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Discretionary Acts Protected by Governmental Immunity

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tion of the reasons given by the courts for excluding, in criminal trials, evidence gathered by unreasonable search and seizure. Further, there is good reason not to leave this issue of fact to the jury. It is doubtful that the jury would be able to disregard the evidence, particularly when there is—as in the principal case—no question as to its validity. It is doubtful that the average jury would be interested in performing the intellectual "gymnastic" of disregarding the evidence, their basic aim being to do justice in the particular case rather than promote long-term policies of law.[26]

The court's approach, however, is not unique. On this particular question,[27] and in related areas of law,[28] other courts have given preliminary fact questions to the jury. Perhaps this is the result of a "tenderness" for the party that would be adversely affected by exclusion.[29] Whatever the basic reason behind the decision here, it seems unfortunate that the court chose to ignore a commonly accepted evidentiary principle by stating simply that "our system" gave them no choice but to submit the question to the jury.[30]

DISCRETIONARY ACTS PROTECTED BY GOVERNMENTAL IMMUNITY

Plaintiffs sought damages from the State of Washington for property destroyed by a juvenile escapee from Green Hill School, who set fire to a church and adjoining house. Plaintiffs alleged, *inter alia,* that the state was negligent in maintaining an "open program" in a "close security" institution, and in assigning the juvenile, regarded as a security risk, to the "open program."[1] Plaintiffs relied on a recent statute purportedly abolishing state immunity from liability for torts committed by officials, whether acting in a "governmental" or "prop-

[26] MCCORMICK, EVIDENCE § 53, at 123 (1954).
[27] McCreary v. State, 165 Tex. Crim. 436, 307 S.W.2d 948 (1957).
[28] Cases cited note 6 *supra.* See discussion and cases in 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940).
[29] MCCORMICK, EVIDENCE § 53, at 124 (1954).
[30] 66 Wash. Dec. 2d at 900, 406 P.2d at 626.

[1] Schools such as the one from which the juvenile escaped are "designated as close security institutions to which shall be given the custody of children with the most serious behavior problems." WASH. REV. CODE § 72.05.130(4) (1959). The institution in question was comprised of various cottages to which boys were assigned. One cottage provided "maximum security and disciplinary isolation when required," but others were part of an "open program" which became "progressively less restrictive relative to assignment to work details, unescorted movement between details and school classes, recreational outlets, and intercottage association." 67 Wash. Dec. 2d at 246-47, 407 P.2d at 442.

rietary" capacity.[2] The trial court entered judgment on a verdict for plaintiffs. On appeal, the Washington Supreme Court, sitting en banc, reversed in a 7-2 decision. *Held:* The statute abolishing governmental immunity does not apply to discretionary acts of officials charged with implementing state policy; such acts are immune from judicial scrutiny as to possible negligence. *Evangelical United Brethren Church v. State*, 67 Wash. Dec. 2d 243, 407 P.2d 440 (1965).

The doctrine of governmental immunity, originating in the medieval maxim "The King can do no wrong,"[3] has undergone a process of slow disintegration in the United States.[4] In many jurisdictions, liability depends upon whether the activity challenged is of a "governmental" or "proprietary" nature.[5] This dichotomy has been abrogated

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[2] Wash. Sess. Laws 1961, ch. 136, § 1, at 1680:

> The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

During pendency of litigation in the principal case, the statute was amended. The court took note of the new version in writing the opinion in the principal case. The amended version states, WASH. REV. CODE § 4.92.090 (1963):

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[3] The king was deemed incapable of doing or thinking wrong. BLACKSTONE, COMMENTARIES 246 (17th ed. 1830). In the United States, the Supreme Court early rejected the doctrine in Chisholm's Ex'r v. Georgia, 2 U.S. (Dall.) 419 (1793), but a storm of protest among the states led to ratification in 1796 of the eleventh amendment, which restored the doctrine to its full vigor. See CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 263 (9th ed. 1950); Borchard, *Governmental Responsibility in Tort*, IV, 36 YALE L.J. 1, 38 (1926). Subsequently, the Supreme Court justified the doctrine in Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907), by stating that "there can be no legal right against the authority that makes the law on which the right depends."

The doctrine as applied to local public agencies did not originate with the theory that the king can do no wrong. In Russel v. Men of Devon, 100 Eng. Rep. 539 (1788), recovery was disallowed on a theory that it is better for an individual to sustain injury than for the public to suffer inconvenience. See also Mower v. Inhabitants of Leicester, 9 Mass. 247, 6 Am. Dec. 63 (1812). The history of the doctrine of sovereign immunity is exhaustively treated by Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[4] See generally Borchard, *supra* note 3; Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1923).

[5] The governmental-proprietary dichotomy apparently originated in 1842 in Bailey v. New York, 3 Hill 531 (N.Y.). Washington adopted the dichotomy in Russell v. Tacoma, 8 Wash. 156 35 Pac. 605 (1894). In his treatise, PROSSER, TORTS § 125, at 1005 (3d ed. 1964), Professor Prosser states:

> [T]he classification of particular functions as governmental or proprietary has proved to be so confused and difficult, and has been subject to so much disagreement, . . . that the reader must be referred to detailed consideration in the texts on the law of municipal corporations.

WASH. REV. CODE § 4.92.090 (1961) does away with the need to distinguish between the two functions. But the holding in the principal case opens a new pandora's box, namely the distinction between functions that are discretionary and those that are not.

in a few progressive jurisdictions, either judicially[6] or legislatively.[7] However, those jurisdictions which have abolished the doctrine still make an exception, and thus accord governmental immunity when the alleged negligence arises out of a discretionary act performed by an official charged with the implementation of governmental policy.[8] The Washington court, having early adopted the "governmental-proprietary" dichotomy,[9] later insisted that the doctrine could not be judicially abolished.[10] The legislature complied by enacting a statute abolishing the immunity,[11] since held by the court to apply to municipalities in decisions which made no mention of a discretionary limitation.[12]

The court faced the issue of imposing the discretionary limitation

[6] Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, (Fla. 1957); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. App. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 908 (1960); Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[7] *E.g.*, WASH. REV. CODE § 4.92.090 (1963), quoted in note 2 *supra*; N.Y. CT. CLAIMS ACT § 8 (1947), which states:

> The state hereby waives its immunity from liability and hereby assumes liability . . . in accordance with the same rules . . . as applied against individuals or corporations. . . .

[8] Whenever sovereign immunity has been abolished, whether judicially or legislatively, some sort of discretionary limitation has been imposed. Thus, the federal government is not liable under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1964), for any claim arising out of an act "based upon the exercise or performance or failure to exercise or perform a discretionary function . . . whether or not the discretion be abused." Similarly, a New York court, under a broad government liability statute, N.Y. CT. CLAIMS ACT § 8 (1947), recognized a discretionary limitation by refusing to allow the question of a city's negligence in timing a traffic light to go before the jury. Weiss v. Fote, 17 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960). And when California courts abolished the doctrine in a case concerning the negligence of hospital employees in allowing plaintiff to fall and aggravate a broken hip, the court held that the doctrine of sovereign immunity no longer applied unless the disputed action was discretionary. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), 46 MINN. L. REV. 1143 (1962); see also Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

[9] Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605 (1894). It has been pointed out that the judicial approach to governmental immunity in Washington has been somewhat confused. See generally Comment, 36 WASH. L. REV. 312, 316-17 (1961).

[10] Kilbourn v. Seattle, 43 Wn. 2d 373, 379, 261 P.2d 407, 410 (1953).

[11] See statutes cited note 2 *supra*. In the earlier version of the statute, the language differed in that the state merely "consent[ed] to the maintaining of a suit or action against it." It seems likely that the legislature amended the statute because of the possibility that it might be given a restricted interpretation. An early example of this type of statutory interpretation occurred in Billing v. State, 27 Wash. 288, 67 Pac. 583 (1902), in which the court was confronted with a statute which gave persons "the right to bring an action against the state." The court held that no liability could be had against the state which did not exist prior to the enactment of the statute, and that the statute merely conferred jurisdiction upon courts to hear and determine suits brought against the state. See also Howard v. Tacoma School Dist. No. 10, 88 Wash. 167, 152 Pac. 1004 (1915).

[12] See Hosea v. City of Seattle, 64 Wn. 2d 678, 393 P.2d 967 (1964); Kelso v. City of Tacoma, 63 Wn. 2d 913, 390 P.2d 2 (1964). It was stated in the dissent in the principal case that: "To date this court has not evinced judicial distaste for the

for the first time in the principal case. In adopting the limitation, the court pointed out that the state policy underlying the delinquent youth program necessarily requires the exercise of "executive expertise, evaluation and judgment,"[13] and reasoned that, in any organized society, there must be room for implementing basic governmental policy unhampered by the fear of sovereign tort liability. As the policy underlying Washington's delinquency program is to furnish that type of care, instruction, and treatment most likely to accomplish rehabilitation and restoration to normal citizenship, the majority determined that the decision to create an "open program" in a "close security" institution, and the decision to assign the escaping juvenile to such a program, necessarily involved that type of discretion which could not be challenged as negligent. The majority construed the statute as applying only to those acts or omissions properly characterized as "operational, ministerial or housekeeping" functions, treating policy decisions embracing the exercise of "purely administrative or executive discretion" as not being within its purview.

There is no doubt that the decision to establish the open program was made at the administrative level, and that it was necessary to effectuate the state's juvenile policy. It would seem, however, that the decision to commit a particular juvenile to an open program does not affect the basic juvenile rehabilitation policy; rather, the individual commitment decision appears to belong to the "housekeeping" category.[14] In view of the juvenile's prior record and classification as a

clearly articulated legislative policy abolishing the doctrine of sovereign tort immunity in this state." 67 Wash. Dec. 2d at 260, 407 P.2d at 449.

[13] 67 Wash. Dec. 2d at 255, 407 P.2d at 447. The policy underlying the state's juvenile program is set forth in WASH. REV. CODE § 72.05.010 (1959), and, so far as it is pertinent to the principal case, states that there shall be provided "that type of care, instruction, and treatment most likely to accomplish rehabilitation and restoration to normal citizenship."

[14] The court in the principal case promulgated the following test, 67 Wash. Dec. 2d at 252, 407 P.2d at 445:

> [I]t would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate the posing of at least the following four questions: (1) Does the challenged act, omission, or decision necessarily involve a basic policy, program, or objective? (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program or objective? (3) Does the act, omission or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretion-

security risk,[15] it would also seem that the jury should have been allowed to determine whether or not the state was negligent.

Because no legislative histories are provided by the Washington legislature, the legislative purpose underlying the sovereign immunity statute is open to speculation. Even though the legislature may have "painted with the broadest possible brush"[16] in purporting to abolish sovereign immunity, and although there is substantial merit to the argument that "discretionary" is a lesser included term within the word "governmental,"[17] the majority nevertheless decided to adopt the limitation as being inherent in the statute.[18] If, as seems likely, the result reached in the principal case does not coincide with the purpose of the statute, an amendment to the statute appears necessary. If the result is consistent with that purpose, then future judicial elaboration will be all that is needed. Before either legislative or judicial action is taken, however, several arguments for and against limited sovereign immunity should be considered.

Proponents of the discretionary limitation to sovereign immunity point out the threat posed to orderly government by allowing a jury to substitute its judgment for that of the legislature or executive.[19] To properly perform his discretionary duties, an official must be free from the threat of personal liability for torts committed in the line of

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ary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending on the facts and circumstances involved.

Although the court reached a contrary conclusion, it seems clear that the decision to commit the juvenile to an open program was not essential to the accomplishment of the state's juvenile policy, nor did it require the exercise of basic policy evaluation. It seems therefore, that had the court correctly applied its own test, an opposite result should have been reached.

[15] The juvenile in question, a repeat inmate of Green Hill School, had set fires, been involved in a disciplinary incident, and had been diagnosed as dangerously psychotic with a recommendation that he be regarded as a security risk and accorded close supervision. 67 Wash. Dec. 2d at 245-48, 407 P.2d at 441-43.

[16] 67 Wash. Dec. 2d at 260, 407 P.2d at 449 (dissenting opinion).

[17] 67 Wash. Dec. 2d at 262, 407 P.2d at 450 (dissenting opinion). Indeed, little if any difference exists between actions now classified as discretionary and those previously classified as governmental. *E.g.*, keeping prisoners in jail, operating hospitals, and maintaining public schools. See PROSSER, TORTS § 125, at 1005-07 (3d ed. 1964); see also Hagerman v. City of Seattle, 189 Wash. 694, 66 P.2d 1152, 110 A.L.R. 1110 (1937) (operation of hospital is a governmental function).

[18] The conclusion reached by the majority appears directly contrary to the literal meaning of a comparatively lucid statute. See statute set out in note 2 *supra*.

[19] In Weiss v. Fote, 17 N.Y.2d 579, 585-86, 200 N.Y.S.2d 409, 413, 167 N.E.2d 63, 66 (1960), the court stated:

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the legislature has seen fit to entrust to experts.

duty,[20] and, it is argued, he must also be free from fear of exposing the state to derivative liability caused by him as its servant.[21] Both the principal case[22] and recent California decisions[23] recognized the latter argument. Added to the threat of government disruption is the theoretical immensity of the potential liability a state faces by virtue of its far-reaching activities. Governments undertake many operations not carried out by private groups; very often these activities affect vast numbers of people, and subject them to a relatively high degree of risk.[24] A final argument favoring retention of the discretionary limitation is that it operates to limit the number of claims that can be successfully prosecuted against the state, thereby serving to reduce taxes.

One argument favoring removal of the discretionary limitation rests upon the thesis that the burden of loss should be shifted from the individual, who can least afford it, to the entire community, which can best afford it.[25] This argument is buttressed by the fact that insurance is available to a state and its agencies.[26] Thus, increased taxes can be kept at a minimum[27] while the state provides redress to those it wrong-

[20] See Bar v. Matteo, 360 U.S. 564, 573-74 (1959), in which the Supreme Court held that a press release issued by the director of a government agency announcing his intention to suspend two employees for conduct for which the agency had been criticized was within the scope of the director's duties, and that he could not be held liable on the ground that the release was libelous.

[21] See 3 DAVIS, ADMINISTRATIVE LAW § 26.01 (1958).

[22] 67 Wash. Dec. 2d at 251, 407 P.2d at 444.

[23] Leading cases involving state derivative liability are Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961), and Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359, P.2d 457 (1961). In both cases, the court recognized a need for continued state immunity when the act of the official was discretionary as distinguished from ministerial. The underlying theory is that public officials must be free from the threat of state liability in order to properly exercise the discretion granted to them.

[24] For a list of some of the activities undertaken by a government, and a birds-eye view of potential suits facing any state, see Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 So. CAL. L. REV. 161, 169-72 (1963).

[25] Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 21, 163 N.E.2d 89, 94 (1959), *cert. denied*, 362 U.S. 968 (1960):

> It is almost incredible that . . . the medieval . . . maxim, "the King can do no wrong," should exempt the various branches of government from liability for their torts, and that the entire burden of damage . . . should be imposed upon the single individual who suffers the injury, rather than be distributed among the entire community constituting the government, where it could be borne without hardship on any individual and where it justly belongs.

[26] See Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 8 DUKE L.J. 588 (1959). Of course, purchase of insurance would have to be authorized by statute or authorization of the funds might well be classified as ultra-vires. See, *e.g.*, Burns v. American Gas Co., 127 Cal. App. 2d 198, 273 P.2d 605 (1954); Adams v. City of New Haven, 131 Conn. 552, 41 A.2d 111 (1945).

[27] In Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1, 23-24 (1961), the court pointed out that liability insurance was not available when the doctrine of governmental immunity originated, and that a "scheme for prepaying and sharing the risk" would only put a slight added tax burden on the public.

fully injures.[28]

Another argument pointed out that "tort liability is in fact a very small item in the budget of any well organized enterprise."[29] As such, tort liability should not be looked upon as wasting public funds. Rather, the theory goes, tort settlements should be accorded the same treatment as any other expenses incurred by the state in the operation of its far-flung undertakings.[30]

A third argument attacks the questionable assumption that fear of state liability will deter state officials from exercising the discretionary powers conferred upon them.[31] If payment is to be made out of state funds, the fear of personal liability is removed, and no reason exists to prevent a state official charged with implementing policy from acting just as boldly as his corporate counterpart. Indeed, the threat of state liability could lead to selection of more competent or qualified employees, a result which would certainly be beneficial to the community as a whole.[32] One writer has even suggested that the basis of governmental liability should not be fault at all, but should be "equitable loss spreading," treating the cost imposed on taxpayers as part of the price paid for living in our society.[33] Finally, it has also been suggested that an administrative agency be set up to alleviate pecuniary loss, and judicial logjams, by allowing for speedy handling of claims against the state while, at the same time, eliminating nuisance suits, excessive claims, and capricious jury verdicts which could con-

[28] It has been suggested that the underlying rationale of the departure from governmental immunity may be the recognition that the general trend of the times is to provide redress to all persons who are injured or damaged. Another suggested basis is the recognition by courts that governments are increasingly invading what was once the private sector of the economy and that, therefore, governments should be liable in the same way as private individuals. Kennedy & Lynch, *supra* note 24, at 169. Other examples of the modern trend are evidenced by Workmen's Compensation Laws, and the trend to strict tort liability in the products and realty fields. See generally Note, 41 WASH. L. REV. 166 (1966).

[29] Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. App. 2d 11, 163 N.E.2d 89, 95, quoting from Green, *Freedom of Litigation, III,* 38 ILL. L. REV. 355, 378 (1943).

[30] The court in *Molitor, supra* note 29, 163 N.E.2d at 95, recognized that payments in tort cases are not a dissipation of public funds: "[P]ayment of damage claims incurred as an adjunct to transportation is [a] . . . proper authorized purpose as are payments of other expenses. . . ."

[31] See Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961), where the argument went to the personal liability of state officials. The court pointed out that immunity of a state agency should not necessarily be coextensive with the immunity of its officials because, were the policy to allow officers to exercise their discretion without fear, it would be unlikely that knowledge of the state's liability for their torts would adversely affect their performance.

[32] See Ropes, *Torts Doctrine of Municipal Immunity—A Myth,* 8 MIAMI L.Q. 555 (1954).

[33] Davis, *Tort Liability of Government Units,* 40 MINN. L. REV. 751 (1956).

ceivably have a deleterious effect upon a smoothly functioning government.[34]

If the discretionary limitation on governmental liability is to be retained, as appears likely, some form of test must be established by which to apply the limitation. In curbing the statutory right of an individual to redress for governmental torts, equity and justice demand adoption of a rigid test. Indeed, by posing a set of four questions to be asked in cases involving the discretionary limitation, the court in the principal case did set forth a test which, if properly applied in each case, would insure just application of the limitation.[35] However, the test is cumbersome and, as the holding in the principal case indicates, easily misapplied. It would seem, therefore, that a simpler but equally confining test should be substituted for the "four-question test" in future cases.

Such a test is set forth by Professor Cornelius J. Peck in an article concerning the discretionary limitation as applied to the Federal Tort Claims Act.[36] Professor Peck suggests that the burden should be on the state to show affirmatively that the risk to which plaintiff was subjected was "*knowingly, deliberately* or *necessarily* encountered by one authorized to do so, . . . *in order to achieve* the objectives or purposes" as laid down in the constitution, statute or regulation.[37] By adopting this test, the court would preserve necessary governmental autonomy, free from unpredictable interference by juries. At the same time, however, the individual claimant would not arbitrarily be denied recovery because the state would rebuttably be presumed liable.

EQUITY EXCEEDING HOMESTEAD EXEMPTION VALUE SUBJECT TO EXECUTION

An action was brought by the plaintiff widow to permanently enjoin a judgment creditor from satisfying a judgment on a community debt from the surplus equity in the homesteaded realty over the homestead exemption. Plaintiff and her husband, in 1956, filed a valid declaration of homestead on their residence in Washington, which was held as

[34] See Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).
[35] See the questions set forth in note 14 *supra*.
[36] Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). Professor Peck exhaustively treats the discretionary limitation as applied to the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-78, 2680 (1964). See also Note, 41 WASH. L. REV. 166 (1966).
[37] Peck, *supra* note 36, at 225-26.