Governmental Immunity: The End of "King's X"

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The doctrine of sovereign immunity has long been the subject of criticism by legal commentators and in recent years, the theory has been judicially re-examined in many states. In Louisiana, in the absence of waiver, the state has enjoyed immunity from suit in both contract and tort. This Comment, dealing only with the tort aspect, is intended to determine the extent of governmental immunity remaining after Board of Commissioners of Port of New Orleans v. Splendour Shipping & Enterprise Co.¹

Municipal Corporations

An exception to the doctrine of sovereign immunity of municipalities was first recognized in Stewart v. City of New Orleans.² In that case, in order to determine possible liability, a functional distinction was drawn between the powers possessed by municipal corporations; those exercised for purely public purposes which are held “as part of the government of the country”³ would be protected by sovereign immunity, while those “conferred upon it for private purposes”⁴ would incur liability. This dichotomy is a familiar concept in the area of inter-governmental taxation where immunity depends on the nature of the function being performed by the state; thus “activities thought not to be essential to the preservation of state governments” are denied immunity.⁵

The division between the governmental and proprietary functions of the municipality remained the standard on which liability was based for over one hundred years.⁶ If the function was characteristic of a private corporate entity, it was proprietary and liability attached. Courts began to consider the profits derived from any particular power as indicative of a proprietary function.⁷ While profit may be an attribute of a private corporation, the mere fact that the exercise of power is profitable does not necessarily make the function proprietary. The classification of the function should be based on the

¹. 273 So. 2d 19 (La. 1973).
². 9 La. Ann. 461 (1854).
³. Id. at 462. (Emphasis added).
⁴. Id. (Emphasis added.)
⁶. See Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529 (1965). As will be discussed in the division of Other State Agencies, this decision removed immunity from those municipalities having a “sue and be sued” provision in their charter.
relation of the type of public service rendered to the municipality's duty to provide that service.

Other State Agencies

Municipalities can be distinguished from other subdivisions of state government as complete governing units, somewhat "independent" from the state, and capable of conducting, on a reduced scale, all the functions of government. Since the municipality is a conglom erate of governmental and proprietary powers, a functional test was an appropriate determinant of sovereign immunity. State agencies, on the other hand, are departments of the executive branch of government traditionally performing purely administrative functions, and bearing a closer relation to the sovereign state than the municipality. In light of this administrative purpose, the distinction between governmental and proprietary functions is not an appropriate test of whether to impose liability on a state agency. As a result, the doctrine arose that the state or its agencies could only be sued through express legislative authorization. However, the supreme court held in *Duree v. Maryland Casualty Company* that legislative authorization to sue the state was only a waiver of immunity from suit, not a waiver from liability. The *Duree* decision, reaffirmed shortly thereafter in *Stephens v. Natchitoches Parish School Board*, reduced any legislative authorization to an empty promise, since the state could later assert the defense of no cause of action. This was corrected in 1960 by an amendment to Article III, § 35 of the Louisiana Constitution which stated in part that each authorization by the Legislature for suit against the State or other such public body, heretofore and hereafter enacted or granted, shall be construed to be and shall be effective and valid for all purposes, as of and from the date thereof, as a waiver of the defendant's immunity both from suit and from liability.

This amendment was construed in *Hamilton v. City of Shreveport* to mean that the legislature was empowered to waive

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immunity from suit and liability, and such waiver extended to governmental and proprietary functions. In that case, the court reasoned that a waiver was effectuated by the "sue and be sued" provision in Shreveport's city charter, since that charter was legislatively authorized.\(^\text{12}\) It was argued in *Bazanac v. State, Department of Highways*\(^\text{13}\) that since *Hamilton* dealt only with a city charter, the decision had no effect on the immunity of other state agencies, although they had a similar provision in their charters. The supreme court rejected that argument and held that the "sue and be sued" provision in the charter or organic act of any governmental body enumerated in the 1960 amendment must be construed as a general waiver of immunity from suit.\(^\text{14}\) As a result of the constitutional amendment and its judicial construction, the number of state agencies subject to suit tremendously increased. There still remained, however, many agencies which lacked a "sue and be sued" provision in their charters, and were therefore immune.

*Splendour*

In *Board of Commissioners of Port of New Orleans v. Splendour Shipping & Enterprise Co.*,\(^\text{15}\) the Board of Commissioners filed suit for damages sustained when Splendour's vessel struck a bridge operated by the Board.\(^\text{16}\) Splendour answered generally, alleging contribu-

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12. *La. Const.* art. XIV, § 40(c) provides in part that "[t]he Legislature shall provide by general law a method whereby any municipality may frame a home rule charter and adopt same by a vote of the majority of its qualified electors voting thereon at an election to be held as prescribed by law." Prior to *Hamilton*, the supreme court in *Westwego Canal & Trans. Co. v. Louisiana Highway Comm'n*, 200 La. 990, 9 So. 2d 389 (1942), had held that the provision in a state agency's charter, that it possessed the power to sue and be sued, was not a waiver of tort liability.

13. 218 So. 2d 121 (La. App. 4th Cir. 1969).

14. See *Herrin v. Perry*, 254 La. 933, 228 So. 2d 649 (1969) (which had been decided between the appellate decision and the hearing of *Bazanac* by the supreme court.)


16. A somewhat concealed aspect of *Splendour* is the determination that although the case fell within the admiralty and maritime jurisdiction, the State was still able to invoke the defense of governmental immunity. Counsel for *Splendour* had argued, in its brief, that *Workman v. New York City*, 179 U.S. 552 (1900) precluded the defense of governmental immunity, as it conflicted with the symmetric and uniform application of the admiralty laws. The Board, relying on *Ex Parte State of New York*, 256 U.S. 490 (1921), successfully distinguished *Workman*. *Ex Parte State of New York* dealt with the issuance of writs of prohibition to a United States District Court which sought to exercise jurisdiction over the state of New York. In issuing the writs, the Court said "[m]uch reliance is placed upon *Workman v. New York City*, 179 U.S. 552. But that dealt with a question of the substantive law of admiralty, not the power to exercise
tory negligence and filed a reconventional demand for damages to its ship. The Board then interposed the defense of sovereign immunity to the reconventional demand. Since the state instituted the litigation and sought damages, defendant could be classified as the passive party in this litigation, attempting only to reduce its losses by interposing a recognized defense to a claim of negligence. The court of appeal found that as an agency of the state, the Board enjoyed immunity as there had been no express waiver by the legislature. The supreme court reversed, holding that the Board of Commissioners and "other such boards and agencies" were not immune from suit in tort.17

The theory of governmental immunity rests upon an idea which has little justification in modern law. It began in England as a personal attribute of the King and later, through a somewhat uncertain process, was extended to the state.18 Its application in the United States is basically unsound, since "the keystone of American political thought has been responsible government"19 and the idea that the government is above the people is inconsistent with this premise. Any assertion of governmental immunity is subject to at least one overriding objection—it is basically unfair. If the theory of responsible government is accepted as proper, then any negligence should create liability for which the government should respond. To hold otherwise
puts the state above the law and answerable to no one. This inherent unfairness seemed most persuasive to the court in *Splendour*.\(^{20}\)

The *Splendour* court found a conflict between the doctrine of governmental immunity and the Louisiana Constitution. Article I, § 6 states in part that “every person for injury done him shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay.” Prior to *Splendour*, this provision, in force since 1864, had never been held to be inconsistent with the rule of governmental immunity. Both Justice McCaleb and Justice Summers argued that the 1960 constitutional amendment, which set forth certain guidelines for suit against state subdivisions, elevated the jurisprudential doctrine of sovereign immunity to constitutional status. Thus they argued that this could preclude the doctrine’s abrogation by judicial fiat. Justice Summers stated that

> not only is the Legislature’s right to waive immunity from suit not abrogated, the right is instead, implicitly recognized and approved, confirmed and strengthened. It follows, therefore, unless the State’s sovereign immunity is waived by the Legislature, that immunity is retained.\(^{21}\)

While this position is arguable, it would seem that the purpose of the amendment was to provide an administrative procedure whereby suit could be brought against the state, and not to set forth governmental immunity as a fundamental principle. The development of governmental immunity has been almost exclusively controlled by the courts and it would be inconsistent to say that it has been removed from the courts’ grasp by implication.

The statement in *Splendour* that the Board of Commissioners “and other such boards and agencies are not immune from suit in tort,”\(^{22}\) is a broad rejection of governmental immunity, sufficient to negate the assertion of the defense by any political subdivision. Since state agencies have been traditionally considered “closer” to the state than municipalities,\(^{23}\) it would be anomalous to allow municipalities to claim immunity while denying it to state boards and agencies.

**Other Jurisdictions**

As noted in *Splendour*, many other states have abrogated the

\(^{21}\) Id. at 29.
\(^{22}\) Id. at 26.
rule of governmental immunity with certain limitations. The court in \textit{Splendour} did not place any restriction on the type of activity subject to liability or specify which public bodies will enjoy immunity. Other jurisdictions have put some limitation on their abrogation, and if this is to occur in Louisiana, the standards set forth by other courts will be helpful in formulating the best rule. Many states have limited the defense to certain public bodies. Florida was the first jurisdiction to abolish the doctrine of governmental immunity in a case where a municipality was held liable for the torts of its policemen. The court purported to remove the doctrine only with regard to municipalities, and this concept of narrow removal subsequently was followed in Illinois and Michigan.

Recent cases have expanded the concept of narrow removal. In \textit{Brown v. City of Omaha}, a Nebraska court held that immunity may no longer be asserted by “cities and all other governmental subdivisions and local public bodies.” New Jersey, in \textit{Willis v. Department of Conservation and Economic Development}, extended the right to sue governmental bodies to include the state as a separate entity. Colorado, the most recent state to reject the doctrine, sanctioned suit against a county, school district, or the state itself. This pattern lends support to the conclusion that the \textit{Splendour} reasoning would

25. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
28. California, in \textit{Muskopf v. Corning Hospital District}, 55 Cal. 2d 211, 359 P.2d 457 (1961), began a trend of broadening the scope of the removal. Speaking for the court, Justice Traynor discarded governmental immunity, and expressed no outer limit for the abrogation. Although other states followed with similar broad rejections, the trend appears to have been changed by a series of decisions from 1963 to 1968. See \textit{City of Fairbanks v. Schaible}, 375 P.2d 201 (Alaska 1964); \textit{Parish v. Pitts}, 244 Ark. 1239, 429 S.W.2d 45 (1968); \textit{Haney v. City of Lexington}, 386 S.W.2d 738 (Ky. 1964); \textit{Rice v. Clark County}, 79 Nev. 253, 382 P.2d 605 (1963). Upon investigation, however, it is found that these decisions were either based on an existing statute, (see \textit{City of Fairbanks v. Schaible}, 375 P.2d 201 (Alaska 1964)), or that the limitations placed on the abrogation were reduced by later rulings, (see \textit{City of Louisville v. Louisville Seed Co.}, 433 S.W.2d 638 (Ky. Ct. App. 1968)). It appears that only Nevada and Arkansas were inconsistent with the liberal trend begun by \textit{Muskopf}.
30. Id. at 809.
subject boards, agencies, and municipalities to liability for tortious conduct.

Other jurisdictions have confined immunity to certain classes of activities performed by public bodies. "Judicial or legislative acts,"\(^3\) including those functions which involve discretion in the manner of performance, and those which are the exercise of a judicial, legislative, quasi-judicial or quasi-legislative power\(^3\) are given the benefit of immunity. The reasoning behind the "discretion" aspect of this restriction is that when powers are delegated from the state to public bodies, they must have the right to select the best method of performance without the imposition of liability. This classification is obviously broad and has prevented an objective standard by which to ascertain liability, as illustrated in Catto v. Schnepf.\(^3\) Plaintiff was involved in an automobile accident and sought to impose liability on the municipality by alleging negligent construction of the highway. The court held that "the Township's conduct involving the design and reconstruction of the road in question was one 'resting in the discretionary judgment of the governing body'"\(^3\) and therefore not subject to review. This case indicates the broad area which may be included in the realm of discretionary acts, and the improbability of a practical standard by which to determine liability.

Similarly, "ministerial" or nondiscretionary acts done in furtherance of a power conferred on a public body by the judiciary or legislature do not incur liability.\(^3\) Ministerial acts have been said to include the promulgation of zoning ordinances\(^3\) and malicious prosecution.\(^9\) It seems, however, that this aspect of the restriction may be extended to include many situations which should not be shielded from liability. For example, a Florida court has held that no tort action will lie against a municipality for property loss caused by the negligent actions of a fire crew, since the selection and maintenance of proper firemen is an exercise of a legislative or quasi-legislative power.\(^4\) In Middleton v. City of Fort Walton Beach,\(^4\) an arrest warrant, known

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34. See note 38 infra.
36. Id. at 76.
41. 113 So. 2d 431 (Fla. Ct. App. 1959).
to be false by the issuer and the arresting officer, was issued for plaintiff’s arrest. The court stated that even assuming that the parties were acting within the scope of their employment, the city would not be liable since the acts involved were quasi-judicial in character.\footnote{42}

Other jurisdictions have taken a “duty” approach as to which activities would be immune from liability; that is, liability attaches only if the governmental body owes a duty to the particular person who is injured.\footnote{43} In City of Louisville v. Louisville Seed Company,\footnote{44} a Kentucky court defined the restriction as follows:

\begin{quote}
Where the act affects all members of the general public alike, it would be unreasonable to apply to it the broad principles of tort liability. But, when the city, by its dealings or activities, seeks out or separates the individual from the general public and deals with him on an individual basis, as any other person might do, it then should be subjected to the same rules of tort liability as are generally applied between individuals.\footnote{45}
\end{quote}

A Florida court reached a similar conclusion in Modlin v. City of Miami Beach,\footnote{46} in which an overhead mezzanine floor collapsed, killing plaintiff’s wife. Plaintiff alleged negligence by the city for improper inspection of the building. The court found that the performance of this duty, the enforcement of the building code, was owed to the general public, not specifically to the deceased, and the city was therefore not liable. The same theory was relied on by an Arizona court where a policeman failed to stop a drunken driver under circumstances giving the officer notice of his condition, and a wreck resulted shortly thereafter, killing the other driver.\footnote{47}

It appears that while a total removal of the defense of governmental immunity might be theoretically ideal, practically it is not feasible, largely because of the extent to which the public depends on governmental services. Suppose Louisiana provided a hurricane warning system whereby residents of coastal towns were alerted to approaching hurricanes. If, due purely to the negligence of the operators, a hurricane was charted to strike Town X, but in actuality, was

\footnotesize{\addcontentsline{toc}{section}{Footnotes}}

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\setcounter{footnote}{42}
\item Id. at 432.
\item See Massengill v. Yuma, 104 Ariz. 518, 456 P.2d 376 (1969); Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967); Huey v. Town of Cicero, 41 Ill. 2d 361, 243 N.E.2d 214 (1968); City of Louisville v. Louisville Seed Co., 433 S.W.2d 638 (Ky. Ct. App. 1968).
\item 433 S.W.2d 638 (Ky. Ct. App. 1968).
\item Id. at 643.
\item 201 So. 2d 70 (Fla. 1967).
\end{enumerate}
\end{footnotesize}
going to, and struck Town Y, liability would result. The residents of Y would have a cause of action for negligent failure to warn, while the residents of X could sue for the expenses incurred by removal of their goods. If the state were faced with this possibility of liability, the solution would be to cease performance of the service. As a policy matter, we cannot afford to discourage the performance of governmental services; thus, it seems necessary to excuse negligence in certain situations. The question remains, which immunity rule would provide the most satisfactory result?

The “judicial or legislative acts” restriction appears undesirable. There are few functions performed by a public body which could not be said to involve a certain degree of discretion and, as Catto illustrates, the courts have shown considerable latitude in determining what does or does not involve discretion. The test for imposition of liability should be distinct, and if given a broad and somewhat vague category, the courts will be faced with the same problems that existed in the determination of whether a particular function was governmental or proprietary. Similarly Middleton illustrates how the “judicial and legislative power” aspect may be expanded.48

The “special duty” restriction appears to provide the most practical solution. It provides a well defined standard by which to determine the liability of a governmental body. For example, a person injured by the operation of a garbage truck could recover by showing negligence, with no need to show that the nature of the function falls within a certain category. Also, it has the effect of limiting the liability of the state by preventing the state or agency from being liable to a large number of people. However harsh this may appear in certain situations, it seems necessary to excuse the negligence of the state where services of a public nature are performed. This is not to advocate a return to the governmental-proprietary distinctions. The basis of the special duty exception is that there must be a duty owed to the injured individual which is different from that owed the general public. If this duty is found, the nature of the function is irrelevant. The governmental-proprietary rule, however, looks to the nature of the function first and then, if it is found to be proprietary, ordinary tort rules govern. It appears that duty should be the paramount question in a tort case and not the nature of the particular function being performed by the negligent actor.

Another possible solution to the problem of formulation of standards could be legislative. As a result of judicial removal of govern-

mental immunity several state legislatures have reinstated the doctrine entirely or partially, or passed acts to define and limit the state's liability. The most comprehensive of these acts has been passed by California and Illinois. Under the California plan, certain functions of government are classified as either subject to or exempt from liability, thereby adding continuity to the development of governmental liability. Any Louisiana legislative action will undoubtedly have to wait the fate of the proposed constitution which provides in Article III, § 14(A) that “[n]either the state nor any of its agencies or political subdivisions shall be immune from suit and liability in contract or for injury to person or property.” However, in the meantime, the avenue of judicially imposed limitations is still a viable solution.

Conclusion

Splendour marks a major breakthrough in the area of governmental liability in Louisiana, and although the court has not indicated whether any restrictions will be placed on this liability, it is strongly suggested that there be some limitation. Care must be taken in the development of any limitation if Splendour is to enable just results, and it is recommended that the special duty restriction be adopted to facilitate the development of a practical, distinct standard.

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51. The California Law Revision Commission did not choose to follow the Federal Tort Claims Act, reasoning that there were inherent problems “in a statute . . . that waives immunity from liability generally and attempts to specify exceptions to governmental liability.” California Law Revision Commission, Recommendations Relating to Sovereign Immunity, Vol. 4, Page 812 (1963).

52. In Evangelical United Breth. Church of Adna v. State, 407 P.2d 440 (Wash. 1965), despite the fact that the Washington legislature had provided “[t]he state . . . , whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct,” the court held that this did not apply to discretionary acts of officials.