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STATE IMMUNITY IN ILLINOIS: THE COURT OF CLAIMS*

INTRODUCTION

The state of Illinois is about to update its ninety-six-year-old constitution, a project long overdue. A provision in need of careful reconsideration is Article IV, section 26 which provides "The state of Illinois shall never be made defendant in any court of law or equity."

Since before the turn of the century there has been doubt and distrust of this article. Modern sociological and legal trends have made inroads upon its rather antiquated and conceptualistic foundation that the "King can do no wrong." The following paper will examine the historical background of this article, the law currently in effect with respect to it, and finally will constructively criticize its future application.

HISTORICAL DEVELOPMENT¹

The Constitution of 1818 did not provide for suits or the adjustments of claims against the State.² However, by statute, in 1819, the General Assembly gave the Auditor of Public Accounts the authority to sue and to be sued in the name of the State, and when judgment was rendered against him, he was authorized to satisfy the judgment out of the State Treasury.³ This act was replaced by another in 1829, which provided that judgments against the Auditor were to be subjected to the review of the General Assembly, and that payments were to be made only upon specific appropriation.⁴

In 1818, the Illinois Constitution was revised to provide that "The General Assembly shall direct by law in what manner suits may be brought against the State."⁵ As well intentioned as the amendment might have been, the Legislature, between 1848 and 1870, failed to provide the requi-

* The following three papers should be read together. They have been submitted to the Illinois Constitutional Study Commission, created by the Illinois Legislature in 1965.

¹ For a survey of the doctrine of sovereign immunity and its source, see, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1039 (1927); Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928).

² ILL. LEGISLATIVE REFERENCE BUREAU, CONSTITUTIONAL CONVENTION BULLETINS 864 (1920).

³ *Ibid.* Judgements were to be paid out of moneys not otherwise appropriated.

⁴ Ill. Laws 1829, at 184. This act was, however, repealed in 1845 and a similar provision substituted. Ill. Laws 1845, at 162.

⁵ ILL. CONST. art. III, § 34 (1848).

site mechanics for the maintenance of such actions. Twelve years later, at the Illinois Constitutional Convention of 1862, a proposal was introduced that suits might be brought against the State in the circuit courts of the various counties, but neither the Constitution nor this proposal were adopted.⁶

In 1870, another convention was held from which the present Constitution was promulgated. A delegate, Lawrence S. Church, of McHenry, sent to the Committee on the Legislative Department a resolution proposing that the Legislature be forbidden from passing any law rendering the State amenable to suit in the judicial courts.⁷ However, the Committee reported out the following provision:

The State of Illinois shall never be made Defendant or sued in any court of law or equity; but the General Assembly may provide in any case that they may deem it advisable, for commissioners or arbitrators to investigate and report any claim against the State, subject to review of the General Assembly and the General Assembly may provide means for payment of all just claims against the State.⁸

Subsequently, this Committee amended its report prior to the final vote on adoption and delineated the entire amendment except: "That the State shall never be made Defendant in any court of law or equity."⁹ The reason given for this action was that the provision was superfluous, since the legislature could impose liability upon the State if it so chose.¹⁰

When the provision came before the convention for final adoption, Delegate Church objected to the new language. Church argued that the language of the amendment adopted by the Committee would radically change the law of the forum, because claims against the State had been permitted in the past. His basic contention was that the new language absolutely forbade consent by the legislature to liability, while his proposal would give the legislature the implied power to effect alternate modes of adjustment. He was supported by other delegates who thought that the provision would abolish all remedies of creditors of the State. Therefore, he called for a reconsideration of the provision as it had originally been reported out by the Committee, even though it was not the language he had originally proposed.

The opposition contended that the Committee's first provision, as writ-

⁶ ILL. LEGISLATIVE REFERENCE BUREAU, *op. cit. supra* note 2 at 864.

⁷ "Resolved, that the following restriction be inserted in the Constitution: No law shall be passed by the General Assembly; whereby the State shall be defendant in any court of law or equity." 1. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS [hereinafter referred to as DEBATES AND PROCEEDINGS] at 175 (1920-22).

⁸ *Id.* at 997.

⁹ *Id.* at 997.

¹⁰ *Id.* at 960.

ten, would force the Legislature to allow all claims to be settled before the designated commissioners and arbitrators, and would result in placing the final approval of the claim in the hands of a politically oriented and necessarily corruptible agency.¹¹ They were particularly fearful that holders of certain state bonds, who were asserting a claim for the face value thereof, would likely receive full relief before such administrative bodies regardless of the desires of the legislature.¹² Furthermore, many delegates questioned whether the legislature would bear the responsibility for the decisions of the appointed commissioners and arbitrators and whether the awards would be reflective of the will of the electorate.¹³

A compromise was proposed that the judiciary should hear the claims against the State. The opposition balked, contending that the courts could not afford the State a fair hearing. It was alleged that the defense counsel for the State would not adequately prepare a defense and thus would not be able to prevail against a zealous plaintiff who would have studiously prepared his case. Absurd as this charge may seem, it was accorded weight by the convention.¹⁴ Because the convention was pressed for time, a vote was called on Mr. Church's resolution. It was defeated. The convention then passed the amendment as reported by the Committee without further debate, and thus Article IV, section 26, became officially part of the constitution.

INTERPRETATION OF THE CONSTITUTION—WHAT CONSTITUTES
A SUIT AGAINST THE STATE

This constitutional provision has had a long and somewhat confusing history in the Illinois courts. While this section is expressed in absolute terms, the courts long ago engrafted upon it the condition subsequent that the state could be made a party-defendant, provided it consented by ex-

¹¹ *Id.* at 960-63.

¹² ILL. LEGISLATIVE REFERENCE BUREAU, *op. cit. supra* note 2 at 864-65.

¹³ 2 DEBATES AND PROCEEDINGS, *supra* note 7 at 963. Mr. Pierce stated: "It is contended that the claims or that assumption that these bonds are guaranteed by the State is unfounded, in fact, but in the future it may happen that when these bonds are in the hands of wealthy capitalists, there may be a pressure brought to bear upon the Legislature of this State, for the purpose of inducing the State to pay or assume these bonds thus sold, upon the plea that the State is virtually bound by the contract made by the sellers of the bonds. Now, it is not probable that the Legislature, being directly responsible to the people, and elected every two years, would ever assume to pay these obligations. But if the Constitution provides a method by which they can transfer the responsibility of deciding upon them to others—a court of arbitrators, or a board of commissioners—the Legislature can easily shirk the responsibility, and throw it upon a board of commissioners appointed or elected for the very purpose of indorsing the payment of these obligations."

¹⁴ *Ibid.*

press resolution of the Legislature.¹⁵ From this followed the establishment of the Court of Claims, which will be discussed more fully below. Otherwise, the state may not be sued.¹⁶ The dictate is clear, and where it is held applicable, the constitutional prohibition is absolute and may not be waived by either the General Assembly or by any agent of the state.¹⁷ The scope of this provision may be extended to proceedings in which the state is not a formal party, including suits against state agencies which have been created to manage and conduct the business of a department of the state.¹⁸

Two tests have been created by the courts to determine if a suit against such an agency is a suit against the state, and thus prohibited. The first consideration is whether granting the relief sought would directly and adversely affect the rights of the state. Where the answer is in the affirmative, the action is held to be a suit against the state.¹⁹ If the state would not be so affected, it is deemed not to be an action against the state and therefore, not prohibited.²⁰ The second test is a determination of whether the state agency sought to be sued is "a mere department of the State government or an independent legal entity,"²¹ the former being immune from suit. Many factors must be considered in making this determination, and therefore, no definite standards have evolved.²²

¹⁵ *People v. Sanitary Dist. of Chicago*, 210 Ill. 171, 71 N.E. 334 (1904); *Galpin v. City of Chicago*, 249 Ill. 554, 94 N.E. 961 (1910); *Monroe v. Collins*, 393 Ill. 553, 66 N.E.2d 670 (1946).

¹⁶ See, e.g., *People v. Georgeoff*, 32 Ill.2d 534, 207 N.E.2d 466 (1965).

¹⁷ *People v. Sanitary Dist. of Chicago*, *supra* note 15.

¹⁸ The various departments of the State government are the following: The Department of Finance; Agriculture; Labor; Mines and Minerals; Public Works and Buildings; Mental Health; Public Health; Registration and Education; Conservation; Insurance; Public Safety; Revenue; Aeronautics; Financial Institutions and Personnel. See ILL. REV. STAT. ch. 127, § 3 (1965). These departments have been held immune from suit: *Monroe v. Collins*, *supra* note 15 at 558, 66 N.E.2d at 673: "[t]he State is not named as a party to this action but that is not necessary to make it an action against the State, for a suit against a department of the State government serving as an agency of the State comes within the constitutional prohibition." See also, *Krochock v. Dept. of Revenue*, 403 Ill. 148, 85 N.E.2d 682, *appeal dismissed* 388 U.S. 804 (1949); *Noorman v. Dept. of Public Works and Buildings*, 366 Ill. 216, 8 N.E.2d 637, *appeal dismissed* 302 U.S. 637 (1937); *People v. Dept. of Public Welfare*, 286 Ill. 505, 14 N.E.2d 642 (1937).

¹⁹ *Monroe v. Collins*, *supra* note 15; *Posinski v. Chicago M. St. P. and Pac. R. Co.*, 376 Ill. 346, 33 N.E.2d 869 (1941).

²⁰ *Boro v. Murphy*, 32 Ill. 2d 453, 207 N.E.2d 593 (1965); *People v. Ill. State Toll Highway Commission*, 3 Ill. 2d 218, 120 N.E.2d 35 (1954).

²¹ *People v. Ill. State Toll Highway Commission*, 3 Ill. 2d 218, 224, 120 N.E.2d 35, 39 (1954).

²² "The multiplicity of factors which the courts have considered in reaching a decision of this question makes it impracticable to exact a simple rule which will fit every situation." *Id.* at 227, 120 N.E.2d at 41.

It should be recognized, however, that municipal corporations were stripped of any state immunity in the same year the constitution was enacted.²³ Municipal corporations are liable, when acting in a proprietary or ministerial function, but when exercising uniquely governmental powers, they are considered agencies of the state and thus immune. Again, the above tests generally apply.

Actions against state officers and officials who are acting within the scope of their authority, and whose authority is based upon a constitutional statute, are generally prohibited.²⁴ If however, the officer or official has performed an ultra vires act, or has acted under color of an unconstitutional act or statute, then such a suit is not considered an action against the state.²⁵ This doctrine is based on the holding of *Ex parte Young*,²⁶ in which the Supreme Court of the United States ruled that a state officer attempting to enforce an unconstitutional statute is not proceeding within his governmental capacity, and the state can therefore impart no immunity to him. This rule is firmly established in Illinois.²⁷ Therefore, while the constitutional prohibition is absolute, it is so construed that the defense of sovereign immunity is limited in its application.

STATUTORY PROVISIONS—ADMINISTRATIVE TRIBUNALS

Upon adoption of the Constitution of 1870, the doctrine of sovereign immunity became the law of Illinois. The General Assembly alone was entrusted with the power to pass upon the validity of claims against the state, and it alone could provide redress where relief was merited. In 1877, however, the first of a long series of acts was passed providing for an administrative tribunal whose function was to hear claims against the state, sort out those with merit, and present them to the legislature.

The Act of 1877 created the Commission of Claims, which remained in existence in one form or another until 1903. The Commission was to be composed of three state judges,²⁸ a president, who was to be selected from the Illinois Supreme Court, and two Circuit Court judges, all appointed by

²³ *Town of Waltham v. Kemper*, 55 Ill. 346 (1870).

²⁴ *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503 (1880).

²⁵ *Noorman v. Dept. of Public Works*, supra note 18.

²⁶ 209 U.S. 123, (1908).

²⁷ "Where an action at law or suit in equity is brought against a state officer or the director of a department on the grounds that, while claiming to act for the state, he violates or invades the personal and property rights of the plaintiffs under an unconstitutional act, or assumes authority which he does not have, the action is not against the state. See *Owens v. Green*, 400 Ill. 380, 81 N.E.2d 152 (1948).

²⁸ This provision clearly violated the constitutional requirement of separation of powers found in ILL. CONST. art. III. See *infra* note 33.

the Chief Justice of the Illinois Supreme Court. The Commission was empowered to "hear and determine all unadjusted claims against the State of Illinois—according to the principals of equity and justice except as otherwise provided in the Laws of the State."²⁹ Awards were to be filed with the Auditor of Public Accounts and a statement of awards submitted to the General Assembly for final determination. All actions were to be concluded by a rejection by the Commission of any claim.³⁰ In 1881, the Commission was specifically given jurisdiction over all claims arising from the taking or damaging of private property in the construction of, or for the use of any state institution or other public improvement.³¹

The Commission of Claims, as provided for in the Act of 1877, never came into existence, as evidenced by a joint resolution adopted in 1877.³² It was therein stated that the Chief Justice of the Supreme Court refused to appoint the necessary commissioners³³ and that a backlog of claims had been filed with the Auditor of Public Accounts upon which no action had been taken.³⁴ It was therefore resolved that a legislative committee be set up to investigate these claims and report its findings to the General Assembly which would act in regard to payment.³⁵ While this committee was in fact formed,³⁶ there is little evidence that it ever functioned.³⁷

As a result of the foregoing, the act of 1877 was amended in 1889, which resulted in a complete overhauling of the Commission of Claims. The Commission was empowered to hear and determine all unadjusted claims founded upon any law of Illinois, any express or implied contract, all unadjusted claims against State institutions, claims for the taking or damaging of property, and all claims referred to it from either house of the legislature. Three commissioners were to be appointed to four-year terms by the Governor, with the advise and consent of the Senate.³⁸ This enactment was in turn repealed by the Court of Claims Act of 1903.

²⁹ Ill. Laws 1877, at 64.

³⁰ *Id.* at 64-65. See, ILL. LEGISLATIVE REFERENCE BUREAU, *op. cit. supra* note 2 at 867; SPIEGEL, *THE ILLINOIS COURT OF CLAIMS: A STUDY OF STATE LIABILITY* 72-73 (1962).

³¹ Ill. Laws 1881, at 60.

³² Ill. Laws 1887, at 315.

³³ *Ibid.* The Chief Justice of the Supreme Court stated that the duties of the commissioners was extrajudicial, and that members of the state judiciary could not serve as both commissioners and justices of the courts. See also, SPIEGEL, *op. cit. supra* note 30 at 73.

³⁴ *Ibid.*

³⁵ The committee was to be composed of five members, three appointed by the speaker of the house and the other two by the president of the senate.

³⁶ ILL. H.R. JOUR., 1887 at 738; ILL. S. JOUR., 1887 at 634.

³⁷ SPIEGEL, *op. cit. supra* note 30 at 73-74.

³⁸ Ill. Laws 1889, at 89-91.

With the passage of the first Court of Claims Act, the Commission of Claims disappeared forever. However, many similarities can be seen between these two administrative tribunals. The composition, method of selection, term of office, and the conclusiveness of the decisions of the Court of Claims on the parties before it were exactly that of the Commission of Claims.³⁹ However, two new features did appear. It was provided that the Auditor of Public Accounts was made the *ex officio* clerk and was required to compile and publish the opinions of the court. Secondly, while the jurisdiction of the Court of Claims was similar to that of the Commission of Claims, the court's jurisdiction was to be exclusive, and no claim could be paid by the legislature unless favorably passed upon by the court.⁴⁰ This exclusive jurisdiction was challenged in the case of *Fergus v. Russell*,⁴¹ where the validity of enactments of the General Assembly granting private relief was contested. The Illinois Supreme Court held that the power to grant relief for claims against the state was vested in the legislature, and such power could not be divested, even voluntarily.⁴² It is of interest to note that in the Court of Claims Act of 1917,⁴³ which repealed the previous act, a similar, if not stronger provision, granted exclusive jurisdiction to the Court of Claims.

The Court of Claims Act of 1917 made little change in the structure of the court, the only noticeable difference being the substitution of the Secretary of State for the Auditor of Public Accounts as *ex officio* secretary. A statute of limitations of five years was included, and as in previous acts, the Attorney General was to represent the state. In addition, determinations were to be made in accordance with the rules of the Workmen's Compensation Act. As noted above, the court was given exclusive jurisdiction, and no claim could be appropriated for by the legislature unless approved by the court. While this provision was never passed upon by the courts of Illinois, it would seem that it was unconstitutional as was the similar provision in the act of 1903.⁴⁴

TORT CLAIMS AGAINST THE STATE

"It can hardly be questioned that the Court of Claims has tried to be just and fair in its handling of contract claims. It has endeavored to hold

³⁹ Ill. Laws 1903, at 140-142.

⁴⁰ *Id.* at 142.

⁴¹ 277 Ill. 20, 115 N.E. 166 (1917).

⁴² "The Court of Claims is a statutory body not provided for in the Constitution, and its actions have no effect upon the power of the Legislature [which] has no such power in any case. [F]avorable action by the Court of Claims upon the claims would not give the Legislature power to pay such claims by making appropriations therefor. If it has the power to pay claims it cannot be deprived of it by unfavorable action on such claims by the Court of Claims." *Id.* at 25, 115 N.E. at 167-68.

⁴³ Ill. Laws 1917, at 325-27.

⁴⁴ See *supra* note 42.

the State responsible for its contractual obligations and at the same time protect the State against claims which are questionable or inflated."⁴⁵ In its handling of tort claims, however, the court did not reflect contemporary views of justice and state responsibility.⁴⁶ Due to this refusal to recognize many tort claims, the court of Claims Act now in force was passed.⁴⁷ Therefore, a brief survey of decisions under the 1917 act may prove useful.

In reviewing tort claims submitted to the Court of Claims under the 1917 Act, the decisions of the courts can be divided into two areas. The first group were seemingly determined by a tribunal which considered itself to be a court of conscience.⁴⁸ As may be recalled, the court was empowered "to hear and determine all claims and demands . . . which the State, as a sovereign commonwealth, should, in equity and *good conscience*, discharge and pay."⁴⁹ Based upon these dictates, the court began to recommend payment of tort claims, even though the state was not legally liable.⁵⁰ This relaxation of the traditional immunity of the state, which had been based upon a strict interpretation of the doctrine of sovereign immunity, commenced in 1919 when the Governor asked the court to pass upon six factually diverse tort claims.⁵¹ In each case, the court held that the state was not liable, but recommended payment based on justice under the circumstances. This trend solidified in the next year when the court stated:

[w]hile it is well settled that the State and the conduct of State institutions exercise a governmental function and there can be no recovery arising in tort at such institutions. It is not necessary however that the court determine in this case the question of legal liability of the State as the circumstances of this case are such that the Court with a view to the exercise of the function for which it was created and to do equity and social justice may justify and fairly award compensation to the claimant. . . .⁵²

Thus, the court clearly repudiated earlier decisions in adopting various theories of social justice, and based awards on equity and good conscience.

⁴⁵ SPIEGEL, *op. cit. supra* note 30 at 165.

⁴⁶ *Id.* at 85-120.

⁴⁷ ILL. REV. STAT. ch. 37, §§ 439.1-439.25 (1965).

⁴⁸ SPIEGEL, *op. cit. supra* note 30.

⁴⁹ Ill. LAWS 1917, at 326 (emphasis added).

⁵⁰ See *Randall v. Illinois*, 4 Ill. Ct. Cl. 92, 93 (1920): ". . . it is a rule of this Court even in the absence of legal liability to consider the equity and justice of a proposition."

⁵¹ *Branister v. Illinois*, 4 Ill. Ct. Cl. 72 (1919); *Henke v. Illinois*, 4 Ill. Ct. Cl. 79 (1919); *North v. Illinois*, 4 Ill. Ct. Cl. 70 (1919); *Schawab v. Illinois*, 4 Ill. Ct. Cl. 77 (1919); *Smith v. Illinois*, 4 Ill. Ct. Cl. 74 (1919); *Watkins v. Illinois* 4 Ill. Ct. Cl. 81 (1919).

⁵² *Good v. Illinois*, 4 Ill. Ct. Cl. 90, 90-91 (1920).

The employment of these theories was "obviously an attempt to mitigate the harshness resulting from the inapplicability of the rule of respondeat superior. . . ." ⁵³ In many cases, the court held that the rule of respondeat superior could not be applied to the state and rejected the claim. ⁵⁴ The court then went on to state "however, the Court feels that as an act of social justice and equity . . . an allowance should be made to claimant in this case." ⁵⁵ An abrupt end came in 1928 when the court renounced the rule of good conscience and equity and started a transitional period back to a rule of strict immunity. ⁵⁶

The case of *Crabtree v. State of Illinois* ⁵⁷ clearly illustrates the return to a strict theory of state immunity. The court stated that its jurisdictional grant only empowered it to pass upon claims based upon a legal or equitable obligation of the state. In construing the Act of 1917, which conferred jurisdiction over claims ex delicto, it determined that it did not create any new liability against the State, and further stated that a claimant must bring himself within the court's jurisdiction before he could invoke the principles of equity and good conscience. The doctrine of respondeat superior and immunity remained the rule of the court until 1945. ⁵⁸

The legislative reaction to the return to strict state immunity by the Court of Claims first appeared in 1935. In that year, the General Assembly passed a bill amending the Court of Claims Act of 1917. Not only was the court granted jurisdiction wherever a person has suffered damage, but the inapplicability of respondeat superior to the state was waived. ⁵⁹ This bill was, however, vetoed by Governor Horner. Subsequently, there was much legislative activity to pass a new statute which would liberalize the state's responsibility for tort injuries. Bills which were passed by the legislature were vetoed by Governors Horner and Green, either on the basis of poor draftmanship or as being violative of public policy. ⁶⁰ It was, however, obvious that the legislature was very dissatisfied with the decisions of the Court of Claims, and ultimately the Court of Claims Act of 1945 was passed.

With the enactment of the Court of Claims Act of 1945, the State of Illinois has been rendered largely amenable to claims brought against it. The rule of immunity of the state from tort liability arising from the ac-

⁵³ SPIEGEL, *op. cit. supra* note 30 at 99.

⁵⁴ *Kubler v. Illinois*, 4 Ill. Ct. Cl. 203 (1921).

⁵⁵ *Quinn v. Illinois*, 4 Ill. Ct. Cl. 151, 152 (1921).

⁵⁶ See SPIEGEL, *op. cit. supra* note 30 at 107-109.

⁵⁷ 7 Ill. Ct. Cl. 207 (1933).

⁵⁸ See 33 I.L.P. 689 (1959, as amended by 1965 supp.).

⁵⁹ Ill. Laws 1917, at 325.

⁶⁰ See SPIEGEL, *op. cit. supra* note 30 at 78-81.

tions of its officers, agents, and employees is expressly abolished and the doctrine of respondeat superior may be applied against the state for injuries arising through the state's negligent exercise of governmental functions.⁶¹ After a brief survey of the structure, and composition, jurisdiction, and mechanical operation of the court, the only remaining exception to complete state responsibility, shall be considered.

The court is still composed of three judges, appointed by the the Governor, with the advice and consent of the Senate,⁶² for a term of six years.⁶³ The Secretary of State remains the ex officio clerk of the court,⁶⁴ and determinations of the court are still binding upon the parties.⁶⁵ A new trial may be granted, however, if a claimant can show grounds which would be sufficient for a new trial by the rules of common law or equity.⁶⁶ A statute of limitations of two years is set forth for most cases,⁶⁷ and a complaint for personal injuries must be filed within six months,⁶⁸ or else suit is barred.⁶⁹

In 1951, the jurisdiction of the court was narrowed by removing from its ambit claims arising under the Workman's Compensation Act and the Workman's Occupational Diseases Act.⁷⁰ The court now, however, has jurisdiction to hear all claims against the Medical Center Commission, the Board of Trustees of the University of Illinois and Southern Illinois University, and the Board of Governors of State Colleges and Universities.⁷¹ While the present act, in effect, provides that the legislature will not appropriate for any claim not first passed upon by the court,⁷² it avoids the pitfalls of the two previous acts by stating that this is policy only.⁷³ The court follows the case law in determination of claims, and therefore the

⁶¹ *Malley v. Illinois*, 18 Ill. Ct. Cl. 137 (1949); *Moorve v. Illinois*, 21 Ill. Ct. Cl. 282 (1951). See ILL. REV. STAT. ch. 37, § 439.80 (1965): "The defense that the State . . . is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

⁶² ILL. REV. STAT. ch. 37, § 439.1 (1965).

⁶³ ILL. REV. STAT. ch. 37, § 439.2 (1965).

⁶⁴ ILL. REV. STAT. ch. 37, § 439.7 (1965).

⁶⁵ ILL. REV. STAT. ch. 37, § 439.17 (1965).

⁶⁶ ILL. REV. STAT. ch. 37, § 439.15 (1965).

⁶⁷ ILL. REV. STAT. ch. 37, § 439.22 (1965).

⁶⁸ ILL. REV. STAT. ch. 37, § 439.22-1 (1965).

⁶⁹ ILL. REV. STAT. ch. 37, § 439.22-2 (1965).

⁷⁰ Ill. Laws 1951, at 1303.

⁷¹ ILL. REV. STAT. ch. 37, § 439.8D (1965).

⁷² ILL. REV. STAT. ch. 37, § 439.23 (1965): "It is the policy of the General Assembly to make no appropriation to pay any claim against the State, cognizable by the court, unless an award therefor has been made by the court."

⁷³ See *supra* notes 41 and 43.

elements of freedom from contributory negligence, proximate cause, res ipsa loquitor, and so on, are applicable.⁷⁴ In addition, unless otherwise provided in the rules of the court, the Illinois Civil Practice Act is followed.⁷⁵

While the Court of Claims Act of 1945 presents a model statute for state responsibility, there is one inconsistency: a limitation of \$25,000 has been placed upon the state's liability in tort.⁷⁶

To be fully consistent with a theory of waiver, there should be no limit on recovery; rather, claimants should be compensated in full for injury to property or person. There have been but few cases in which recovery would have been greater had there been no limit. It would seem that the State could assume full liability for the occasional grievous case without unique financial burden.⁷⁷

CLAIMS AGAINST OTHER STATES AND THE FEDERAL GOVERNMENT

At the present time, thirty-nine states have constitutional provisions dealing with governmental immunity.⁷⁸ Three have prohibitive provisions similar to that of Illinois.⁷⁹ Twenty-six states stipulate either that the legislature should in some manner provide how claims shall be brought, or that it designates the procedure for maintenance of the suit.⁸⁰ Most of the states also provide statutes dealing with the matter of where the cause shall be entertained. These are either consent statutes authorizing suits in the regular judicial courts; statutes creating a board or commission with authority to examine claims; or statutes creating a Court of Claims, either of the administrative or of the judicial variety. In general, the award of damages remains subject to at least the nominal approval of the legislature, and

⁷⁴ See 33 I.L.P. 690 (1959, as amended 1965 Supp. I).

⁷⁵ *Klasen v. Illinois*, 22 Ill. Ct. Cl. 16 (1954).

⁷⁶ ILL. REV. STAT. ch. 37, § 439, 8D (1965).

⁷⁷ Note, 47 Nw. U.L. REV. 914, 918 (1953).

⁷⁸ Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

⁷⁹ ALA. CONST. art. I, § 14; ARK. CONST. art. V, § 20; W. VA. CONST. art. VI, § 35.

⁸⁰ State constitutions with the provision that the legislature shall or may establish procedures for suit: ALASKA CONST. art. II, § 21; ARIZ. CONST. art. IV, § 18; CALIF. CONST. art. XX, § 6; DEL. CONST. art. I, § 9; FLA. CONST. art. III, § 22; IND. CONST. art. IV, § 24; KY. CONST. § 231; LA. CONST. art. V, § 22; NEB. CONST. art. IV, § 22; N.D. CONST. art. I, § 22; OHIO CONST. art. I, § 16; ORE. CONST. art. IV, § 24; PA. CONST. art. I, § 11; S.C. CONST. art. XVII, § 2; S.D. CONST. art. III, § 27; TENN. CONST. art. I, § 17; WASH. CONST. art. IV, § 27; WYO. CONST. art. I, § 8. State constitutions that set forth the procedures to be employed in suits against the state: IDAHO CONST. art. V, § 10; N.C. CONST. art. IV, § 9; MICH. CONST. art. IV, § 20; N.Y. CONST. art. IV, § 23; MONT. CONST. art. VII, § 20; NEV. CONST. art. V, § 21; UTAH CONST. art. VII, § 13.

the governmental-proprietary distinction is still employed as a matter of policy in deciding whether liability should attach in a given case.⁸¹

Considering now the federal establishment, as a general rule the eleventh amendment prohibits suits by citizens against states, and prohibits suits by foreign countries and aliens against states in federal courts.⁸² However, neither the United States, nor any of the sister states, is precluded from bringing an action against another state in the federal courts subject, of course, to the traditional rules of law and equity.

Perhaps the most liberal of consenting sovereigns is the United States itself. Prior to 1855, the federal government had settled private claims upon petitions to Congress as provided for in the Constitution. When this overburdened the Congress, the United States Court of Claims was established to hear grievances and submit them to Congress for approval.⁸³ This court's jurisdiction, however, was limited to contract actions, claims based on the Constitution, acts of Congress, and regulations of executive departments.

General tort liability was not recognized prior to the Tort Claims Act of 1946.⁸⁴ By this enactment the government, with a few exceptions,⁸⁵ is held to the same standard as a private person, for loss or injuries due to the wrongful act of any federal employee acting within the scope of his employment. The cases are heard without jury in district courts and no ceiling is placed on recovery, other than that punitive damages and interest are disallowed. Final orders are reviewable in the courts of appeal or the court of claims, provided both parties consent. Otherwise, a petition of certiorari is available to the Supreme Court. The courts, in construing this act, tend to liberalize the phrase "scope of employment" as a matter of

⁸¹ See SPIEGEL, *op. cit. supra* note 30 at 44-59.

⁸² U.S. CONST. amend XI: The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

⁸³ 10 Stat. 612, § 1 (1855).

⁸⁴ 60 Stat. 842 (1946), 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2678, 2680 (1964).

⁸⁵ The two major exceptions are the following: that there is no liability for claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights; and that the government is not liable for any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise, or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. For a further discussion of the exceptions under the Federal Tort Claims Act, see DAVIS, ADMINISTRATIVE LAW TEXT §§ 25.01-27.10 (1959).

policy in order that Congress might be relieved of the burden of private petitions. In essence, then, the United States is subject to the same liability as any defendant in federal court.

RECENT DEVELOPMENTS IN ILLINOIS

Turning to the recent developments in the field of governmental immunity in Illinois, in the past decade the courts have been the primary source of change, not the Legislature. A 1952 case took the first big step in Illinois. A child injured in a school yard brought suit against a county school district, which at that time was considered a state agency. Taking notice that the district was adequately protected by liability insurance, the court held that recovery should be permitted to the extent of the policy limits. It was recognized that the main reason for governmental immunity was to protect public funds, and thus the need disappeared when insurance protected the funds sufficiently.

However, the case which truly affected the Illinois law regarding governmental immunity was the landmark *Molitor decision*.⁸⁷ Here the defendant, also a school district, was responsible for the negligent operation of a school bus that crashed, causing injuries to several pupils. In allowing the claim, the court was impressed with the basic concept underlying the entire body of tort law, *i.e.*, that liability follows negligence. Turning then to the question of immunity, the court stated:

The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the 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 resulting from the wrongful acts of the 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.⁸⁸

While the case apparently opened the Pandora's box of suits against all subdivisions of the state, its impact was cushioned upon rehearing, in that the decision was to be given only prospective effect. Concurrently, the legislature passed four immunity statutes exempting counties, forest preserves, parks, and the Chicago Park District from liability and limiting

⁸⁶ *Thomas v. Broadlands Community Consolidated School District 201*, 348 Ill. App. 567, 109 N.E.2d 606 (1952).

⁸⁷ *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89, (1959).

⁸⁸ *Id.* at 20, 21.

the liability of school districts.⁸⁹ Thus, almost as fast as the door was opened, it was closed. In 1965, these statutes were declared unconstitutional by the Supreme Court of Illinois on the grounds that the classifications were unreasonable and arbitrary.⁹⁰ In response to this decision, the legislature passed a more comprehensive statute, the Governmental and Governmental Employees Tort Immunity Act.⁹¹ The statute specifies those governing bodies which are now considered by the legislature to be local public entities, as opposed to being state agencies, and expressly excludes the state from the scope of its coverage.⁹² Prior to this enactment, the courts were required to make this determination in each and every case, but now the legislature has set out what agencies are not extensions of the state, and the courts are seemingly bound by this designation.

The statute is constructed along the lines prescribed by the *Harvey* case,⁹³ in that it bases immunity upon the particular activity engaged in, rather than on the specific agency concerned.⁹⁴ The local public entity is not liable in tort when it or its officers exercise particularly governmental functions involving the use of discretion, such as making law or ordinances, issuing licenses, making inspections in accordance with statutes or regulations, or distributing welfare.

The public entity cannot be held liable for the acts of its officers or servants unless the officer or servant is himself liable. The public employee or officer in a position calling for the exercise of discretion or determination of policy is not liable for injuries resulting therefrom, even if he abuses his discretion. Thus, public officers are generally immune from

⁸⁹ ILL. REV. STAT. ch. 34, § 301.1 (1965); ILL. REV. STAT. ch. 57½, § 32 (1965); ILL. REV. STAT. ch. 105, §§ 12.1-1 and 491 (1965); ILL. REV. STAT. ch. 105, § 333.2a (1965); ILL. REV. STAT. ch. 122, §§ 821-831 (1965).

⁹⁰ *Harvey v. Clyde Park District*, 32 Ill. 2d 60, 203 N.E.2d 573, 577 (1965), wherein the court stated that "[s]o far as the present case is concerned, cities and villages, park districts, school districts and forest preserve districts, as well as the state itself, all maintain recreational facilities that are available for public use. If the child involved in the present case had been injured on a slide negligently maintained in a park operated by a city or village, there is no would-be legislative impediment to full recovery. If the child had been injured on a slide negligently maintained by a school district or by a forest preserve district, or as was actually the case by a park district, the legislature has barred recovery. In this pattern there is no discernible relationship to the realities of life. We hold, therefore, that the statute relied upon by the defendant is arbitrary and unconstitutionally discriminates against the plaintiff.

⁹¹ ILL. REV. STAT. ch. 85 §§ 1-101-10-101 (1965).

⁹² ILL. REV. STAT. ch. 86, §§ 1-206 (1965).

⁹³ *Supra* note 90.

⁹⁴ See *supra* note 90 at 67, 203 N.E.2d at 577, wherein the court stated: "From this decision, it does not follow that no valid classifications for purposes of municipal tort liability are possible. On the contrary it is feasible and it may be thought desirable, to classify in terms of types of municipal functions, instead of classifying among different governmental agencies that perform the same function."

suit arising out of such activities as law making, granting licences, and instituting legal proceedings. Officers enforcing or executing the law are liable only for "willful and wanton negligence" in enforcement and are not liable for failure to enforce the law.

Immunity is also granted to public officers for activities, which, though they do not require a direct exercise of discretionary judgment, are considered to be so delicate that in order to maintain efficient government the employee acting in good faith, as a matter of policy, should not be liable. These include acting in good faith under an unconstitutional or invalid enactment, making inspections, unauthorized entry upon property where entry is apparently authorized by law, maintaining school safety patrols, or making misrepresentations within the scope of his employment. In the event a public employee is sued, the public entity is given the right to intervene and defend.

In addition, the act limits the liability of public entities for injuries resulting in the public use of its facilities and property. The entity has the duty to exercise only ordinary care to keep its property reasonably safe and is liable only if it has sufficient notice of a dangerous condition which could have been repaired. A public entity is not liable for failure initially to provide traffic control devices on the streets unless the failure to provide such was in a case where the danger was concealed; nor is it liable for conditions of public ways caused by weather. In the case of public parks and playgrounds, no liability is imposed in the absence of willful and wanton negligence causing a dangerous condition to exist and in the case of primitive trails and paths no liability is imposed at all. Lastly, with regard to public property, the entity is not liable for failure to supervise activities on public property except in the case of swimming facilities, where it is liable only for failure to supervise during posted swimming periods.

A special provision is made for police and fire prevention activities of public entities. There is no liability for injuries resulting from failure to provide police protection and incarceration facilities. In the case of prisoners in the custody of the entity, no liability is imposed for failure to obtain medical care for a prisoner, unless it is known or a custodian has reason to know, that a prisoner is in need of immediate medical aid. In addition, the entity is immune from suit for ordinary negligence interfering with a prisoner's right to obtain judicial review of his confinement.

As for fire protection, the Act provides that the entity is not liable for failure to provide fire protection or contain fires where fire control is provided. No liability is imposed for failure to maintain fire equipment in working order, except in the case of vehicles used on public roads.