

# Retention of the Administrative Settlement

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Finally, no fireman is liable for injury caused by an act or omission while engaged in fire fighting.

Public health activities also come within the purview of this enactment. The public entity is not liable for injuries caused by a policy decision to prevent the spread of communicable disease, or for negligence in diagnosis or treating of disease with due care, as prescribed by medical authorities. Furthermore, a public entity is not liable for decisions to confine individuals for mental illness or addiction. Except for these provisions, public hospitals and physicians in the public employ remain otherwise liable for their acts.

The Act also sets out specific procedures for suits against public entities. There is a one-year statute of limitations and a requirement that notice, setting forth the parties and the particular facts of the claim, must be served on the clerk of the public entity within six months. If such notice is not served, the suit is barred. When liability is determined, the act provides that settlement and compromise by the entity is permissible. The entity may also insure itself. If the judgment is large enough so as to impose undue hardship on the public entity, the act eases the burden by allowing the judgment to be paid annually over a ten-year period, with interest.

The public entity is also given authority to issue bonds to cover the payment of outstanding tort judgments and to levy taxes to purchase insurance. If the public entity derives revenue for the use of its facilities or services, it must provide, from them, funds sufficient to cover tort judgments.

*Henry Novoselsky*  
*John Peterson*

## RETENTION OF THE ADMINISTRATIVE SETTLEMENT

The purpose of this comment is to determine whether the sovereign immunity provision of the Constitution of Illinois should be retained in its present form,<sup>1</sup> modified to some extent, or rejected completely. In its present form, this section presents to the layman an absolute statement of sovereign immunity. It also informs an attorney that claims against the state may not be prosecuted in the courts of Illinois. As noted above, the state is to a great degree responsible for claims against it.<sup>2</sup> It would there-

<sup>1</sup> ILL. CONST. art. IV, § 26: "The state of Illinois shall never be made defendant in any court of law or equity."

<sup>2</sup> See Comment, 15 DE PAUL L. REV. 340 (1966).

fore seem preferable that the constitution present to the nonprofessional person a more realistic picture of state liability. As desirable as it may seem to attain this result, a closer examination of this situation reveals that the problem is not so simple, and certain basic issues of public policy are involved. The first of these issues is whether the state should be liable for claims against it, and if so, to what degree. The question also arises as to which branch of the state government, the legislative or the judicial, should determine and define this liability.

#### STATE RESPONSIBILITY—TO WHAT EXTENT?

In order to determine whether a state should be responsible for claims against it, and to what degree, it is necessary to have an understanding of the rationale behind the doctrine of sovereign immunity. This theory traditionally has been based upon the precept that the King can do no wrong—*Rex non potest peccare*.<sup>3</sup> While this traditional maxim has often been cited by the courts, in reality, acceptance of the doctrine seems to be based upon the contention that, due to fiscal and administrative considerations, a sovereign which may be sued civilly, cannot govern effectively.<sup>4</sup> In practice, however, the rule is not treated as an absolute impediment to suits against the sovereign. The state legislatures and courts, as well as the federal government, have so trimmed the ambit of this doctrine that the rule now seems to be sovereign responsibility, not sovereign immunity, and today the majority of claims against governmental units are paid.<sup>5</sup> The issue, therefore, is not whether the state should be liable, but to what extent.

The problem of state immunity is centered in the area of tort liability. This is due to the fact that the state, of necessity, must be responsible for its contractual obligations. If this were not true, there would be a singular unwillingness to enter into a binding relationship which only binds one party. It is also obvious that a person does not consent to the commission of a tort, while a contractual relationship is voluntarily assumed.

Perhaps the best method of ascertaining what is the proper amount of sovereign responsibility, and whether Illinois has adequately shouldered this burden, is to compare its liability to that of another selected jurisdic-

<sup>3</sup> Note, 47 Nw. U. L. Rev. 914 (1953).

<sup>4</sup> Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926); Note, 43 ORE. L. REV. 267, 269 (1964).

<sup>5</sup> 3 DAVIS, ADMINISTRATIVE LAW, § 25.01 at 434 (1958 Supp. 1965): "Of all the deserving tort claims filed against federal, state and local governmental units, probably far more are paid today than are unpaid, despite the persistence of the basic doctrine that the sovereign cannot be sued without consent." See also, Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954).

tion, as well as that degree of responsibility which the leading commentators feel a sovereign should have imposed upon it.

It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the scope of their employment. The doctrine of governmental immunity runs counter to that basic concept.<sup>6</sup>

The imposition of tort liability<sup>7</sup> serves two purposes; it compensates the injured party, and serves to deter future tortious conduct.<sup>8</sup> As desirable as it may seem to attain these results, the question arises as to whether the imposition of liability upon the state, predicated upon an absolute standard of liability for negligent conduct, would impair the ability of the state to perform the manifold services which are necessary to, and demanded by, its citizens. If this question is answered in the affirmative, and an absolute standard of liability based upon negligence would shackle the state's performance of vital functions, then it must be realized that this is not the proper criterion with which to determine a state's liability.

In support of such open-end liability based upon negligence, the statement is occasionally made that the state is in business, like a private corporation, and therefore, it should consider liability for the negligence of its officers, agents and employees as a necessary risk of operation. It is contended that the state can adequately provide for such expenses through taxation and liability insurance. While it is true that some of the activities of the state overlap into the sphere of private enterprise, it must be recognized that, to a great extent, the functions of private and govern-

<sup>6</sup> *Molitor v. Kaneland Com. Unit Dist.*, 18 Ill. 2d 11, 20, 163 N.E.2d 89, 93 (1959).

<sup>7</sup> Liability in tort may be based upon one of two theories, the fault theory or the risk theory. See David, *Public Tort Liability Administration: Basic Conflicts and Problems*, 9 LAW & CONTEMP. PROB. 335 (1942). The fault theory is the rationale behind the imposition of liability for negligent conduct. The risk theory imposes liability without fault, as is exemplified by the various Workman's Compensation acts, and seems to be gaining favor with some of the commentators as a basis with which to impose tort liability on the state. See 3 DAVIS, *op. cit. supra* note 5 at § 25.17. Utilizing this concept, it is argued that losses should be spread equally throughout the tax-paying public as a price to be paid for the benefits received from society. The state is the entity which creates the risk, and therefore, its beneficiaries should bear the responsibility. See Kennedy & Lynch, *Some Problems of a Sovereign without Immunity*, 36 So. CAL. L. REV. 161 (1963); Note 1964 DUKE L.J. 888 (1964). If the theory were carried to its logical extreme, absolute liability could be imposed, even if the injured person failed to exercise due care, or intentionally caused the injury. See Kennedy & Lynch, *id.* at 177. If this were the case, the state's burden of liability could prove excessive, and therefore, "the usual proposal of American commentators is not that governmental units should be absolutely liable, it is that liability should be imposed for negligence or fault." 3 DAVIS, *op. cit. supra* note 5 at § 25.11 at 484.

<sup>8</sup> See Kennedy & Lynch, *supra* note 7.

mental entities are not similar, and for this reason, a similar basis should not be used to impose liability.<sup>9</sup> A private corporation does not zone property, grant licenses, or provide courts; nor do they pass laws and regulations which involuntarily bind the public.<sup>10</sup> This fact has been recognized by the commentators and is one of the factors which has been advanced to support the contention that a limited form of liability should be imposed so as not to impede these uniquely governmental functions.<sup>11</sup>

A further justification for a retention of some degree of sovereign immunity and a limited form of liability is the manner in which open-ended liability would effect governmental services. Many of the services tendered by the state are inherently dangerous, and it is doubtful that a private industry could carry them out.<sup>12</sup> These functions are, in most cases, required by law, and could not be abandoned by the state if the burden of liability proved to be excessive.<sup>13</sup> It is highly doubtful that these activities could ever be operated at a profit. Therefore, even if the state were able to divest itself of these responsibilities, it seems inconceivable that a private corporation could run these services at a cost in any way proportionate to their public value.<sup>14</sup> The state would be faced with a situation in which it is exposed to a greater risk with less freedom of action; therefore, two results would occur. The State would be forced to raise appreciably the level of maintenance, supervision and services to a degree necessary to reduce liability. A foreseeable result of this would be the taxpayer receiving much less for his tax dollar in the way of services.<sup>15</sup> Also, while the state continues to operate these functions at a prohibitive cost, due to the fact that they, by law, may not be curtailed, other nonobligatory functions will have to be curtailed or eliminated.<sup>16</sup>

While it must be agreed that open-ended liability would prove to be too burdensome for the taxpayer,<sup>17</sup> attention must be turned to the con-

<sup>9</sup> See 3 DAVIS, *op. cit. supra* note 5 at § 25.17; Kennedy & Lynch, *supra* note 7 at 166-67; Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963).

<sup>10</sup> See 3 DAVIS, *op. cit. supra* note 5 at § 25.17; Kennedy & Lynch, *supra* note 7 at 176-77.

<sup>11</sup> Borchard, *Government Liability in Tort*, 34 YALE L.J. 229 (1925); 3 DAVIS, *op. cit. supra* note 5 at § 25.11; Kennedy & Lynch, *supra* note 7.

<sup>12</sup> See Kennedy & Lynch, *supra* note 7 at 177; Note, 6 ARIZ. L. REV. 102 (1964).

<sup>13</sup> Kennedy & Lynch, *supra* note 7 at 177.

<sup>14</sup> See Note, 1964 DUKE L.J. 888 (1964).

<sup>15</sup> Kennedy & Lynch, *supra* note 7 at 178; Note, 6 ARIZ. L. REV. 102 (1964).

<sup>16</sup> Kennedy & Lynch, *supra* note 7; Van Alstyne, *supra* note 9 at 467.

<sup>17</sup> Note, 6 ARIZ. L. REV. 102 (1964).

attention that this problem can be resolved through the use of liability insurance.<sup>18</sup>

[L]iability insurance is no new and untried device. We take judicial notice that it serves private citizens and private corporations as a means of prepaying just the sort of unexpected burden with which we are dealing with in this case. . . .

We do not ignore the fact that this decision . . . will, of course, occasion some increase in the tax burden due to the purchase of insurance.<sup>19</sup>

Two basic points have been overlooked by the proponents of liability insurance as a method of financing the increased burden of open-ended liability. The first problem would arise immediately upon removal of the impediment of sovereign immunity. With no basis but conjecture with which to estimate the increased potential liability of the state, it would seem to be impossible to have the unknown risk underwritten at a moderate cost. One result of the decision of the Supreme Court of Arizona, completely abolishing the doctrine of sovereign immunity,<sup>20</sup> was the decision of the insurer of the City of Tucson to cancel the city's public liability and property damage insurance.<sup>21</sup> A more important point is that liability insurance would cost the taxpayer more than self-assurance by the state.

The argument will of course be made that the solution to this problem [the impairment of government functions by open-ended liability] is simple and that the government can carry insurance to protect itself against a high level of liability as private industry does. This argument is usually made by persons unacquainted with the cost of insurance premiums. In purchasing insurance, one is in reality contracting for service. The insurance company anticipates making a profit from its business, and thus the cost of its services may be greater than where the public agencies are self insured. Insurance premium rates naturally depend on loss experience, and if a high degree of public liability is imposed on public agencies, the cost to taxpayers of insurance will be correspondingly great.<sup>22</sup>

Thus, the complete removal of sovereign immunity would prove to be an onerous burden for the taxpayer, regardless of the method used to finance the increased liability of the state. The result would be either higher taxation or a reduction of nonobligatory services. Total accountability would also impede the operation of uniquely governmental functions to a degree disproportionate to the value of a program of complete

<sup>18</sup> See Note, 43 ORE. L. REV. 267, 269 (1964), wherein it is stated that "[i]nsurance may well prove to be an adequate means of ending government immunity without endangering government finances."

<sup>19</sup> *Williams v. City of Detroit*, 364 Mich. 231, 259, 111 N.W.2d 1, 24-25 (1961).

<sup>20</sup> *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963).

<sup>21</sup> Note, 6 ARIZ. L. REV. 102 (1964).

<sup>22</sup> *Kennedy & Lynch, supra note 7 at 178. See also, supra note 21.*

compensation based upon the theory of social justice.<sup>23</sup> With these facts in mind, it must be stated that the doctrine of sovereign immunity, in a limited form, should be retained. The embodiment of this doctrine in our constitution, through article IV, section 26, can therefore be considered merited, and retention of the section may be justified upon this basis.

We have noted that the doctrine of state immunity must be limited in its application. While the state cannot guarantee its citizens protection against all risks,<sup>24</sup> it is obvious that there must be compensation of innocent victims of torts committed by the state to the extent that the purely governmental functions of the state are not jeopardized. If the sovereign state employed the doctrine of state immunity as an absolute defense against claims of a class which in no way imperiled vital state functions, then no justification would exist for its incorporation in our constitution. Sovereign responsibility must coexist with sovereign immunity, since one nourishes the other.

Various standards and tests, such as the "governmental-proprietary" and the "discretionary-ministerial" distinctions, have been applied in an attempt to discern the proper limits of state liability. While it is beyond the scope of this discussion to delve into these yardsticks, it should be noted that they unfairly limit the sovereign's responsibility.<sup>25</sup>

In an effort properly to shoulder its burden of sovereign responsibility, the State of New York has gone further than any other jurisdiction in waiving sovereign immunity.<sup>26</sup> In its Court of Claims Act, the State of New York completely waived its sovereign immunity and consented to suit as if it were a private entity,<sup>27</sup> with a minor exception concerning

<sup>23</sup> It is often stressed that social justice demands that the consequences of a tortious injury suffered by an individual be shared equally by the citizenry, and should not fall on victim alone. See, e.g., *Williams v. City of Detroit*, *supra* note 19. See also, *supra* note 7.

<sup>24</sup> 3 DAVIS *op. cit. supra* note 5 at § 25.11.

<sup>25</sup> The "governmental-proprietary" distinction is usually only applied to subdivisions of the states, the activities of the states themselves having been held to be governmental, and therefore immune, in all jurisdictions except California and Texas. See *supra* note 14. This distinction has proved to be confusing and very unsatisfactory. See 3 DAVIS, *op. cit. supra* note 5 at 25.07. The "discretionary-ministerial" standard is predicated upon the contention that if a public official were liable civilly for wrongs committed in the course of a governmental function involving discretion, such as a legislative, judicial or quasi-judicial activity, then fear of retaliation through civil suit might outweigh sound discretion. See *supra* note 14. This classification is one of the major exceptions in the Federal Tort Claims Act and has caused some confusion in its application. See 3 DAVIS, *op. cit. supra* note 5 at §§ 25.08-10.

<sup>26</sup> Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958); Leflar & Kantrowitz, *supra* note 5.

<sup>27</sup> N.Y. CT. CL. ACT § 8.

torts committed by the militia.<sup>28</sup> While New York has gone further than some commentators deem necessary to satisfy its sovereign responsibility,<sup>29</sup> it is obvious that it meets even the most stringent standards set by other commentators to gauge state accountability.<sup>30</sup>

At first glance, it would seem that the State of New York has, in rendering itself completely liable, overcome the objections to total liability previously raised in this discussion. While the State of New York is liable as a private individual or corporation, and is therefore accountable for the torts of its officers when it engages in activities in which private individuals and corporations also engage,<sup>31</sup> unlimited liability is not the rule. In a discussion of the limits of state responsibility in New York, it was noted that “. . . the state obviously performs a great many functions which are not performed by private persons or corporations, and according to their intrinsic nature could hardly be performed by such persons.”<sup>32</sup> The question therefore arose upon implication of the New York Court of Claims Act as to what degree of liability, if any, should be imposed upon the state where the function involved had no analogy in private enterprise.<sup>33</sup> This question has been answered by pointing out that the New York Legislature was aware of the limitations of the analogy between private individuals and the State, and therefore there was no intent to impose liability for claims arising out of the operation of purely governmental functions.<sup>34</sup> Under this theory of purely governmental functions three specific areas of exemptions arose. The first of these immune areas are legislative acts. It is held that an injury springing from a legislative act is not actionable in spite of the fact that laws enacted for the public welfare often produce private injury, due to the fact that the government could not function if so hampered by civil actions.<sup>35</sup> Judicial acts are also immune due to the fact that the state has no control over the judiciary and therefore the doctrine of respondeat superior cannot apply. Immunity is also predicated upon the need to preserve the independent operation of the judiciary, as well as the legislature.<sup>36</sup> The same rationale is used to extend immunity to administrative agencies which

<sup>28</sup> N.Y. Cr. Cl. Act § 8-a (as added by Laws, 1953, c. 343).

<sup>29</sup> See Kennedy & Lynch *supra* note 7 at 176-80.

<sup>30</sup> See 3 Davis, *op. cit. supra* note 5 at § 25.17.

<sup>31</sup> Herzog, *supra* note 26.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Newiadony v. State*, 276 App. Div. 59, 93 N.Y.S.2d 24 (1949); Herzog, *supra* note 26. In all cases where property is taken by legislative action, compensation must be made as required by due process. *Ibid.*

<sup>36</sup> Herzog, *supra* note 26.

act in a quasi-judicial manner.<sup>37</sup> These areas of immunity seem to fully meet the standards set by the commentators.<sup>38</sup>

The above survey of the thoughts of the commentators, as well as the position of one of the most responsible jurisdictions, has determined the extent to which a sovereign ought to be held accountable for its tortious conduct. Possessing adequate standards, it is now possible to determine whether Illinois is bearing its proper share of sovereign responsibility, or employing the doctrine of sovereign immunity as a bar against valid claims. As noted above, there can be no justification of the retention of the doctrine if it is employed to frustrate valid claims against the state.

The language of article IV, section 26 seems to be absolute in its prohibition of suits against the state; however, this section has been so construed by the courts of Illinois to be rather narrow in application.<sup>39</sup> While this section is absolute, its ambit only encompasses suits against the state itself; suits against those agencies of the state deemed to be integral branches of a department of the state; and suits against state officers acting within the scope of their authority and under color of a constitutional statute.<sup>40</sup> The enactment of the Local Governmental and Governmental Employees Tort Immunity Act exempted local public bodies, including counties, from the ambit of the section, so as to further limit its application.<sup>41</sup> A suit which does not fall into one of the above categories is not a suit against the state, and sovereign immunity does not act as a bar to an action at law in the courts.<sup>42</sup>

Due to the total proscription of suits against the sovereign, it has been impossible to sue the state in the judicial system of Illinois; therefore, soon after the adoption of the Constitution of 1870, the General Assembly passed the first of a long series of acts which provided for administrative tribunals to hear claims against the state and submit those thought to be valid to the legislature.<sup>43</sup> The current Court of Claims is the result of a long series of such enactments.<sup>44</sup>

The sole purpose of the Court of Claims is to hear claims against the State of Illinois, as well as tort claims against the Medical Center Commission, the Board of Trustees of the University of Illinois, Southern Illinois University and the Board of Governors of State Colleges and

<sup>37</sup> *Id.* at 35.

<sup>38</sup> 3 DAVIS, *op. cit. supra* note 5 at §§ 25.13 and 25.15; Kennedy & Lynch, *supra* note 7 at 180.

<sup>39</sup> See Comment, 15 DE PAUL L. REV. 340 (1966).

<sup>40</sup> *Ibid.*

<sup>41</sup> ILL. REV. STAT. ch. 85, §§ 1-101-10-101 (1965).

<sup>42</sup> See *supra* note 39.

<sup>43</sup> Ill. Laws 1877, at 64.

<sup>44</sup> See *supra* note 39.

Universities.<sup>45</sup> Its mechanical functions are set out in the Act and have been discussed in the previous study. As a peripheral point, however, it might be of interest to note the mechanical process of claims in the court. All evidence is submitted at a hearing before a commissioner of the court. The commissioner acts similarly to a master in chancery, in that he makes a record of the hearing and files it, along with his recommendation, with the court. Briefs may be filed with the court, and occasionally oral argument is allowed. The judges of the court, who in recent years have been members of the Illinois Bar, consider all the evidence and make a determination.<sup>46</sup> The court closely follows the case law of Illinois, requiring all of the elements of a cause of action before it will grant an award.<sup>47</sup> Provisions for a rehearing are set forth in the Act.<sup>48</sup> However, there can be no judicial review under the Administrative Review Act due to the constitutional provision.<sup>49</sup> Awards are then sent to the legislature where they are approved as a matter of policy.<sup>50</sup>

The State of Illinois has long been a leader in the movement for the assumption of a greater degree of sovereign responsibility.<sup>51</sup> When the Court of Claims acted at variance with the legislative desires and returned to a strict theory of state immunity, and disallowed tort claims against the state on the rationale that sovereign immunity precluded the application of respondeat superior against the state,<sup>52</sup> the legislature reacted in clear and unequivocal terms by assuming liability for the negligent acts of its officials, agents, and employees. This was accomplished by the inclusion of section 439.8D in the 1945 Court of Claims Act. This subsection provides that in tort claims against the state "[t]he 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. . . ." While this section effectively reduced the Court of Claims to a mere agency to determine the validity of tort claims upon their merits, it ac-

<sup>45</sup> ILL. REV. STAT. ch. 37, § 439.8 (1965).

<sup>46</sup> SPIEGEL, *THE ILLINOIS COURT OF CLAIMS: A STUDY OF STATE LIABILITY* 172-73 (1962).

<sup>47</sup> 33 I.L.P. *State Government* § 103 (1959, Supp. 1965); SPIEGEL, *op. cit. supra* note 46; Note, 47 Nw. U. L. REV. 914 (1953).

<sup>48</sup> ILL. REV. STAT. ch. 37, § 439.15 (1965): "When a decision is rendered against a claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient grounds for granting a new trial."

<sup>49</sup> ILL. REV. STAT. ch. 110, §§ 264-279 (1965). See *supra* note 3.

<sup>50</sup> "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 therefore has been made by the court." ILL. REV. STAT. ch. 37, § 439.23 (1956). This policy is closely followed. See, SPIEGEL, *op. cit. supra* note 46.

<sup>51</sup> SPIEGEL, *op. cit. supra* note 46.

<sup>52</sup> See *supra* note 39.

complished much more. Because the state is liable to the extent provided in the Court of Claims Act,<sup>53</sup> it has, by making the doctrine of respondeat superior applicable to itself, made Illinois a jurisdiction which satisfies the highest standards of sovereign responsibility.

The reality of the situation is that the state, in applying the doctrine of respondeat superior to itself, has waived the doctrine of sovereign immunity, even if the negligence of the state employee occurred in the course of a governmental function.<sup>54</sup>

We have held that such Section [Section 439.8D] constitutes a complete waiver by the State of its immunity from liability in tort for the negligent exercise of a governmental function, and that the doctrine of respondeat superior can be applied against respondent in an action based on negligence.<sup>55</sup>

It is quite apparent that the state of Illinois is "claims conscious." The 1945 Act placed Illinois among the most advanced states with respect to the assumption of liability, and the frequent enactments since that time (raising the limit of recovery to \$25,000) have in each instance further liberalized the state's policy relative to the settlement of claims against it.<sup>56</sup>

Due to the fact that there are no exceptions to sovereign responsibility in the Illinois law, as are found in the Federal Tort Claims Act,<sup>57</sup> it can truly be said that

[s]ince the passage of the Court of Claims Act in 1945, Illinois has made great strides in the assumption of responsibility for state wrongs. Recent legislation broadening the jurisdiction of the court of claims has, in that respect, virtually put the Illinois system on a par with that of New York, which is generally considered to have made the greatest advance in claims settlement in the United States.<sup>58</sup>

By recourse to the standards of sovereign responsibility, which have been previously developed, it can be seen that the State of Illinois is fair and just in the settlement of claims against it. The doctrine of state immunity is employed only to the extent of placing a \$25,000 limitation upon recovery in tort claims, and to protect purely governmental functions.<sup>59</sup> With the above facts in mind, it can be stated that article IV, section 26, with its embodiment of sovereign immunity, need not be repealed or modified as an inequitable barrier to claims against the state.

<sup>53</sup> 33 I.L.P., *supra* note 47.

<sup>54</sup> *Ibid.* See also, Herzog, *supra* note 26; Leflar & Kantrowitz, *supra* note 5.

<sup>55</sup> Moore v. State, 21 Ill. Ct. Cl. 282, 284 (1951).

<sup>56</sup> SPIEGEL, *op. cit. supra* note 46 at 84.

<sup>57</sup> Note, 47 Nw. U. L. Rev. 914, 918 (1953). Due to the nature of the Court of Claims Act, the state is still immune in the areas of purely governmental activities; that is, legislative, judicial, and quasi-judicial functions.

<sup>58</sup> SPIEGEL, *op. cit. supra* note 46 at 215.

<sup>59</sup> ILL. REV. STAT. ch. 37, § 439.8D (1965).

SOVEREIGN IMMUNITY: A LEGISLATIVE POLICY  
CONSIDERATION

The State of Illinois is one of four states which has a constitutional provision which prohibits suits against the state.<sup>60</sup> The Illinois Constitution provision, within the limits discussed above, closes the courts of this state to any claim in which the state is defendant. It is due to this fact that the state of Illinois is the only jurisdiction with an administrative tribunal which hears claims against the state.<sup>61</sup> Yet, Illinois is one of the most responsible jurisdictions in regard to settlement of claims against it. This seemingly paradoxical situation gives rise to questioning the value of retention of this section. It is stated that this section does not mirror the state's true responsibility for claims against it, and only serves to confuse the layman. It should also be noted that the case law of Illinois is used in the Court of Claims, and that the state is largely suable in that tribunal. Critics object that the state should be sued directly, rather than by this circuitous method. These criticisms do not reflect a true understanding of the basic purpose of this section; that is, the preservation of the right of the legislature to set the public policy in regard to the limits of sovereign responsibility.

As noted previously, the state cannot insure its citizens against all risks which occur in the operation of the state government. In order to preserve these functions, there must be limits imposed on the accountability of the state. This is done through recourse to the doctrine of sovereign immunity. A basic question then arises; should these limitations be set and defined by the legislature or the judiciary? In Illinois, due to the constitutional provision, the state cannot be brought before the bench. Therefore, the question of the proper extent of state liability cannot be raised and passed upon by the Illinois courts. Thus, the entire question reposes with the legislature.

The extent of state liability is decided by balancing the public policy of the need for unimpeded governmental services against the concepts of tort liability, such as compensation for injuries.<sup>62</sup> Due to the fact that the considerations involved are political in nature, and therefore particularly within the scope and experience of the legislature, this balancing process is manifestly a legislative function. A determination of this policy entails use of legislative machinery to undertake a comprehensive study, and

<sup>60</sup> ALA. CONST. art. I, § 14; ARK. CONST. art. V, § 20; ILL. CONST. art. IV, § 26; W.VA. CONST. art. VI, § 35.

<sup>61</sup> SPIEGEL, *op. cit. supra* note 46 at 52.

<sup>62</sup> Note, 6 ARIZ. L. REV. 102, 108 (1950); *supra* note 14.

this involves the formation of committees<sup>63</sup> and hearings so that the necessary facts may be acquired.<sup>64</sup> It is not possible for the courts to balance such policy decisions on a case-by-case basis,<sup>65</sup> and the courts have, in the main, deferred to the legislature.<sup>66</sup>

While the courts have usually followed Justice Frankfurter's statement that in determination of matters of public policy ". . . the clash of fact and opinion should be resolved by the democratic process and not by the judicial sword."<sup>67</sup> There has been a growing national dissatisfaction with the manner in which many jurisdictions have been applying the doctrine of sovereign immunity.<sup>68</sup> Within the past ten years the dam has burst and many courts have taken it upon themselves to modify the position taken by some states which, in the opinion of the court, has been the employment of sovereign immunity to frustrate valid claims against the state. In the period from 1957 to the present, the courts in no less than thirteen jurisdictions have either abolished sovereign immunity or have severely restricted its application.<sup>69</sup> Most of these courts have avoided the criticism of judicial legislation by stating that sovereign immunity is a court created doctrine and ". . . judicial and not legislative action closed the courtroom doors, and the same hand can, and in proper circumstances should, reopen them."<sup>70</sup> In the majority of these cases the immunity of local governmental units was passed upon.<sup>71</sup> However, in one jurisdiction the state was included within the scope of the decision which completely abolished sovereign immunity.<sup>72</sup> In California, Illinois and Minnesota the legislature reacted to the judicial modification of sovereign immunity by statutory enactments which reestablished the doctrine.<sup>73</sup>

<sup>63</sup> The Torts Law Commission of the State of Illinois, for instance, was created in April 1961 by ILL. S. B. 229 (adopted August 21, 1961).

<sup>64</sup> Van Alstyne, *supra* note 9; *supra* note 14.

<sup>65</sup> *Ibid.*

<sup>66</sup> The legislature, not the courts, ordinarily determines the public policy of the state. See *Boyer v. Iowa High School Athletic Association*, 256 Iowa 337, 127 N.W.2d 606, 612 (1964).

<sup>67</sup> *International Brotherhood v. Hanke*, 339 U.S. 470, 478 (1950).

<sup>68</sup> See *supra* note 14.

<sup>69</sup> For a complete survey of these decisions see, 3 DAVIS, *op. cit. supra* note 5 at § 25.01.

<sup>70</sup> *McAndrew v. Mularchuk*, 33 N.J. 172, 193, 162 A.2d 820, 832 (1960). See also, *Muskopf v. Corning Hospital District*, 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); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963).

<sup>71</sup> 3 DAVIS, *op. cit. supra* note 5 at § 25.01.

<sup>72</sup> *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963).

<sup>73</sup> See *supra* note 14.

Other courts, when faced with the opportunity of judicially abolishing this public policy, have held that this remains a matter for the legislature, and have refused to act.<sup>74</sup> The legislative reaction to this judicial abrogation has been noted by these courts in their refusal to abolish or modify the doctrine of sovereign immunity. "All this confirms our view that whatever is done to change the doctrine of governmental immunity should be done by the legislature and not the courts."<sup>75</sup> "We think experience in the few states where the court has attempted to abrogate the immunity doctrine indicates legislative action is a better solution."<sup>76</sup>

In 1959, the Supreme Court of Illinois joined the ranks of those courts abolishing sovereign immunity. In the case of *Molitor v. Kaneland Community Unit District*,<sup>77</sup> the court was called to pass upon the immunity of a school district for the negligence of its employees. The court expressly overruled that immunity previously enjoyed by school districts and stated that immunity in such cases is unjust, not supported by any valid reason, and therefore has no place in modern society. The legislature reacted by passing a variety of makeshift statutes to reaffirm the immunity of local governmental units.<sup>78</sup> A subsequent skirmish between the court and the General Assembly took place when the court held a statute granting immunity to park districts unconstitutional.<sup>79</sup> The legislature retaliated by passing the Governmental and Governmental Employees Tort Immunity Act in 1965.<sup>80</sup> The next round has not yet begun.

The *Molitor* decision is disturbing for a number of reasons. The language is sweepingly broad, and there is no reason why it should not apply to all governmental units in the state,<sup>81</sup> and there is authority to the effect that this decision has abrogated immunity to the extent of governmental functions.<sup>82</sup> Most disturbing, however, is the fact that the

<sup>74</sup> *Boyer v. Iowa High School Athletic Association*, *supra* note 66; *Nelson v. Maine Turnpike Authority*, 157 Me. 174, 170 A.2d 687 (1962); *Fette v. City of St. Louis*, 366 S.W.2d 446 (Mo. 1963); *Clark v. Ruidoso-Hondo Valley Hospital*, 72 N.M. 9, 380 P.2d 168 (1963); *Vendrell v. School District*, 226 Ore. 263, 360 P.2d 282 (1961). See also, 3 DAVIS, *op. cit. supra* note 5 at § 25.01.

<sup>75</sup> *Fette v. City of St. Louis*, *supra* note 74, at 448.

<sup>76</sup> *Boyer v. Iowa High School Athletic Association*, *supra* note 66 at 342, 127 N.W.2d at 609.

<sup>77</sup> 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

<sup>78</sup> ILL. REV. STAT. ch. 34 § 301.1 (1961); ILL. REV. STAT. ch. 57½, § 3a(1961); ILL. REV. STAT. ch. 105, §§ 12.1-1-491 (1961); ILL. REV. STAT. ch. 105, § 333.2a (1961); ILL. REV. STAT. ch. 122 §§ 821-831 (1961).

<sup>79</sup> *Harvey v. Clyde Park District*, 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

<sup>80</sup> *Supra* note 41.

<sup>81</sup> Note, 48 ILL. B.J. 549 (1959).

<sup>82</sup> *Peters v. Bellinger*, 22 Ill. App. 2d 105, 159 N.E.2d 528 (1959).