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Torts

William E. Crawford*

I. LOUISIANA SHOULD TURN TO SOVEREIGN IMMUNITY WITH A STATE TORTS CLAIMS ACT

A. Chamberlain Holds the Cap on Damages Against the State Unconstitutional

Louisiana Revised Statutes 13:5106(B)(1) provides that: "In any suit for personal injury, the total amount recoverable, exclusive of medical care and related benefits and loss of earnings, and loss of future earnings, as provided in this Section, shall not exceed \$500,000."¹ *Chamberlain v. State of Louisiana* holds that this damages ceiling contravenes the constitutional proscription against sovereign immunity contained in Louisiana Constitution article XII, section 10.²

In 1987, three high school classmates were playing "King of the Mountain" on one of two bulkheads constructed to protect a bridge over the Houma Canal. Seventeen-year-old Chad Chamberlain was thrown off the bulkhead, remained under water for nearly fifteen minutes, was rescued, but suffered severe brain damage. His parents filed suit on behalf of themselves and their son against the Department of Transportation and Development ("DOTD"), and others, claiming that the bulkhead was under DOTD's control and that the electrical system on the bulkhead was defective. Plaintiffs claimed that the electrical system used to electrify navigation lanterns partially electrified the water surrounding the bulkheads, causing the boy's injuries.³

The district court awarded the plaintiffs \$2,000,000 in general damages and then reduced them proportionately to fit within the cap mandated by Louisiana Revised Statutes 13:5106(B)(1); the plaintiffs' total general damage award was \$500,000. Plaintiffs were also awarded \$3,453,781.42 in special damages for past and future medical expenses and loss of earning capacity. The appellate court affirmed the decision in all respects, including the finding that the statutory cap was constitutional.⁴

The Louisiana Supreme Court granted plaintiffs' application for writs and directly addressed the constitutionality of the "caps" provision. The court noted that Louisiana Revised Statutes 13:5106(B)(1), enacted by Act 452 of 1985, was "one of six separate statutory measures the legislature, for perceived good reasons, enacted in 1985 to relieve the state of some of the ordinary burdens of

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1. La. R.S. 13:5106(B)(1) (1991).

2. *Chamberlain v. State*, 624 So. 2d 874, 875 (La. 1993).

3. *Id.* at 876.

4. *Chamberlain v. State*, 621 So. 2d 1118 (La. App. 1st Cir.), *rev'd*, 624 So. 2d 874 (1993).

tort liability."⁵ After delineating the reasons prompting the enactment of the ceiling on general damages, the court determined that the legislative goal behind the enactment was to protect the public fisc.⁶ The court said that it was not its role to consider the wisdom of the adoption of the caps statute, rather, its duty was to determine the legality of the statute.⁷

The court reviewed its powers with respect to the legislature, noting that plenary power in the legislature is the rule, whereas prohibitions on the exercise of particular powers is the exception. The court further noted that the party challenging a statute's validity, to overcome the presumption of constitutionality afforded all statutes, must articulate a particular constitutional provision limiting the legislature's powers. With these principles in mind, the court maintained that the constitutionality of the caps statute depended upon the meaning of Louisiana Constitution article XII, section 10.⁸

The plaintiffs argued that the provision created a constitutional right to sue the state in tort which could not be legislatively curtailed. The DOTD contended, however, that sovereign immunity was judicially abolished before the 1974 Constitution, that the constitutional enactment was merely an attempt to elevate the abrogation to constitutional status, and that its adoption was not intended to abridge the legislature's exclusive power to limit liability. The DOTD cited *Sibley v. Board of Supervisors*⁹ for the general proposition that limiting recoverable tort damages does not contravene Louisiana Constitution article XII, section 10(A).¹⁰

The court focused on the prohibition against immunity from liability provided in Louisiana Constitution article XII, section 10(A). Prior to 1960, courts construed the provision as it then existed "as doing no more than giving the legislature the power to waive the traditional sovereign immunity from suit, but not the immunity from substantive tort liability."¹¹ The supreme court had held that

5. *Chamberlain*, 624 So. 2d at 878 (footnotes omitted).

6. *Id.*

7. *Id.* at 879.

8. La. Const. art. XII, § 10, states:

A. No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

B. Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

C. Procedure; Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

9. 462 So. 2d 149, *on reh'g*, 477 So. 2d 1094 (La. 1985).

10. *Chamberlain*, 624 So. 2d at 879.

11. *Id.* at 880.

any attempt by the legislature to waive the state's immunity from liability would violate the constitutional provision.¹² Then in 1960, a constitutional amendment was added to the liability language, assuring that any waiver of immunity would be both from suit and from liability. The court then found, in *Hamilton v. City of Shreveport*,¹³ that the 1960 amendment made each legislative authorization of suit a waiver of immunity from both suit and from liability.¹⁴

In light of their history, the court construed Article XII, section 10(A) and 10(B) of the Louisiana Constitution as continuing the same immunity from liability policy as existed pre-1974. Specifically, the legislative waiver authorized by Section 10(B), when given, must be both from suit and from liability.¹⁵ The court concluded:

The framers [of the Louisiana Constitution of 1974] obviously did not intend to change—broaden or widen—the meaning of the immunity from liability language. Rather, the framers intended to give constitutional status to the proscription against immunity from substantive tort liability. The only real difference is that the framers removed the former discretionary right to consent to suit and liability in tort from the legislature and reserved that right inviolate to the people, making that right a concrete one, beyond the legislature's reach.¹⁶

With this conclusion stated as a premise, the court then considered whether Louisiana Revised Statutes 13:5106(B)(1) unconstitutionally “contravenes that proscription against sovereign immunity from substantive tort liability.”¹⁷ To provide a framework for its analysis, the court addressed each sub-section of Article XII, section 10 separately:

1. Section 10(A) represents a compromise between complete abrogation and categorization, and is a self-executing mandatory prohibition against immunity in tort.¹⁸
2. Section 10(B) employs permissive, legislative waiver language, which retains “some vestige of sovereign immunity as a viable doctrine.”¹⁹
3. Section 10(C), aimed at protecting the public fisc, gives the legislature the power to establish the procedures for suits authorized under Sections 10(A) and 10(B).²⁰

12. *Id.*

13. 247 La. 784, 174 So. 2d 529 (1965).

14. *Chamberlain*, 624 So. 2d at 881.

15. See generally Lee Hargrave, “Statutory” and “Horatory” Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 652-53 (1983).

16. *Chamberlain*, 624 So. 2d at 881.

17. *Id.*

18. *Id.* at 881-82.

19. *Id.* at 882.

20. *Id.* at 882-83.

Based on the above analysis, the court determined that regardless of Louisiana Revised Statutes 13:5106's explicit disclaimer that the legislature's intent was not to resurrect sovereign immunity, "we . . . are bound by the wording of the constitutional provision and by our prior jurisprudence to reach a contrary result."²¹ The ceiling on damages, the court found, cannot be "construed as anything other than a partial resurrection of sovereign immunity," such that "the statutory ceiling on general damages imposed by Louisiana Revised Statutes 13:5106(B)(1) conflicts with Section 10(A) and is thus unconstitutional."²² According to the court, to limit the state's liability to \$500,000 is, in effect, to immunize the state from liability. "Section 10(A)'s unequivocal, self-executing waiver of sovereign immunity as to suit and liability in contract and tort cases constrains the legislature and the courts from imposing limitations on this constitutional right to sue the state."²³

Having stated this unequivocal position, the court was then left with the unenviable task of contradicting its previous decision in *Sibley*,²⁴ wherein the court had stated that the constitution's denial of immunity from suit in tort did not support the contention that the constitutional provision "prohibits the Legislature's limiting in any respect recoverable tort damages."²⁵

The court noted that although *Sibley* lacked precedential value because full rehearing was granted, it was, in fact, frequently relied upon by other courts and commentators; therefore, the court proceeded to attack its earlier analysis in *Sibley*. Significantly, the court determined that even though neither the language of Section 10(A) nor the constitutional debates contained any expression, explicit or implicit, indicating an intent to prohibit the legislature from enacting statutes limiting recoverable tort damages, upon further analysis, the court found its "statement in *Sibley I* that Section 10(A) does not implicitly prohibit such statutes was incorrect as it overlooks Section 10(A)'s historical underpinnings, . . . and its self-executing nature and the implied prohibitions resulting therefrom."²⁶

The court also, rather cursorily, rejected the argument that under Section 10(C) the legislature is authorized to refuse to pay judgments, and is thus implicitly authorized to limit recoverable tort damages. The court said that Section 10(C) deals with the effect of judgments and does not come into play until the judgment is rendered, and thus only addresses the claimant's ability to enforce the judgment.²⁷ Addressing the claimant's ability to enforce the

21. *Id.* at 883.

22. *Id.* at 884.

23. *Id.* at 885.

24. *Sibley v. Board of Supervisors*, 462 So. 2d 149, *on reh'g*, 477 So. 2d 1094 (La. 1985) (finding that La. R.S. 40:1299.39, which provided for a \$500,000 damages cap on malpractice suits against the state, did not violate La. Const. art. XII, § 10).

25. *Sibley*, 462 So. 2d at 154, *quoted in Chamberlain*, 624 So. 2d at 885.

26. *Chamberlain*, 624 So. 2d at 886-87.

27. *Id.* at 888.

judgment is within the legislature's control, whereas addressing a claimant's ability to go to court and get a judgment against the state is not.

Perhaps the court should have given more consideration to the last argument. Regardless of the stage in the proceedings at which the legislature may interpose its power, its constitutional authority to limit the enforcement of the judgment surely cannot be squared with the court's interpretation of Section 10(A).

B. The Threat of Financial Disaster to the State is Real

According to informal data,²⁸ appropriations for judgments against the Louisiana Department of Transportation and Development, through 1988, were:

YEAR	LOUISIANA LEGISLATURE
1972	\$ 179,448.75
1973	570,321.19
1974	67,209.96
1975	439,996.43
1976	581,511.33
1977	1,918,298.25
1978	1,807,583.83
1979	1,417,897.83
1980	5,590,721.62
1981	2,904,947.50
1982	7,297,547.98
1983	12,689,196.96
1984	13,394,238.22
1985	44,725,240.88
1986	11,341,159.00
1987	27,811,448.00
1988	5,918,840.52 ²⁹

Information from the Office of Risk Management shows that claims payments from the Office of Risk Management for actions against the state in all major categories of liability amounted to:

FISCAL YEAR 1991-1992: \$ 25,901,607.00
FISCAL YEAR 1992-1993: \$ 45,735,944.00³⁰

28. This data was gathered and presented by proponents of tort reform at legislature committee hearings in the Regular Session of 1989.

29. This last figure for 1988 may be artificially low given that DOTD transferred a number of cases to other administrative divisions of the state.

30. Information gathered by author from the Office of Risk Management.

Significant milestones precipitated the foregoing chronology of tort costs to the state. In 1973, the Louisiana Supreme Court in *Board of Commissioners v. Splendor Shipping & Enterprises Co.*³¹ held that the "Board of Commissioners of the Port of New Orleans, and other such boards and agencies are not immune from suit for tort." The supreme court was free to write such an opinion because sovereign immunity was then a creature of the jurisprudence, not of the Louisiana Constitution. The Louisiana Constitution of 1974 in Article XII, section 10(A) explicitly abrogated the state's immunity from tort liability.³² The next and perhaps even more significant event came in 1980, when in *Jones v. City of Baton Rouge*³³ the Louisiana Supreme Court held that strict liability under Louisiana Civil Code article 2317 applied to the state and other governmental entities. At this point, the stage for financial disaster was completely set.

While cause and effect may be infinitely debated, the above chronological tabulation of liability strongly suggests that the state's increasing liability is directly linked to the aforementioned events. Taking into account the typical time delay from accident to final judgment, it is clear that an escalation began quite dramatically after the constitutional change of 1974. Then, beginning in 1983, the full effect of abrogated immunity, together with strict liability, began to take effect; the astronomical rise in state payments culminated in 1985 with DOTD alone paying out in excess of \$44 million.³⁴ The state's reaction was immediate. Six statutes were enacted in 1985,³⁵ one being a very minimal torts claims act with a cap on damages,³⁶ another being a very effective limitation of the theory of strict liability in suits against the state or governmental entities.³⁷ Because the \$500,000 cap on damages was not retroactive, the effect

31. 273 So. 2d 19, 26 (La. 1973).

32. La. Const. art. XII, § 10(A).

33. 388 So. 2d 737, 740 (La. 1980).

34. See *supra* note 30.

35. Besides La. R.S. 13:5106(B)(1) (1991), enacted by 1985 La. Acts No. 452, and the two statutes mentioned in this sentence, the other three statutes are as follows:

(1) La. R.S. 13:5114(D) (1991), enacted by 1985 La. Acts No. 450, authorizing structured payment plans by governmental defendants to satisfy personal injury and wrongful death claims;

(2) La. R.S. 42:1441.1-1441.4 (1990) and La. R.S. 29:23.1 (1989), enacted by 1985 La. Acts No. 451, limiting the state's master-servant liability, and transferring liability for torts committed by local public officials from the state to the particular subdivision the officer serves;

(3) La. R.S. 9:2798.1 (1991), enacted by 1985 La. Acts No. 453, precluding governmental entities and their officers and employees from incurring liability for policy-making or discretionary acts or omissions.

See Kenneth M. Murchison, *Local Government Law, Developments in the Law, 1984-85*, 46 La. L. Rev. 491, 512-33 (1986).

36. La. R.S. 13:5112(C) (1991), enacted by 1985 La. Acts No. 509, and La. R.S. 13:5117, enacted by 1985 La. Acts No. 509, but repealed by 1989 La. Acts No. 754, providing for court costs and limiting pre-judgment interest on personal injury and wrongful death claims against governmental defendants to six percent.

37. La. R.S. 9:2800 (1991), enacted by 1985 La. Acts No. 454, limiting the liability of

was not seen immediately, but in 1988, the appropriation for DOTD tort liability dropped significantly. The fiscal year figures for 1991-92 and 1992-93 are for the entire state, not just DOTD. Even with the cap on damages effectively in place, and with the limitation of strict liability in force, our most recent payout exceeds \$45 million.³⁸

To support its decision and announce the reasons behind it, the legislature included in Louisiana Revised Statutes 13:5106 the following statement of purpose:

E. The legislature finds and states:

- (1) That judgments against public entities have exceeded ability to pay on current basis.
- (2) That the public fisc is threatened by these judgments to the extent that the general health, safety, and welfare of the citizenry may be threatened.
- (3) That the limitations set forth in this Section are needed to curb the trend of governmental liability abuses, to balance an individual's claim against the needs of the public interests and the common good of the whole society, and to avoid overburdening Louisiana's economy and its taxpaying citizens with even more new and/or increased taxes than are already needed for essential programs.
- (4) That the purpose of this Section is not to reestablish an immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the constitution.³⁹

The state is a poor vehicle for loss distribution. However, this principle, along with the "deep pocket" theory, drives our appellate courts' approach to tort development.⁴⁰ The fact is that the state has a very limited pocket and can pay

governmental entities under La. Civ. Code art. 2317 for things, other than buildings, in their custody to situations where the governmental entity had notice of the defect that caused the injury.

38. See *supra* note 30.

39. La. R.S. 13:5106(E) (1991).

40. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 116 (La. 1986), *superseded by statute*, La. R.S. 9:2800.51 et seq. (1991) (emphasis added) ("The underlying reason for the owner's or guardian's strict liability is that the person to whom society allots the supervision, care or guardianship (custody) of the risk-creating person or thing *should bear the loss resulting from creation of the risk*, rather than some innocent third person harmed as a consequence of his failure to prevent the risk."); *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 168 (La. 1985) (emphasis added) ("For the most part, however, because of the difficulty in finding fault for all times and purposes, the Code has *left the function of defining fault in the hands of the courts.*"); *Turner v. Bucher*, 308 So. 2d 270, 274 (La. 1975) ("Nevertheless, an innocent victim should not be denied reparation if there exists a source of financial responsibility . . ."); *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 862 (5th Cir. 1967) ("Until Americans have a comprehensive scheme of social insurance, courts must resolve by a balancing process the head on collision between the need for adequate recovery and

its tort liability only from tax revenues. If a referendum was held, would the public support a proposal that increased taxes to finance the state's growing tort liability? The success of such a measure is doubtful.

C. What Approach is Best for the State in the Face of the Rapid Escalation of Tort Liability?

As Professor Robertson stated in his comprehensive article on governmental tort liability, "Louisiana's present scheme of governmental immunity from torts is a hodgepodge of provisions whose contours remain uncertain and whose constitutionality is often questionable. Louisiana could be better served by a comprehensive tort claims act like those in existence at the federal level and in many states."⁴¹

In view of the inclination of the Louisiana Supreme Court to eliminate sovereign immunity or any limitation of liability against the state, a constitutional amendment is needed, similar to Louisiana Revised Statutes 13:5106, that recognizes the legislature's right to limit, but not eliminate, the state's liability. The state legislature would then have constitutional authority to control issues of immunity. Nineteen states have followed that general scheme.⁴² Generally a valid exercise of legislative power to limit the tort immunity of the government, the foregoing scheme has been upheld in the face of equal protection attacks because courts find that the limitation of immunity is rationally related to protecting public funds.⁴³ Additionally, as presently exists in numerous

viable enterprises."). Prior to 1975, this "fault" required to hold a person liable was defined in terms of negligence. The defendant was not liable unless he failed to act as a reasonable person, or failed to use reasonable care, under the circumstances, even though some harm occurred from the person's conduct. *See also* Guido Calabresi, *The Costs of Accidents, A Legal and Economic Analysis*, 39-67 (1970); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 *J. Legal Stud.* 461, 470-71 (1985); and Fowler V. Harper et al., *The Law of Torts* (2d ed. 1986). According to the Harper textbook, "[W]e may well be in a stage of transition toward some form of social insurance for accident victims." *Id.* § 12.1, at 103. "Thus the possible objectives of tort law in accident cases may be classified as the moral objective, the compensation objective, the admonitory or deterrent objective, and the objectives of avoiding discouragement of desirable activity, economic waste, and a disproportionate burden on any members or groups in society." *Id.* § 11.5, at 98-99. Three systems of loss spreading exist: social insurance, private risk pooling insurance, and enterprise liability, which is imposing costs on those markets likely to insure or self-insure. *Id.* § 11.5, at 100-01 n.9. For a more detailed analysis of the deep pocket theory and loss spreading as part of accident prevention, see *id.* at 99-101 nn.8-9.

41. David W. Robertson, *Tort Liability of Governmental Units in Louisiana*, 64 *Tul. L. Rev.* 857, 858 (1990) (footnote omitted).

42. *Civil Actions Against State and Local Government, Its Divisions, Agencies, and Officers*, 34-36 (Jon L. Craig et al. eds., 2d ed. 1992). These states are: Alaska, Arizona, California, Delaware, Florida, Georgia, Indiana, Kentucky, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. All citations to specific state constitutional provisions or statutes are found in text.

43. *Id.* at 178-79.

states,⁴⁴ this legislative scheme may include a limitation of liability from punitive damages or pre-judgment interests.

Most importantly, many states provide for statutory caps on damages.⁴⁵ Specifically, such limitations have been adopted in the following states:

	<i>SINGLE OCCURRENCE</i> ⁴⁶	<i>AGGREGATE</i> ⁴⁷
Alabama	\$ 100,000	\$ 300,000
Colorado	150,000	400,000
Florida	100,000 ⁴⁸	
Indiana	300,000	5,000,000
Maryland	200,000	500,000
Massachusetts	100,000	
Minnesota	200,000	600,000
Missouri	100,000	1,000,000
Montana ⁴⁹	750,000	1,500,000
Nebraska	1,000,000	5,000,000
Nevada	50,000	
New Hampshire	150,000	500,000
New Mexico	400,000	750,000
North Carolina	100,000	
North Dakota	250,000	500,000
Oklahoma	100,000	1,000,000
Oregon	100,000 ⁵⁰	500,000
Pennsylvania	250,000	1,000,000 ⁵¹
South Carolina	250,000	500,000 ⁵²
Texas	100,000 ⁵³	500,000 ⁵⁴
Utah	250,000	500,000
Vermont	250,000	1,000,000
Wisconsin	50,000	
Wyoming	250,000	500,000

44. *Id.* at 478-83.

45. *Id.* at 485-89.

46. *Id.* at 489-93.

47. *Id.* at 493-96.

48. There is a \$200,000 cap on two or more claims of one person arising out of same incident or occurrence.

49. Statute terminated June 30, 1993.

50. Claimant may recover additional special damages not exceeding \$100,000.

51. This cap is for state government. There is a \$500,000 cap for political subdivisions.

52. The cap is \$1,000,000 if the injury was caused by a licensed physician or dentist employed by the governmental entity while that person is in the course and scope of employment.

53. This cap is for local government. The cap for state governments or municipalities is \$250,000.

54. This cap is for state governments and municipalities. There is a \$300,000 cap for local governments.

It has been widely held that no fundamental right to recover unlimited damages from governmental entities exists, and that statutory caps are valid in the face of constitutional attacks based on equal protection, due process, and open court provisions.⁵⁵ Louisiana, however, given *Chamberlain's* interpretation of its unique constitutional abrogation of sovereign immunity, presently stands unprotected from unlimited tort liability.

II. CONCLUSION

If the basic statement in the Louisiana Constitution, article XII, section 10(A) were changed from a statement of nonimmunity, as it currently stands, to a statement of immunity, Louisiana would be afforded the protection from unlimited liability that it needs. Given Section 10(C)'s delegation of power to the legislature, Louisiana would have a comprehensive scheme that could be regulated responsibly by the legislature, instead of one subject to the will of the appellate courts. A constitutional amendment to accomplish this might be in the following form:

Immunity from Suit and Liability for the State, a State Agency, or a Political Subdivision

A. Immunity in Contract and Tort. The state, a state agency, or a political subdivision shall be immune from suit and liability in contract or for injury to person or property, except to the extent otherwise provided by the legislature.

B. Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

C. Procedure, Judgments. The legislature shall provide a procedure for suits against the state, a state agency, or a political subdivision, and shall provide for the limitation of their liability. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable or paid except from funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.⁵⁶

55. Civil Actions, *supra* note 42, at 178-79.

56. *Cf.* the present text of La. Const. art. XII, § 10, *supra* note 8.