

Proposed Remedy for the Inadequacies of Administrative Settlements

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court seems to have adopted the analogy between governmental and private entities as a basis for imposing liability, a basis which, as stated above, is an improper rationale due to the inherent difference between public and private entities.

Moreover, the same policy that would protect government corporations from the payment of damages for the injuries they bring upon others would be equally pertinent to a like immunity to protect private corporations, for conceivably many essential private concerns could also be put out of business by the damages they could incur under tort liability. But as a matter of fact, this argument has no practical basis. Private concerns have rarely been greatly embarrassed, and in no instance, even where immunity is not recognized, has a municipality been seriously handicapped by tort liability.⁸³

With the obvious dichotomy between the General Assembly and the courts in Illinois, coupled with the high degree of sovereign responsibility which the state has assumed under the present Court of Claims system, no useful purpose can be seen in either changing or modifying Article IV, section 26 of the Illinois Constitution. Also, in view of the position taken by the Supreme Court of Illinois, it would seem that the retention of this provision is necessary for the preservation of the legislative right to set public policy in an area where it is uniquely able to so act.

Henry Novoselsky

PROPOSED REMEDY FOR THE INADEQUACIES OF ADMINISTRATIVE SETTLEMENTS

By revising the state constitution, the people of Illinois could take the opportunity to deal with the irritating problem of sovereign immunity, and in particular, with article IV section 26 of the state constitution. As was previously indicated, the courts, until very recently, have adhered slavishly to this constitutional mandate, perhaps only because a sufficient alternate administrative procedure was available, but this certainly does not mean there should not be modification. As one writer has put it:

even though we should not search for a binding past purpose, we may look for past evils, changes, developments and trends—all as aids in understanding the present. As Lincoln said “if we could first know where we are, and whither we are tending, we could better judge what to do and how to do it.” It is perhaps in this sense, that the present has been shaped by the past and can only fully be understood through knowledge of that past. That “Holmes” rather cryptic statement should be interpreted: “The present has a right to govern

⁸³ *Molitor v. Kaneland Community Unit District*, *supra* note 77 at 24, 163 N.E.2d at 95.

itself, so far as it can. . . . Historical continuity with the past is not a duty, it is only a necessity. . . ."¹

With this in mind, an examination of this immunity provision is called for to see if a change is in order.

THE PRESENT PROVISION MISSTATES THE FACTS

At the outset, it must be recognized that article IV, section 26 misrepresents the facts. As is seen from the foregoing exposition of the current position of sovereign immunity in Illinois, the state can be made a defendant and is subjected to the same principals of law and equity as are private individuals. While the forum is administrative and recovery limited, liability remains the same. We have seen how the immunity of certain state agencies has been whittled away under the justification that they are no longer considered state agencies. Needless to say, the constitution should not be a fraud. It should reflect what the law really is in order that the layman, by a simple reading, can understand, at least in a general way, the nature and extent of his rights. To be sure, a well versed attorney, in such cases, should and would turn to the court of claims to seek a remedy, but the state constitution is not only for lawyers; it is for the people. This is perhaps the most compelling reason for change, although little mention is made of it by the commentators.

THE RESTRICTIVE EFFECTS OF THE PRESENT PROVISION

The main reason for amending this provision lies in the restrictive effects upon the legislature imposed by the constitutional doctrine of separation of powers. Because of this provision, the court of claims, or any other tribunal the legislature may deem to establish in the future, must be, of necessity, an administrative agency of the legislative branch of the government. This means, in essence, that the legislature, even if it chose to do so, could not permit, for example, judicial review of the court of claims or submission of certain claims to the judicial courts. This is the reason that the recent court decisions and statutes are prefaced with the dicta that the agency found to be amenable to suit is not a state agency.

The Illinois constitution of 1870, which provides that the state shall never be made a defendant in any court of law or equity, has to some extent limited the manner in which claims against the state can be settled. Unless this provision of the constitution were amended, and there is currently no movement for such an amendment, it would be impossible for the legislature to enact consent statutes for suit in the regular courts, or to establish a judicial tribunal in the regular judiciary to handle such claims.²

¹ Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U.CHI. L. REV. 502, 530 (1964).

² SPIEGEL, *THE ILLINOIS COURT OF CLAIMS: A STUDY OF STATE LIABILITY* 206 (1962).

The effect of the constitutional provision is best exemplified by the following hypothetical. If the courts of Illinois were to hold that part of the Local Governmental and Governmental Employees Tort Immunity Act³ was *de facto* an unconstitutional consent by the state to allow certain state agencies to be amenable to suit in the judicial courts, such a determination could be a defeat to a valid legislative policy under the present provision, article IV, section 26. The chances of such occurring are indeed doubtful, but the fact that it could is a vivid example of the problems presented by retaining this provision in its present form. This provision acts as a shackle upon the legislature. As a practical matter, it could prevent the legislature from creating the court of claims as a part of the judicial branch of the government. Thus, the court of claims would not be subject of the review procedures of the judiciary system, or to that system's supervisory powers.

The only appeal from the court of claims is to that court itself. This is perhaps the very reason for the court's inconsistent behavior in the past when awards were granted "in equity and good conscience," rather than upon rights given to the litigants under the law. Had the stabilizing effects of judicial review been available, in all likelihood this never would have happened. Arbitrary law making, although not a problem today, is nevertheless a danger, and it may come forward in the future to haunt both the state and litigants alike.

Furthermore, the temptation of political influence present in administrative agencies should not be introduced into judicial proceedings. The all important principal of the independent judiciary cannot be applied by the legislature to the court of claims. For example, in the court of claims, the claim of each plaintiff is submitted to a commissioner who hears the parties' witnesses and evidence and makes a record of the case which is submitted to the judges for decision. These commissioners have frequently been political appointees rather than individuals with judicial experience.⁴ Being unable to place the court of claims under the authority of the judicial department, independent supervision by the judiciary appears impossible.

These restrictive effects upon the legislature are again consequences that go unnoticed by the commentators, probably because the only visible effect of the provision is to protect the state from liability, and thus apparently release the legislature from the fear of law suits. Yet, these restric-

³ ILL. REV. STAT. ch. 85, § 1-206 (1965). Section 1-206 states that "local public entity" includes a county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district, and all other local governmental bodies. It does not include the state or any office, officer, department, division, bureau, board, commission, university or similar agency of the state.

⁴ SPIEGEL, *op. cit. supra* note 2 at 168.

tions are present and should be dealt with accordingly. The majority of writers are of the opinion that a state's degree of amenability to suit should be a matter of legislative decision, and perhaps this is a valid observation, since the legislature, rather than the courts, has the facilities for such policy-making.⁵ While the question of what the legislature's policy should be is not within the scope of this work, it should be recognized that such policy-making is seriously hampered by this provision. The legislature has basically three general policy choices: no liability, liability in an administrative agency, or liability in the judicial system. Since the legislature cannot establish a policy of amenability to suit in the judicial courts, article IV, section 26 takes from the legislature one of its three major policy choices.

THE CONSEQUENCES OF A REVISION

The next point, of course, is whether the legislature should be given this policy-making power, and what consequences would follow. Perhaps this is a moot question in Illinois, since the results of the present administrative system are clearly visible. Needless to say, were the legislature to confer jurisdiction upon the judiciary to hear claims against the state, liability would be limited as a matter of policy, probably under a statute similar to the present Local Government and Governmental Employees Tort Immunity Act. If, for the sake of argument, however, the legislature were to make the state completely liable, in the judicial courts, for all tortious conduct committed by its servants, no matter what the function in which they were engaged, the consequences would be great.

First, the state would be subject to the same law as any other defendant. It would not be an insurer of all claims, since liability would have to be proven whether the case involved a ministerial or discretionary function. The mere fact that a decision of some official is discretionary does not mean that the state would be liable if the official, in good faith, errs. This point is not considered by those who fear that government liability would open the flood-gates to frivolous claims, virtually rendering the state one vast insurance company. A similar fear, often expressed, is that to submit the claims of private persons against the state to a jury would automatically render the state liable due to the sympathy of the jury in favor of a private litigant against a large, fluid and impersonal state gov-

⁵ See Borchart, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925); Borchart, *Governmental Responsibility in Tort*, 36 YALE L.J. 1039 (1927). See also, 2 HARPER & JAMES, TORTS § 29.3 (1956); Green, *Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Harno, *Tort Immunity of Municipal Corporation*, 4 ILL. L.Q. 28 (1921); Repko, *American Legal Commentary of the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942); Note, 47 NW. U. L. REV. 914 (1953); Note, 54 NW. U. L. REV. 588 (1959).

ernment. This view evidences a gross lack of faith in our judicial system. Certainly, if the state employs competent counsel and conscientiously defends these claims, the state will have the same rights as any other party before the court.

Secondly, the courts would probably apply to any such case against the state the case law developed over the years in dealing with other public entities, such as municipal corporations. Thus, the governmental-proprietary distinction doctrine, non-feasance doctrine, and the law-making doctrine would limit state liability as a matter of judicial policy.

In considering the economics of liability, any discussion must be prefaced by recognizing that the state is, in effect, a business, and like any business, it should suffer the normal risks of operation. Liability for the misfeasance of servants and agents is a normal risk, but a well-run business can prepare and protect itself.

Since the inception of the Court of Claims in 1889, through 1960, 4,621 claims were considered, 61 per cent of these being filed since 1933. Of these, awards were granted in 53.7 per cent of the cases.⁶ Total awards made from 1889 to 1960 amounted to \$5,619,314, with the single highest award being \$102,805.26.⁷ On the average, most awards have been for amounts between \$1,000 and \$5,000.⁸ Fifty-three per cent of the total claims (2449) have been tort claims. Awards were made in 59.3 per cent of the tort claims filed, but since 1945, awards have been made in 66.4 per cent of the cases. A total of 188 awards have been made in personal injury cases, but this represents only 34.4 per cent of the tort claims filed.⁹

In comparison, the city of Chicago, being a municipal corporation and liable in tort, had 1281 tort claims filed against it in 1965 alone, representing a total *ad damnum* of \$39,699,844.44. A total of \$1,670,060.14 was paid out by the city, \$1300 in jury verdicts, and \$1,668,760 by settlement. A survey of the number of cases, disposal of cases, and funds paid out in settlement over the past five years, indicates a comparative consistency from year to year.¹⁰

The Chicago Transit Authority, a public corporation, provides commuter and rapid transit service for metropolitan Chicago. Needless to say, the operation of such a system involves a particularly high risk in tort liability. The Authority classifies tort liability as an operation and mainte-

⁶ SPEIGEL, *op. cit. supra* note 2 at 193.

⁸ *Id.* at 196.

⁷ *Id.* at 195.

⁹ *Id.* at 197.

¹⁰ From a statistical summary furnished by Mr. Brian M. Kilgallon, head of the Torts Division of the City of Chicago Law Department, to be published in the ANNUAL REPORT OF THE LAW DEPARTMENT, 1965. Total judgments for 1960 were \$1,357,217; for 1961, \$1,132,957; for 1962, \$1,345,243; for 1963, \$1,639,211; for 1964, \$2,294,390; and for 1965, \$1,670,060.

nance expense. In 1964, the Authority suffered a total of 21,413 claims. The average settlement for each was \$165. Of these, 2,443 were disposed of by lawsuit, with each case going to court costing an average of \$1,913 per settlement, plus an additional overhead expense of \$499. In 1964 the claims department budget, including claims, suit settlements and expenses, was \$7,249,111. Hence, claims cost the Authority 5.40 per cent of its total revenues.¹¹

These figures indicate that governmental entities as large or larger than many state agencies can, and do, suffer tort liability, and do prepare sufficiently for it, so that normal operations are not affected. The authority prepares for liability by use of a sinking fund, but liability insurance, graduated tax levies, and deferred payment plans are also alternatives. It is interesting to note that the State of Illinois settled the judgments arising from the *Molitor* decision¹² by an appropriation of \$750,000 from the State Motor Fuel Tax Fund to Kane County.¹³ Perhaps this is a suitable alternative for state liability protection arising out of the use of the highways.

In any event, the conclusion is inescapable that the state, from a financial point of view, can sustain liability if the legislature chooses to make it liable through a revision of article IV, section 26. With a minimum of proper administration, none of the state's vital functions should be interrupted.

Needless to say, despite the previous supposition, it is almost certain that the Illinois legislature would not make such a universal grant of jurisdiction to the state courts. Davis points out that such a universal delegation by the legislature to the courts would be a mere "passing of the buck" and that the courts would eventually set guidelines within the areas of liability wherein the state should be immune as a matter of public policy.¹⁴

PROPOSALS

Any proposal should grant to the legislature the authority to make the desired policy decisions and yet not upset the present administrative system which has worked so well over the years. It is no more desirable to remove the legislature's power to choose to retain the administrative system than to prevent the legislature from rendering the state amenable to

¹¹ CHICAGO TRANSIT AUTHORITY ANNUAL REPORT 4 (1964).

¹² *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

¹³ DEPARTMENT OF FINANCE OF THE STATE OF ILLINOIS, 87TH ANNUAL REPORT 59 (1965). The Motor Fuel Tax Fund derives proceeds from the Illinois gasoline tax. Part of the proceeds are allocated to the State Road Fund for maintenance of the highways, while another portion is deposited in the Motor Fuel Tax Distributive Fund for disbursement upon approval by the Division of Highways, to counties, municipalities and townships.

¹⁴ DAVIS, ADMINISTRATIVE LAW TEXT § 25.17 (1959).

suits in the judicial courts. Furthermore, merely to strike out the present provision without substituting an amendment would create more disorder than doing nothing at all. The conflict now existing between the legislature and the judiciary would become impossible to resolve. The whole question might well deteriorate into a situation similar to that which arose after the *Molitor* decision, when the courts rendered decisions, and the legislature enacted haphazard statutes to neutralize the effects. Even though the present provision is not desirable, it does at least maintain a degree of order by withholding jurisdiction from the judiciary under all circumstances.

The problem, then, is to find language which would best achieve the desired result. The language of the state constitutions with provisions different from that of Illinois can be classified into four categories. The first provides that suits may be brought as directed by law, but does not specifically designate what branch of the government must do the directing.¹⁵ While the implication is clear that the legislature is the branch of the government contemplated by the framers, a constitution should be clear in its delegation of powers to avoid any possible conflict between the branches. As little as possible should be left to implication.

The second type provides, in mandatory language, that the legislature has the duty to direct where and how suits shall be brought.¹⁶ The drawback to this language is that it does not retain for the legislature the requisite amount of discretion for making policy decisions. The language specifies "suit" rather than "claim." This could be interpreted in light of the mandatory language as requiring the legislature to render the state liable in the judicial courts despite a policy in favor of administrative adjustment.

The third type of provision generally specifies a rather elaborate procedure for the settlement of claims and is found most often under the delegation of revenue powers.¹⁷ Such provisions are no better than statutes

¹⁵ See, e.g., CALIF. CONST. art. XX, § 6: "Suits may be brought against the state in such manner and in such courts as shall be directed by law." See also, CONN. CONST. art. III, 7; DEL. CONST. art. I, 9; FLA. CONST. art. III, § 22; OHIO CONST. art. I, § 16; ORE. CONST. art. IV, § 24.

¹⁶ See, e.g., ALASKA CONST. art. II, § 21: "The legislature shall establish procedures for suits against the state." See also, ARIZ. CONST. art. IV, pt. 2, § 18; MICH. CONST. art. IV, § 22; NEB. CONST. art. V, § 22; WASH. CONST. art. II, § 26; WIS. CONST. art. IV, § 27.

¹⁷ See, e.g., IDAHO CONST. art. IV, § 18: "The governor, secretary of state, attorney-general shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law: provided, that in the administration of moneys in cooperation with the federal government the legislature may prescribe any method of disbursement required to obtain the benefits of federal law. And no claims against the state, except salaries and compensation of officers fixed by law, shall be

which authorize claims courts, adjustment boards, and similar administrative tribunals. An adjustment in policy must be made by the cumbersome procedure of repeal, and such naturally tends to unnecessarily stagnate reform, should the need arise.

The fourth provision, the one best suited to satisfy the present needs of Illinois, gives the legislature the power, and complete discretion, to decide in what manner suits should be brought.¹⁸ The provision designates the branch of the government to have the power and specifies that the power is discretionary, which necessarily means that an administrative tribunal is a permissible alternative to liability in the judicial courts. As applied to Illinois, this would mean the legislature could enact consent statutes or that it could place the court of claims under the supervision of the judiciary. At the same time, the legislature would have authority to retain the court of claims as an independent administrative agency if it chose to do so. Ultimately then, the discretion in deciding public policy concerning the question of sovereign immunity would be with the legislature.

In conclusion, it is imperative to remember that it is a constitution which is now sought to be amended. Although the present state of the law may be favorable to the state's creditors and in the true sense just, this does not mean that improvement at this time is not inappropriate considering the fact that any new constitution may need to endure for another ninety-six years. To paraphrase Justice Marshall, a "provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."¹⁹

Human affairs in the twentieth century proceed at a rapid pace calling for immediate legislative and judicial counteraction. Thus, the people should vest in the legislature the power to facilitate just and equitable settlement of claims against the state as the legislature finds appropriate, even if their selection is for adjudication in the judicial system.

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passed upon by the legislature without first having been considered and acted upon by said board." See also, Mo. CONST. art. IV, § 22; MONT. CONST. art. VII, § 20; N.C. CONST. art. IV, § 9; N.Y. CONST. art. III, § 19.

¹⁸ See, e.g., KY. CONST. § 231: "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." See also, N.D. CONST. art. I, § 22; PA. CONST. art. I, § 11; S.C. CONST. art. XVII, § 2; WYO. CONST. art. I, § 8.

¹⁹ *McCulloch v. Maryland*, 4 Wheaton 316, (1819).