article is intended to treat the doctrine of governmental immunity[1] as it has been applied in Nebraska, with particular reference to the possibility of abrogation of the doctrine, whether partial or complete, whether by the judiciary or by the legislature.

II. STATE IMMUNITY

The Nebraska Constitution[2] provides, "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suit shall be brought," but this section has been held not to be self-executing,[3] so that action by the legislature is required before suit can be brought against the state. This is so even though a companion provision on eminent domain, providing that "The property of no person shall be taken or damaged for public use without just compensation therefor,"[4] has been held to be self-executing.[5]

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1. For comprehensive treatment of the development of the doctrine, *see:* Borchard, *Government Liability in Tort*, (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-25); *Governmental Responsibility in Tort*, (pts. 4-6), 36 YALE L. J. 1, 757, 1039 (1926-27); Holdsworth, *A History of Remedies Against the Crown*, 38 L. Q. REV. 141 (1922).

2. NEB. CONST. art. V, § 22.

3. O'Connor v. Slaker, 22 F.2d 147 (8th Cir. 1927); Gentry v. State, 147 Neb. 193, 22 N.W.2d 634 (1962); Anstine v. State, 137 Neb. 148, 288 N.W. 525 (1939); Shear v. State, 117 Neb. 865, 223 N.W. 130 (1929).

4. NEB. CONST. art. I, § 21.

5. Gentry v. State, 174 Neb. 515, 18 N.W.2d 643 (1962); Schmutte v. State, 147 Neb. 193, 22 N.W.2d 691 (1946); Bordy v. State, 142 Neb. 714, 7 N.W.2d 632 (1943); Hopper v. Douglas County, 75 Neb. 329, 106 N.W. 330 (1905); Douglas County v. Taylor, 50 Neb. 535, 70 N.W. 27 (1897). *Schmutte* allowed recovery for damages resulting from waters running off the right of way of a state highway. The basis was that: "When it appears that the improvement was subsequently (to original condemnation) constructed in an improper manner and damages arise therefrom, an additional element of damages (arising from condemnation) is presented. The liability for this subsequent damage rests upon the original taking or damaging for a public use. Recovery is permitted because that new element was not contemplated nor determined at the time of the original taking or damaging." Schmutte v. State, 147 Neb. at 199, 22 N.W.2d at 695 (1946).

In 1877 the Nebraska Legislature enacted a statute[6] providing a procedure for enforcing "all claims against the state," but the enactment was held to be completely ineffectual to allow recovery from the state for its torts,[7] because

> By consenting to be sued a state simply waives its immunity from suit. It does not thereby concede its liability to plaintiff, or create any cause of action in his favor, or extend its liability to any cause not previously recognized. It merely gives a remedy to enforce a pre-existing liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense.[8]

Furthermore, special statutes enacted by the legislature which purport to give an injured party a right of recovery against the state are invalid[9] as special legislation, in contravention of a constitutional provision which provides that:

> The legislature shall not pass local or special laws in any of the following cases . . . granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other (than enumerated) cases where a general law can be made applicable, no special law shall be enacted.[10]

Hence, only a general act with uniform application will be an effective waiver of state governmental immunity in Nebraska.[11]

There have, however, been a few instances of such general laws which have been upheld as waiving state immunity in particular classes of cases. The Nebraska Employment Regulations provides that the state and its agencies may be sued upon claims for workmen's compensation benefits "in the same manner as provided by such compensation law for suits against individuals

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6. NEB. REV. STAT. § 24-319 (Reissue 1964).

7. Shear v. State, 117 Neb. 865, 223 N.W. 130 (1929); Benda v. State, 109 Neb. 132, 190 N.W. 211 (1922); State v. Mortensen, 69 Neb. 376, 95 N.W. 831 (1903).

8. Shear v. State, 117 Neb. 865, 868, 223 N.W. 130, 131 (1929). Plaintiff there had obtained a special resolution from one branch of the legislature authorizing the suit. But even such resolution was ineffectual as a waiver. By virtue of its sovereignty, there was no obligation or duty on the state to respond in damages for the negligence of its agents.

9. Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938). *See also* Bordy v. State, 142 Neb. 714, 7 N.W.2d 632 (1943) (legislature cannot create liability on part of state for fraud of its officers and waive the statute of limitations for the benefit of a few within a class); Wakeley v. Douglas County, 109 Neb. 396, 191 N.W. 337 (1922) (law imposing liability on counties for destruction of personal property of officers in public buildings by riotous mobs was void).

10. NEB. CONST. art. III, § 18.

11. Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938).

and corporations."[12] The defunct Nebraska Turnpike Authority was made liable for its torts.[13] The 77th Session of the Nebraska Legislature approved a bill[14] which, while explicitly stating that it was not to be considered a waiver of state immunity, directed the Department of Insurance to purchase liability insurance to protect state agency employees from liability for damages occasioned by their negligence in the operation of state vehicles on public roads.

Stadler v. Curtis Gas, Inc.[15] was an action for wrongful death against the Board of Regents of the University of Nebraska and Curtis Gas, Inc. The deceased died of injuries sustained when a water heater, installed by Curtis on premises owned by the Board of Regents, exploded. The district court sustained the Board's demurrer and plaintiff appealed. The supreme court held that, on these facts, a cause of action had been stated against the Board. The basis for the decision was that a state agency ordinarily waives its sovereign immunity when it engages in activities of a proprietary nature, and it is subject to the same regulations as other persons engaged in the same activity. The operation of an apartment house by the Board was thought by the majority to be a proprietary[16] function, and hence the Board was no more immune from suit for its negligence than the ordinary landlord for his.

The three dissenting justices took the view that the Board of Regents was engaged in a governmental[17] function in owning and operating an apartment house, such function being incidental to the administration of the Board's governmental power, and that,

12. NEB. REV. STAT. § 48-190 (Reissue 1960). In Anstine v. State, 137 Neb. 148, 288 N.W. 525 (1939), the Workmen's Compensation Law as originally enacted was held not to be a sufficient waiver of the state's immunity because it provided no means by which process could be served upon the state.

13. Neb. Laws c.139, § 20 (1951) (repealed 1955).

14. L.B. 503 77th Neb. Leg. Sess. (1967).

15. 182 Neb. 6, 151 N.W.2d 915 (1967).

16. *See* Sorensen v. Chimney Rock Pub. Power Dist., 138 Neb. 350, 354, 293 N.W. 121, 123 (1940): "When a state, by itself or through its corporate creations, embarks on an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling." *Stadler* is the first Nebraska case applying the distinction to an agency of the state set up to discharge a governmental function.

17. A function is "governmental" where the duty under which it is performed involves some general public benefit not in the nature of a corporate or business undertaking. BLACK'S LAW DICTIONARY 826 (4th ed. 1951). All other functions undertaken by governmental entities are said to be "proprietary." The distinction is, to say the least, rather vague.

therefore, the majority, in holding that the Board could be liable on the facts stated, had invaded the province of the legislature by either limiting or abrogating the rule of governmental immunity.

The concurring justices were of the opinion that while the governmental-proprietary distinction is unsatisfactory, it offers an advantage over complete abrogation of the doctrine in that it allows for a case-by-case modification to meet the needs of justice. While legislative action is desirable, in default of the legislature the court may blend the policy of the past with the needs of the present in its adjudication of individual cases.

The net effect of the decision in *Stadler* is difficult to assess in view of the diversity of the opinions presented by the court. It is clear that it is now law in Nebraska that the state and its agencies are liable for torts committed in the exercise of proprietary functions. The distinction, however, between proprietary and governmental functions is not to be based on considerations of policy, rather than the nature of the function performed by the entity.

Insofar as the state is concerned, at least as to torts committed in the course of governmental functions, immunity is practically complete, and except for state employees seeking recovery under the Workmen's Compensation Law,[18] persons sustaining injury as a result of the torts of the state or its agents must either recover from the agent himself, or seek a special appropriation from the legislature.[19]

III. OTHER ENTITIES

Liability of governmental entities other than the state is generally made to depend upon whether the particular entity involved is regarded as a municipal corporation or as a subdivision of the state.[20] But in view of the decision in *Stadler*,[21] the distinction seems immaterial.

A. COUNTIES

In Nebraska, a county is not liable in damages for the tortious

18. NEB. REV. STAT. §§ 48-101 to 191 (Reissue 1960).

19. Such appropriations appear to be relatively rare. The 77th Session made 99 special appropriations (L.B. 935, approved July 21, 1967) of which only 20 were for personal injury or property damage resulting from the tortious acts of the state's agents.

20. The rationale is that a county is a political subdivision of the state, having subordinate powers of sovereignty, Woods v. Colfax County, 10 Neb. 552, 7 N.W. 269 (1880), while a municipal corporation operates under a state franchise, with only delegated sovereign powers, *e.g.*, preservation of the peace.

21. Stadler v. Curtis Gas, Inc., 182 Neb. 6, 151 N.W.2d 915 (1967).

acts of its officers or agents unless made so by statute.[22] The Nebraska Legislature has made counties in the state liable for injuries sustained as a result of "insufficiency or want of repair of a highway or bridge," which such counties are responsible for keeping in repair,[23] and for acts of violence by mobs resulting in the death of a person.[24]

Stevenson v. Richardson County,[25] an action for death and injuries arising out of a county's failure to repair a road and bridge, contained the following summary:

> It is settled by Nebraska authority that a county is not by its nature, inevitably and apart from statutory erection, a corporate entity but is rather an instrumentality erected by the state whereby it exercises and administers its sovereign authority, and that, thus envisioned, it is not subject to suit except in the manner, within the time, and for the purposes defined by the legislature.[26]

B. SCHOOL DISTRICTS

Subject to certain exceptions and limitations, in the United States, school districts, school boards, and similar agencies in charge of public schools are immune in the absence of statute from liability for tort,[27] whether committed by themselves, their

22. Stitzel v. Hitchcock County, 139 Neb. 700, 298 N.W. 555 (1941); Dawson County Irr. Co. v. Dawson County, 106 Neb. 367, 183 N.W. 655 (1921); Thompson v. Colfax County, 106 Neb. 351, 183 N.W. 571 (1921); Davie v. Douglas County, 98 Neb. 479, 153 N.W. 509 (1915); Hopper v. Douglas County, 75 Neb. 329, 106 N.W. 330 (1905). *But Cf.* NEB. REV. STAT. § 23-101 (Reissue 1962): "Each county established in this state according to the laws thereof, shall be a body politic and corporate . . . and . . . may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction of the subject matter, either in law or in equity, or other place where justice shall be administered."

23. NEB. REV. STAT. § 39-834 (Reissue 1960). The statute provides a 30 day period of limitations, which begins running at the time of the injury or damage.

24. NEB. REV. STAT. § 23-1002 (Reissue 1962).

25. 9 F.R.D. 437 (D. Neb. 1949).

26. *Id.* at 440. Citing: Swaney v. County of Gage, 64 Neb. 627, 90 N.W. 542 (1902); Hollingsworth v. Saunders County, 36 Neb. 141, 54 N.W. 79 (1893); Wehn v. Comm'r of Gage County, 5 Neb. 494, 25 A.R. 497 (1877); Woods v. Colfax County, 10 Neb. 552, 7 N.W. 269 (1880); Madden v. Lancaster County, 65 F. 188 (8th Cir. 1894). The action was dismissed because plaintiff had failed to bring himself within the statute. See the rigorous construction given NEB. REV. STAT. § 39-834 (Reissue 1960) in Stitzel v. Hitchcock County, 139 Neb. 700, 298 N.W. 555 (1941), where plaintiff failed to prove that the defective highway was "erected and maintained" in defendant county by proving only that it was maintained there.

27. Hagen v. Payne, 222 F. Supp. 548 (W.D. Ark. 1963); Tesone v. School Dist. No. RE-2, 152 Colo. 596, 384 P.2d 82 (1963); Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 127 N.W.2d 606 (1964); Koehn v. Board

officers, agents or employees, at least while engaged in school or educational affairs, which are considered to be of a governmental character.[28]

Since, in Nebraska, the governmental-proprietary distinction is held applicable to municipal corporations,[29] and since the school district is an incorporated entity,[30] it seems clear that it would be subject to liability for only proprietary functions, and therefore not for those functions which are considered to be connected with education.[31]

C. MUNICIPAL CORPORATIONS

Mower v. Inhabitants of Leicester[32] was apparently the first case to apply the doctrine of governmental immunity to a municipal corporation. The decision was improperly based on an action[33] brought against an unincorporated county for injuries sustained as a result of the county's failure to properly maintain a bridge. The essential basis of the court's refusal to allow the action was the lack of any corporate funds out of which a judgment could be satisfied.

Nebraska adheres to the distinction between governmental and proprietary functions of municipal corporation,[34] so that a municipality is immune from liability for torts committed while it or its agent is engaged in a governmental function, but is liable for torts committed in the course of proprietary functions.[35] The

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of Educ., 193 Kan. 263, 392 P.2d 949 (1964); Weisner v. Board of Educ., 237 Md. 391, 206 A.2d 560 (1965); Shields v. School Dist., 408 Pa. 388, 184 A.2d 240 (1962); Campbell v. Pack, 15 Utah 2d 161, 389 P.2d 464 (1964).

28. PROSSER, TORTS § 125 at 1006 (3d ed. 1964); Koehn v. Board of Educ., 193 Kan. 263, 392 P.2d 949 (1964).

29. See note 36 *infra*.

30. NEB. REV. STAT. § 79-401 (Reissue 1966).

31. There appears to be no Nebraska authority on the question. In many states, the distinction is applied to school districts, *e.g.*, Corbean v. Xenia City Board of Educ., 366 F.2d 480 (6th Cir. 1966); Moss v. School Dist., 250 F. Supp. 917 (E.D. Pa. 1966); Rupe v. State Public School Bldg. Auth., 245 F. Supp. 726 (W.D. Pa. 1965); Koehn v. Board of Educ., 193 Kan. 263, 392 P.2d 949 (1964).

32. 9 Mass. 247 (1812).

33. Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788). *See* 4 DILLON, MUNICIPAL CORPORATIONS § 1655 (5th ed. 1911).

34. Greenwood v. City of Lincoln, 156 Neb. 142, 55 N.W.2d 343 (1952).

35. Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967); Brasier v. Cribbett, 166 Neb. 145, 88 N.W.2d 235 (1958); Greenwood v. City of Lincoln, 156 Neb. 142, 55 N.W.2d 343 (1952); Sorensen v. Chimney Rock Pub. Power Dist., 138 Neb. 350, 293 N.W. 121 (1940); Cook v. City of Beatrice, 114 Neb. 305, 207 N.W. 518 (1926); Henry v. City of Lincoln, 93 Neb. 331, 140 N.W. 664, 50 L.R.A. (n.s.) 174 (1913); Updike v. City of Omaha, 87 Neb. 228, 127 N.W. 229, 30 L.R.A. (n.s.) 589 (1910); Gordon v. City of Omaha, 71 Neb. 570, 99 N.W. 242 (1904).

rationale is stated in *Burke v. City of South Omaha*:[36]

> When the state imposes upon an incorporated city the absolute duty of performing some act which the state may lawfully perform, and pertaining to the administration of the government, the city, in the performance of that duty, may be clothed with the immunities belonging to the mere agent of the state; but when the city is merely authorized by way of special privilege to perform such an act in part for its corporate benefit and the benefit of its inhabitants, the city is not clothed with these immunities, and is liable to be sued for injuries inflicted through its negligence in the performance of such an act.[37]

IV. THE IOWA TORT CLAIMS ACT

In response to a growing recognition of the anomolous character of the doctrine of sovereign immunity in a democratic system, many states have enacted more or less comprehensive schemes providing, first, that the state is liable for its torts; and second, a means whereby such liability can be enforced. The Iowa Act is fairly typical.

The Iowa Tort Claims Act[38] provides:

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36. 79 Neb. 793, 113 N.W. 241 (1907). The case of Henry v. City of Lincoln, 93 Neb. 331, 140 N.W. 664 (1913) contains an excellent summary of Nebraska cases decided up to that time which uphold the distinction between governmental and proprietary functions. *Henry* was cited with approval in Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967). *See also* Greenwood v. City of Lincoln, 156 Neb. 142, 145-6, 55 N.W.2d 343, 345 (1962): "A municipal corporation occupies a dual relation to its citizens and the public. In the performance of its governmental or public duties it is the representative of the state. It has the governmental powers conferred and the burdens imposed upon it by its charter; and is entitled to the privileges, immunities, and exemptions given it by law. The governmental functions of a city are for the benefit of the public and not the corporate entity. A municipal corporation has and is obligated to perform corporate duties, those expressly conferred on it by its charter, and also those that devolve upon it by reason of the governmental powers and privileges it has . . . . Its corporate functions are for the benefit of the city as well as advantageous to the public. A municipal corporation is sometimes authorized to own and conduct a business or commercial enterprise and when it engages therein it is said to be acting in its private or proprietary capacity. It has no duty to conduct such an undertaking and when it does it is entirely voluntary on the part and it thereby enters into a third relation distinct from the dual relations above noted. While occupying this third relation it is engaged in conducting a business and is subject to the law and procedure applicable to a private corporation or person conducting a like business. It has in that regard no governmental functions or corporate duties and has no more privileges or exemptions than a private corporation."

37. Burke v. City of South Omaha, 79 Neb. 793, 795-96, 113 N.W. 241, 242 (1907).

38. IOWA CODE ANN. § 25A.1 to .20 (1967).

> The state shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the state shall not be liable for interest prior to judgment or for punitive damages . . . . The immunity of the State from suit and liability is waived to the extent provided in this chapter.[39]

The constitutionality of the Act was passed on in *Graham v. Worthington*,[40] which upheld it, in spite of a provision of the Iowa Constitution restricting *inter alia*, appropriations for local or private purposes,[41] on the grounds that the act had sufficient public purpose.[42]

Section 25A was held to have waived the immunity of the state and designated a class of claims[43] for which redress might be

39. IOWA CODE ANN. § 25A.4 (1967). *Cf.* N.Y. CT. CL. ACT § 8 (McKinney 1963): "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article." *See also* N.Y. CONST. art. VI, § 9: "The Court (of Claims) shall have jurisdiction to hear and determine claims against the claimant or between conflicting claimants as the legislature may provide." *Cf.* The proposed new New York Constitution (defeated by voters at the polls on November 8, 1967): Art. 1 (Bill of Rights), § 2, "any citizen of this state shall have the right to maintain a judicial action or proceeding against any officer, employee, or instrumentality of the state or a political subdivision thereof . . . ."; Art. V (Judiciary), § 15(D), "the Court of Claims (1) shall have jurisdiction in cases in which the state and one or more other parties are alleged to be joint tortfeasors in the manner prescribed by law; (2) may, on motion by one party, allow the impleading of third parties as provided by law; (3) shall in claims involving real property, determine any question of title of such property . . . and (4) shall, upon demand, grant a jury trial to a private litigant if a jury trial could have been demanded by such party in a like action or proceeding in the supreme court . . . ."

40. — Iowa —, 146 N.W.2d 626 (1966).

41. IOWA CONST. art. III, § 30: ". . . [N]or shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

42. Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66, *appeal dismissed*, 338 U.S. 843 (1949): "An act cannot be said to be for 'private purpose' contrary to the constitutional provision that public moneys shall not be appropriated for a private purpose, where some principle of public policy underlies its passage." Dickinson v. Porter, 35 N.W.2d at 79. The court went on to say that under such provision, a law may serve the public interest although it benefits certain individuals or classes more than others.

43. IOWA CODE ANN. § 25A.2(5) (1967): " 'Claim' means any claim against the state of Iowa for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state while

had.[44] The Act did not create a new cause of action, but, instead, gave recognition to and a remedy for a cause of action already existing by reason of the wrong done, for which, however, redress could not have been had.[45]

In *Graham*,[46] however, the court held that the Act did not waive existing governmental immunities of "those entities or subordinate units of the state commonly classified as governmental subdivisions." The court said:

> If the General Assembly had intended by enacting the Iowa Tort Claims Act to eliminate the doctrine of governmental immunity as to all political subdivisions of the state, it could easily have so declared, and where it did not do so, it is not for the Supreme Court to so extend and enlarge or otherwise change the terms of plain intent and meaning of the Statute.[47]

Although this result is probably unsound from the standpoint of proper construction of the language of the statute[48] and the theoretical basis of subordinate entity immunity,[49] it is believed the question has become moot insofar as Iowa is concerned.

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acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury or death, in accordance with the law of the place where the act or omission occurred."

44. Graham v. Worthington, — Iowa —, 146 N.W.2d 626 (1966).

45. *Id.*

46. *Id.*

47. *Id.*, 146 N.W.2d at 633. *Cf.* "However, no writ of execution shall issue against the state or any agency by reason of any judgment under this chapter." IOWA CODE ANN. § 25A.6 (1967). Also: "The provisions of this chapter shall not apply to: (1) any claim based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused." IOWA CODE ANN. § 25A.14 (1967). Section 25 A.2(1) defines "State agency" as including "all executive departments, agencies, boards, bureaus, and commissions of the state of Iowa, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the state of Iowa, whether or not authorized to sue and be sued in their own name."

48. See note 47 *supra.*

49. Civil divisions of the state have no independent sovereignty, and when a state waives its immunity from liability, the immunity of subordinate components of the state disappears to precisely the same extent. Speigler v. School Dist., 39 Misc. 2d 720, 241 N.Y.S.2d 967, *aff'd*, App. Div. 2d 751, 243 N.Y.S.2d 74 (1963); Town of Amherst v. Mayna Frontier Port Auth., 38 Misc. 2d 906, 238 N.Y.S.2d 710, *rev'd on other grounds*, 19 App. Div. 2d 107, 241 N.Y.S.2d 247 (1963); Hefele v. City of New York, 25 App. Div. 2d 142, 267 N.Y.S.2d 946 (1966); Daniels v. City of Syracuse, 200 Misc. 415, 106 N.Y.S.2d 72 (Sup. Ct. 1951). *See also* Note, *Tort Liability of Municipal Corporations in New York*, 43 COLUM. L. REV. 84 (1943).

The Iowa General Assembly enacted an amendment[50] providing:

> (1) "Municipality" means city, town, county, township, school district, and any other unit of local government . . .
>
> (3) "Tort" means every civil wrong which results in a wrongful death or injury to person or injury to property and includes but is not restricted to actions based upon negligence, breach of duty, and nuisance.
>
> Except as otherwise provided in this Act, every municipality is subject to liability for its torts and those of its officers, employees, and agents, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

Thus in Iowa, as in many states, a comprehensive scheme has been enacted, waiving governmental immunity for all levels of state and local government and providing a forum for the adjudication of claims against the state and other government entities, in accordance with the ordinary rules of law.

V. JUDICIAL ABROGATION

In the face of legislative inaction in regard to removal of governmental immunity, a series of decisions have come forth from the courts; beginning with Colorado[51] and Florida[52] in 1957, a direct attack on the doctrine was launched by the courts. In 1959 Illinois[53] joined the siege, and in the years following, New Jersey (1960),[54] California (1961),[55] Michigan (1961),[56] Alaska (1962),[57]

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50. Senate file 710, enacted July 20, 1967, eff. July 25, 1967; p. 377, Iowa Legislative Service, 1967, Acts and Resolutions, 62d Gen. Ass.

51. Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957) ("In Colorado, 'sovereign immunity' may be a proper subject for discussion by students of mythology, but finds no haven or refuge in this court." 316 P.2d at 585). *But Cf.* Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960), where the court invoked the doctrine of governmental immunity with respect to governmental functions of a county. This case is noted at 36 COLO. L. REV. 529 (1963). *See also* M & M Oil Transp. Inc. v. Board of County Comm'rs, 143 Colo. 205, 353 P.2d 590 (1964).

52. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). The abrogation has been limited to municipalities. Counties are still immune, Buck v. McLean, 115 So. 2d 764 (Fla. App. 1960); Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1962). *See* Note, 16 MIAMI L. REV. 572 (1962). *See also:* Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1964); Butts v. Dade County, 178 So. 2d 592 (Fla. 1965).

53. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). The terms of the abrogation were sweeping. However, the legislature quickly reinstated tort immunity with respect to a number of subdivisions. *See* Comment, 9 DEPAUL L. REV. 39 (1959).

54. McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820, 88 A.L.R.2d

Minnesota (1962),[58] Wisconsin (1962),[59] Arizona (1963),[60] Nevada

1313 (1960). The court held that where negligent acts of commission form the basis of the claim against a municipal corporation, the issue of obligation to respond in damages shall be determined on general principles of respondeat superior.

55. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). The case has been extensively noted: 38 U. DET. L.J. 675 (1961); 10 KAN. L. REV. 610 (1962); 46 MINN. L. REV. 1143 (1962). Particularly worth reading are Alstyne, *Governmental Tort Liability: A Public Policy Perspective*, 10 U.C.L.A. L. REV. 463 (1963) which points out the advantages of selective, as opposed to blanket waiver of immunity; and, Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161 (1963) which discusses the two year moratorium on governmental liability enacted by the California legislature to allow time to work out a claims act, as well as the public policy aspect of abrogation.

56. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961). Two subsequent cases, decided within the next year, severely limited the broad language used by the majority in *Williams*. McDowell v. State Highway Comm'r, 365 Mich. 268, 112 N.W.2d 491 (1962), held that a state continues to enjoy immunity. This was because a legislative repeal of the Michigan Court of Claims Act, which waived the immunity of the state, was thought to be the equivalent of an enactment of an immunity provision. The same reasoning was adopted in Sayers v. School Dist., 366 Mich. 217, 114 N.W.2d 191 (1962), which held that school districts, as agencies of the state, are clothed with state's immunity, and that therefore, the repealer was just as effective an interposition by the legislature between the immunity doctrine and the court, as it was in the case of state immunity. *See* Hertler, *Judicial Legislation and the Doctrine of Governmental Immunity*, 39 U. DET. L.J. 570 (1962).

57. City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962). The case was apparently one of first impression, and the court, in construing a statute lifted from the books of Oregon as it appeared in 1883, applied the rule of the Oregon court at that time: that municipalities were liable for their torts.

58. Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962). The doctrine was prospectively abrogated "with respect to tort claims against school districts, municipal corporations, and other subdivisions of the government on whom immunity has been conferred by judicial decision." 118 N.W.2d at 803. Therefore, the state remains immune.

59. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). "We consider that abrogation of the doctrine applies to all public bodies within the state; the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivision of the state, whether they be incorporated or not." 115 N.W.2d at 620. *See* Note, 46 MARQ. L. REV. 252 (1962). Under WIS. STAT. ANN. §§ 81.15, 84.07 (1965), enacted subsequent to *Holytz*, a county had no immunity: Dunnwiddie v. Rock County, 28 Wis. 2d 586, 137 N.W.2d 388 (1965).

60. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963). As in the case of California, abrogation was not prospective: Immunity is "now abolished not only for the instant case, but for all pending cases those not yet filed which are not barred by the statute of limitations and all future causes of action." 381 P.2d at 112. The court determined that, in the interest of certainty, the abrogation should be in terms of a holding rather than mere dicta. Under ARIZ. REV. STAT. ANN. § 11-291 (1956) a county was liable for negligent act of hospital employee. Hernandez v. Yuma County, 91 Ariz. 35, 369 P.2d 271 (1962).

(1963),[61] and Hawaii (1963)[62] added their strength. In rationalizing the decisions, the courts have often relied on dictum from a 1943 New Mexico case:[63]

> It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolution supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.[64]

Where no impediments have been erected by legislative action, the courts have agreed that: "Having found the doctrine to be unsound and under present conditions, we consider that we not only have the power, but the duty, to abolish (governmental) immunity. 'We closed our courtroom doors without legislative help, and we can likewise open them.' "[65]

Whether or not such a duty exists, the courts have stepped in to deal with what is thought to be a serious defect in our system of justice. The appearance of so many cases abrogating the doctrine in such a short time would seem to indicate a complete reversal of the law within the forseeable future, so that tort liability of government entities will be the rule, rather than the exception.

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61. Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963). The case points to complete abrogation, but on the facts, the court limited itself to denial of county immunity only. *See* Hughey v. Washoe County, 73 Nev. 22, 306 P.2d 1115 (1957), holding a county not immune under NEV. REV. STAT. § 450.020 (1965).

62. F. Koehnen, Ltd. v. Hawaii County, 47 Haw. 329, 388 P.2d 214 (1963).

63. Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943).

64. *Id.*, 136 P.2d at 482.

65. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89, 96 (1959). *Cf.* Myers v. Drozda, 180 Neb. 183, 186, 141 N.W.2d 852, 854 (1966): "*Stare decisis* was intended, not to effect a 'petrifying rigidity,' but to assure the justice that flows from certainty and stability . . . we would be abdicating 'our own function, in a field peculiarly non-statutory,' were to insist on legislation and refuse to consider an old unsatisfactory court-made rule." In *Myers* the Nebraska Supreme Court abrogated the doctrine of charitable immunity. *But see* Weisner v. Board of Educ., 237 Md. 391, 206 A.2d 560 (1965): Rule of immunity is too firmly established and has been too long unchanged by legislature to be changed judicially, if it should be changed at all.

VI. POLICY

At common law, the doctrine of governmental immunity is said to have been based on the maxim "The King Can Do No Wrong," which has been variously interpreted to mean that the king was without fault and incapable of committing a wrong, or that while the king could be very evil indeed, his misdeeds were not "wrongs" in the sight of the law, and therefore, were *damnum absque injuria*.[66]

The traditional rationale for the doctrine of governmental immunity can be simply stated in an 1865 Massachusetts case:[67]

> It is an elementary and familiar principle of English and American Constitutional Law, that no direct suit can be brought against a sovereign in his own courts without his consent . . . (the) reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.[68]

After a review of the common law, the court concludes:

> But the question whether the King of England could be sued at Common Law is rather a matter of historical interest than of present application; for all the books agree that it has not been allowed since Edward I.[69]

Several arguments are advanced in favor of abolition of the doctrine of governmental immunity. It is argued that the doctrine is supported by reasons which cannot command respect, that the rules regulating liability of governmental entities for torts have remained stagnant in the face of great social and legal changes.[70] Further, since public activities are bound to cause injury to someone, it is said to be better that losses due to tortious conduct should fall upon all the persons making up the body politic, rather than upon the innocent plaintiff, who is much less able to bear the loss. Further, as in the ordinary law of agency, the doctrine of respondeat superior ought to be applied, because the

66. *See* Holdsworth, note 1, *supra*; Borchard, note 1, *supra*; Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167 (1952).

67. 93 Mass. (11 Allen) 157 (1865).

68. *Id.* at 162.

69. *Id.* at 170.

70. This presentation is adapted from Kennedy & Lynch, note 55 *supra*, at 176.

torts of public employees are properly to be regarded as a cost of the administration of government, which should be distributed to the public by taxation. An analogy has been drawn to the principle of condemnation, and it is said that, just as the government is required to pay for property taken for public purposes, it ought to be made to pay for property damaged in the pursuit of public purposes.

However, those opposing complete abrogation of the doctrine approach the problem from the practical aspect, *i.e.*, the dollar cost to the taxpayer of compensating individuals for losses suffered by them by reason of the operations of the government. It is said that many of the activities of government are of a nature so inherently dangerous that no private industry would wish to undertake the risk of administering them; likewise that nearly all governmental activity, particularly of a legislative, administrative or judicial character, harms someone; and that the cost of paying insurance premiums is at such a high level as to tend to either diminish public services or increase the amount of tax dollars necessary to maintain the current standards of service. "The higher the standard of maintenance, supervision and services established to avoid legal liability, the less of such services the taxpayers will receive for their tax dollar."[71]

While these arguments are certainly valid so far as they go, they just as certainly tend to ignore rather fundamental aspects of the problem.

The Supreme Court of California noted in *Muskopf*,[72] that under its decision there, no governmental entity would be liable for the exercise of discretionary functions, whether or not such discretion was abused.

Similar language appears in many of the claims acts.[73] Under the discretionary function exception, legislative, judicial, and administrative activities would not be made the basis of a claim against the state.[74]

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71. *Id.* at 178.

72. Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (government officials liable for negligent performance of their ministerial duties but nor for discretionary acts within the scope of their authority).

73. *Cf.* Federal Tort Claims Act, 28 U.S.C. § 2680 (a) (1964) ("discretionary function or duty" of any federal agency or employee). *See* James, *The Federal Tort Claims Act and the 'Discretionary Function' Exception*, 10 U. FLA. L. REV. 184 (1957); Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956).

74. *But Cf.* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d

Furthermore, the argument that the cost of providing a system for compensation of persons injured by the operation of government would be prohibitive flies directly in the face of fiscal reality:

> By showing that a particular service fulfills a collective need, or sufficiently so that public action to guarantee its provision is desired, we may justify collective financing of the service.[75]

Admittedly, the question, reduced to its simplest terms, requires a value judgment. But the factors upon which that judgment must be made are believed to be these:

1. Does a real need exist that persons injured by the torts of the state, its agencies and instrumentalities, be compensated to the extent of the wrong done to them?
2. Does the body politic, as distinguished from the persons injured only, receive any genuine benefit from such compensation?

It is submitted that if the answers to these questions be in the affirmative, then the criteria for "collective good" are met. If this is so, the statement that, if a plan of liability for government torts is enacted, the taxpayer will receive fewer public goods and services per tax dollar, ignores the fundamental nature of collective goods.

VII. CONCLUSION

As McCown, J. noted in his concurring opinion in *Stadler v. Curtis Gas, Inc.*:[76]

> The basic judicial conflict is no longer in the area of whether the old doctrine of governmental immunity from torts is obsolete, but only with the question of the responsibility and power of the courts to reform it.[77]

224, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961): "Because of the important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. . . . The immunity of the agency from liability for discretionary conduct of its officials, however, is not coextensive with the immunity of the officials in all instances. . . . Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."

75. BUCHANAN, THE PUBLIC FINANCES 22 (1965).

76. 182 Neb. 6, 151 N.W.2d 915 (1967).

77. *Id.* at 21, 151 N.W.2d at 924.

But even that question is unresolved in Nebraska today. The court appears to be at an impasse.[78]

The legislature has once again appointed a committee to study the feasibility of enacting a claims act in Nebraska. The supreme court has recently overturned a substantial line of decisions and thrown out the doctrine of charitable immunity,[79] in spite of repeated assertions that any change in that doctrine was for the legislature.

Whether the ultimate death of the doctrine of sovereign immunity in Nebraska is determined by the legislature or the court, its demise seems imminent.

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78. "On the question whether the city and county are immune from liability, the court is evenly divided." Landmesser v. County of Cheyenne, 182 Neb. 345, 347, 154 N.W.2d 760, 762 (1967).

79. Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966).