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Abrogation of Governmental Immunity- Prospective, Quasi-Prospective, or Retrospective Application

Abrogation of Governmental Immunity—PROSPECTIVE, QUASI-PROSPECTIVE, OR RETROSPECTIVE APPLICATION—*Profitt v. State; Flournoy v. School District Number One* and *Evans v. Board of County Commissioners*

There is probably no tenet in our law that has been more universally berated by courts and legal writers alike than the doctrine of governmental and sovereign immunity.[1] In response to this criticism, recent cases have indicated the existence of a trend to abrogate the doctrine either in whole or in part.[2] Because the merits of the abrogation of governmental and

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1 *See, e.g.*, Haney v. Lexington, 386 S.W.2d 738, 739 (Ky. 1964); Bernardine v. New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Smeltz v. Copeland, 440 Pa. 224, 226, 269 A.2d 466, 468 (1970) (dissenting opinion); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926); Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924); Casner & Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Eichner, *A Century of Tort Immunities in Virginia*, 4 U. RICH. L. REV. 238 (1970); Green, *Freedom of Litigation: Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462, 472 (1971); Lloyd, *Le Roi Est Mort—Vive le Roi*, 24 N.Y.U.L. REV. 38 (1949); Price & Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971) [hereinafter cited as W. PROSSER].

For a comprehensive review of the literature in this field, *see* Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942).

2 *See* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963) (held that the state can be liable for its tortious acts); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968) (abrogated immunity for municipal corporations); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (held that governmental immunity from tort liability should be rejected as "mistaken and unjust"); Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (held municipal corporations liable in tort); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970) (allowed recovery against the state); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) (held school district liable in tort); Perkins v. State, 259 Ind. 549, 251 N.E.2d 30 (1969) (held the state liable in tort); Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969) (held that the immunity of the state for proprietary functions is abolished); Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964) (abolished tort immunities for municipalities); Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965) (abrogated tort immunity for a county); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962) (abrogated tort immunity for all governmental subdivisions); Brown v. Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968) (abrogated immunity for all governmental subdivisions); Walsh v. Clark County School Dist., 82 Nev. 414, 419 P.2d 774 (1966) (held that a school district did not enjoy immunity with respect to an accident occurring several months before the effective date of a statute waiving immunity from tort liability of state and its subdivisions); Willis v. Depart-

sovereign immunity have been thoroughly discussed in the past,[3] only the various methods of application will be discussed herein.

The Supreme Court of Colorado in the recent companion cases of *Profitt v. State*,[4] *Flournoy v. School District Number One*,[5] and *Evans v. Board of County Commissioners*,[6] abrogated completely the doctrine of sovereign and governmental immunity in that state. The plaintiffs in each of those cases were suing either a governmental agency or the state and were therefore confronted with governmental or sovereign immunity as an impediment to recovery.[7] The court held that, except for the cases at bar, the abrogation would be prospectively applied and would not become effective until June 30, 1972.[8]

As a general rule, the effect of departing from precedent in overruling a prior decision of a court of record is retrospective as to both the case at bar and all other causes of action arising within the applicable statute of limitations, and is prospective as to all future causes.[9] However, a court may,

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ment of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970) (held state liable in tort); Becker v. Beaudoin, — R.I. —, 261 A.2d 896 (1970) (abrogated the immunity of municipal and quasi-municipal corporations); Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (held municipality liable in tort).

Furthermore, it should be noted that some states and the federal government have abrogated their immunities by legislation. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (1970); ALAS. STAT. tit. 9, ch. 65, § 09.65-070 (1962); N.Y. Ct. of Claims Act, § 8 (McKinney 1963); Vermont Laws 1961, Pub. Act No. 265, tit. 12, § 5.601-02. *See also* Parish v. Pitts, 244 Ark. 1239, 1241, 429 S.W.2d 45, 48 (1968); W. PROSSER, *supra* note 1.

A discussion of the applicable rules in those jurisdictions retaining sovereign and governmental immunity is beyond the scope of this article. However, if more information is desired in this area, see 57 AM. JUR. 2d *Municipal, School, and State Tort Liability* §§ 59-64 (1971); Annot., 60 A.L.R.2d 1198 (1958); W. PROSSER, *supra* note 1.

[3] *See* note 1 *supra*.

[4] 482 P.2d 965 (Colo. 1971).

[5] 482 P.2d 966 (Colo. 1971).

[6] 482 P.2d 968 (Colo. 1971).

[7] In the first of these cases, *Profitt*, the plaintiff brought an action to recover for the alleged wrongful death of his son, who was stabbed while an inmate in the state reformatory. The plaintiff in *Flournoy* brought suit against a school district to collect damages for the alleged wrongful death of his son also, who was killed while under school supervision. In *Evans*, the plaintiff alleged that he was injured as a result of carelessness on the part of the defendants in permitting concrete steps at the county courthouse to deteriorate and thereby to constitute a dangerous hazard.

[8] The court, in presenting its opinions on March 22, 1971, delayed the effect of its decision for over fifteen months, because "[t]o give the rule of this opinion immediate effect would constitute a disservice to government entities which will not be able to include in their budgets premiums for liability insurance coverage until a future time." Evans v. Board of County Comm'rs., 482 P.2d 968, 972 (Colo. 1971).

[9] *See, e.g.*, Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932); O'Malley v. Sims, 51 Ariz. 155, 75 P.2d 50 (1938); Los Angeles County v. Faus, 48

by expressly delineating the effect of its decision, declare its holding to be prospective and affect only future cases, thereby excluding the case in which the decision was made.[10] If the court decides to include the present case in its decision, it may also choose to apply the quasi-prospective method,[11] which excludes prior causes of action, but includes the present case.

Each of these three methods of limiting a particular decision has disadvantages and inequities inherent in its application.[12] Where a decision is declared to operate only prospectively,[13] all statements to the effect that the precedent is overruled are mere dicta, since the result reached would have been the same had the prior decision been upheld.[14] The actual holding is accompanied by a prophecy of what the court will hold in the future.[15]

Cal. 2d 672, 312 P.2d 680 (1957); Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (1960).

[10] *See, e.g.*, England v. Board of Medical Examiners, 375 U.S. 411 (1964); Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932); Aronson v. Congregational Temple De Hirsch, 123 So. 2d 408 (Fla. App. 1960); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Donahue v. Russell, 264 Mich. 217, 249 N.W. 830 (1933); Oklahoma County v. Queene City Lodge, 195 Okla. 131, 156 P.2d 340 (1945); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230 (1918); Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924); Note, *Prospectivity and Retroactivity of Supreme Court Constitutional Interpretations*, 5 U. RICH. L. REV. 129, n.4 (1970).

[11] *See* Kojis v. Doctors Hosp., 12 Wis. 2d 367, 373-74, 107 N.W.2d 131, 133-34 (1961). *See also* Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Barker v. St. Louis County, 340 Mo. 986, 104 S.W.2d 371 (1937); Douchey Co. v. Farney, 105 Misc. 470, 173 N.Y.S. 530 (Sup. Ct. 1918). Various legal writers have also recommended the use of the quasi-prospective method of overruling prior precedents. *See, e.g.*, Wigmore, *Editorial Preface* to 9 MODERN LEGAL PHILOSOPHY SERIES at xxxvii-xxxviii (1917); Address by Chief Justice Cardozo, N.Y. State Bar Association, Jan. 22, 1932, in 55 REPORT OF N.Y.S.B.A. 263, 294-96 (1932); Levy, *Realistic Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

[12] "Because we change prior settled law, it is inevitable that some will be adversely affected hereby, no matter which basis we select." Myers v. Genessee County Auditor, 375 Mich. 1, 4, 133 N.W.2d 190, 193 (1965). *See* Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437 (1947); Annot., 85 A.L.R. 262 (1933).

[13] *See* Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962).

[14] *See* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932); Von Moschzisker, *supra* note 10. *But see* Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 439-40 (1947).

[15] *See* note 14 *supra*.

Furthermore, a prospective decision curbs the incentive to appeal the upholding of precedent, because the appellant cannot benefit from a reversal thereof if the decision does not apply to his case.[16] However, a prospective application does carry with it the advantage of allowing the affected governmental agencies to obtain liability insurance before their immunity ends.[17]

A quasi-prospective abrogation, on the other hand, not only protects the governmental agencies in their probable reliance on the immunity, but also recognizes the efforts of the present plaintiff in instituting the action to abrogate the immunity doctrine.[18] A further advantage is that the decision,

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[16] *See, e.g.*, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Von Moschzisker, *supra* note 10; Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 HARV. L. REV. 1403 (1934). *But see* Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Levy, *supra* note 11; Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 439-40 (1947).

[17] In announcing a prospective abrogation of governmental immunity, the court in Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962) stated:

> It may appear unfair to deprive the present claimant of his day in court. However, . . . it would work an even greater injustice to deny the defendant and other units of government a defense on which they have had a right to rely. . . . [I]t is more equitable if they are permitted to plan in advance by securing liability insurance or by creating funds necessary for self-insurance. In addition, provision must be made for routinely and promptly investigating personal injury and other tort claims at the time of their occurrence in order that defendants may marshall and preserve whatever evidence is available for the proper conduct of their defense.

Id. at 287, 118 N.W.2d at 804.

[18] Only in Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970), did the court declare the abrogation of the immunity to be effective to the case at bar and *all* future causes of action. In the remaining jurisdictions applying the quasi-prospective method, the courts have declared that the decision would apply to the case at bar, but would not be effective for other causes of action until a prescribed period of time had elapsed, thereby allowing the affected governmental agencies or subdivisions an even greater opportunity to protect themselves or the legislature time to act.

In Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970), the court stated that its decision would affect the case at bar and:

> [A]ll future causes of action arising on or after 60 days subsequent to the adjournment of the First Regular Session of the Forty-First Idaho State Legislature unless legislation is enacted at that session with respect to the abolition of the sovereign immunity of the state. *Id.* at 950.

The court in Willis v. Department of Conservation, 55 N.J. 534, 537, 264 A.2d 34, 38 (1970), stated that "except for the immediate case, the courts will not accept any tort claim araising before January 1, 1971." In Carroll v. Kittle, 203 Kan. 841, 849, 457 P.2d 21, 29 (1969), it was held that "[E]xcept for the instant case, the effective date of the abolition of the rule of government immunity . . . shall be

because it does affect the case at bar, will itself represent a new precedent, rather than mere dictum.[19] However, serious inequities can arise from a quasi-prospective application. A typical case in point is *Molitor v. Kaneland Community Unit District No. 302*,[20] which arose from a school bus accident wherein eighteen children were injured. By abrogating the doctrine of governmental immunity quasi-prospectively, the court allowed recovery by one child, but precluded recovery by the other seventeen children who were injured in the same accident.[21] Thus a quasi-prospective application creates inequities when other suits could be instigated or are pending at the time of the decision, because these will be excluded from the present ruling.

The most equitable application for possible deserving plaintiffs is the retrospective decision,[22] but it is basically unfair to the governmental agencies which have relied upon the immunity. While a retrospective application allows all deserving plaintiffs to recover for causes of action not barred by an applicable statute of limitations, it subjects the governmental agency to liabilities most likely not covered by insurance. To remedy the unfairness to the governmental agencies which have relied upon the immunity, the

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Aug. 30, 1969." In Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), the court stated that:

> To enable the various public bodies to make financial arrangements to meet the new liability implicit in this holding, the effective date of the abolition of the rule of governmental immunity for torts shall be July 15, 1962. . . . However, . . . this decision shall apply to the case at bar. *Id.* at 33, 115 N.W. 2d at 626.

[19] *See* note 18 *supra.*

[20] 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

[21] In 37 CHI.–KENT L. REV. 44 (1960), one writer criticized the quasi-prospective abrogation of the governmental immunity in *Molitor* by stating:

> If a legislature were to enact a law providing that whenever eighteen children are injured in the burning of a school bus one shall have a cause of action to recover damages and seventeen shall not, cries of outrage would ring through the land. It is doubtful that it would be possible to find a single court which would hesitate, even for one moment, before declaring such an enactment unconstitutional and void. Yet the Supreme Court of Illinois asserts the right to grant, as a matter of reward, that which the legislature could not. *Id.* at 51.

See also Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (dissenting opinion); *cf.* Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

[22] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Hargrove v. Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Perkins v. State, 251 N.E.2d 30 (Ind. 1969); Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964); Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965); Walsh v. Clark County School Dist., 82 Nev. 414, 419 P.2d 774 (1966).

Although the California court in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) also applied the abrogation retrospectively, the legislative fixed a period during which the new rule would be held in abeyance. CAL. STAT. ch. 1404 (West 1961). *See also* Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

court may insert the qualification that the new rule applies retrospectively if, and only if, the city or governmental agency was insured against such liability when the claim arose, and then only to the extent of the maximum applicable amount of its insurance coverage.[23] Even though this method would still exclude certain deserving plaintiffs whose cause of action is barred by a statute of limitations, it provides more advantages and fewer disadvantages than any of the other methods of application.[24]

Although the Colorado court, in *Profitt, Flournoy*, and *Evans*, came to a laudable conclusion in its complete abrogation of sovereign and governmental immunity, its application of the decision under the quasi-prospective theory narrowed the number of affected causes of action to the cases at bar and to those cases arising over fifteen months after the date of the presentation of the opinions. The court attributed the delay of application to its desire to give an opportunity either for the legislature to restore the immunities or for the governmental agencies and subdivisions to obtain adequate insurance coverage.[25] Even though the court doubtless intended to apply the abrogation in the least inequitable fashion, that desired result would have been best acomplished under the retrospective theory with the added qualification that the governmental agency or subdivision have had insurance coverage. In that manner, a greater number of deserving plaintiffs

[23] *See, e.g.*, Johnson v. Municipal Univ., 184 Neb. 512, 169 N.W.2d 286 (1969); Brown v. Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968).

The existence of insurance has been treated in itself as a waiver of immunity to the extent of the coverage in several states. *See* Hall County v. Loggins, 110 Ga. App. 432, 138 S.E.2d 699 (1964); Garrison v. Community Consol. School Dist., 34 Ill. App. 2d 322, 181 N.E.2d 360 (1962); Flowers v. Board of Comm'rs, 240 Ind. 668, 168 N.E.2d 224 (1960) (under statute); Ginter v. Montgomery County, 327 S.W.2d 98 (Ky. 1959); Geislinger v. Watkins, 269 Minn. 116, 130 N.W.2d 62 (1964); Longpre v. Joint School Dist., 151 Mont. 345, 443 P.2d 1 (1968); Vendrell v. School Dist., 226 Ore. 263, 360 P.2d 282 (1961); Ballew v. Chattanooga, 205 Tenn. 289, 326 S.W.2d 466 (1959); Medlar v. Aetna Ins. Co., 127 Vt. 337, 248 A.2d 740 (1968); Marshall v. Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963).

[24] By applying the abrogation of immunity in such a manner, the possibility of large losses by uninsured governmental units is minimized. Furthermore, the fact that the qualification is applied only retrospectively would prevent future governmental refusal to obtain insurance from operating as a bar to possible recovery by the plaintiff.

Even though this method can be criticized because it seems to reward those governmental units which were uninsured, it is the best method to allow more frequent recovery by possible deserving plaintiffs, while causing less inequity to those who have relied on the previous immunity.

[25] *See* note 8 *supra*. A by-product of the delay, which could be avoided by application of the retrospective theory with the added qualification that the governmental entity have had insurance, is that those plaintiffs whose causes of action arise during the interim will be barred from recovery, thus creating a further inequity for possible deserving plaintiffs.

might have benefited from the abrogation of the outmoded governmental immunity, while still not subjecting the governmental agency or subdivision to undue hardship.

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