

1974

Torts- State Tort Immunity Extended to Administrators and Intern of State Supported Hospital

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Torts Commons](#)

Recommended Citation

Torts- State Tort Immunity Extended to Administrators and Intern of State Supported Hospital, 8 U. Rich. L. Rev. 617 (1974).

Available at: <http://scholarship.richmond.edu/lawreview/vol8/iss3/10>

This Recent Decision is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Torts—STATE TORT IMMUNITY EXTENDED TO ADMINISTRATORS AND INTERN OF STATE SUPPORTED HOSPITAL— *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 509 (1973).

The doctrine of sovereign immunity as developed in England and adopted in the United States has its roots in feudalism.¹ While it is not clear how this monarchistic doctrine came to be adopted in the new and belligerently democratic republic of America,² it has become firmly entrenched in our jurisprudential system.³ Sovereign immunity as applied to tort actions means that the state, in consequence of its sovereignty, is immune from liability for negligence, except where it has expressly waived immunity by legislative enactment or judicial decision.⁴ While the Federal Tort Claims Act waives federal tort immunity in certain situations,⁵ the

1. The idea that the King can do no wrong was an application of the feudal principle that a lord could not be sued in his own courts. The King, as the apex of the feudal structure, was the "fountain head of justice" and was thus subject to the jurisdiction of no court. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 460-63 (3d ed. 1923).

2. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) Chief Justice Marshall declared that no suit could be instituted against the United States without its consent. Although this is the first appearance of the sovereign immunity rule in Supreme Court decisions, no reasons were advanced for its adoption. It has been suggested that the sovereign immunity rule was adopted in the United States due to the heavy public debts and generally precarious financial condition of the nation in the years immediately following the Revolution. It was feared that the financial burden of adverse tort judgments could not be sustained. Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947).

3. *Kawanakoa v. Polyblank*, 205 U.S. 349 (1907); *United States v. Lee*, 106 U.S. 196 (1882); *Hill v. United States*, 50 U.S. (9 How.) 386 (1850); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

4. *Faber v. State*, 143 Colo. 240, 353 P.2d 609 (1960); *Condon v. State*, 169 Misc. 666, 8 N.Y.S.2d 544 (1938); *Holzworth v. State*, 238 Wis. 63, 298 N.W. 163 (1941). See notes 5 and 6 *infra*.

5. The Federal Tort Claims Act (1945) makes the United States liable under the law of the place where the tort occurs for the negligent or wrongful act or omission of federal employees within the scope of their employment ". . . [I]n the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C.A. §§ 1346(b), 2674 (1948). The act does, however, continue immunity as to certain specific governmental activities, such as the activities of the armed forces in time of war. 28 U.S.C.A. § 2680(j) (1948). See *Feres v. United States*, 340 U.S. 135 (1950). The two other exceptions to the general federal tort liability created by the act are more comprehensive. One provides that the United States shall not be liable for any international tort. 28 U.S.C.A. § 2680(h) (1948). See *Fletcher v. Veterans Adm.*, 103 F. Supp. 654 (E.D. Mich. 1952). Far more sweeping is the exception which provides that the United States shall not be liable for acts done with due care in the execution of a statute, or for acts or omissions which are within the "discretionary function or duty" of any federal employee or agency. 28 U.S.C.A. § 2680(a) (1948). The leading case of *Dalehite v. United States*, 346 U.S. 15 (1953) is an excellent example of the application of § 2680(a).

states have generally been reluctant to take similar action.⁶

Sovereign immunity extends both to agencies of the state⁷ and to state agents and employees.⁸ Under the majority and Virginia view, however, the protection afforded state agents and employees is not absolute, but depends upon whether the act performed is "discretionary" or "ministerial." Discretionary acts require personal deliberation or decision on the part of the agent, *i.e.*, the employee must exercise his judgment as to the manner in which he executes his duties.⁹ Ministerial acts are those which demand

6. All states have, to a greater or lesser extent, granted consent to be sued, but few have swept aside sovereign immunity as dramatically as did the Federal Tort Claims Act. For an exhaustive though somewhat dated summary of the statutes and common law of each state dealing with sovereign immunity, see Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. INTRA. L. REV. 1363 (1954). For a list of those states which have by judicial decision abrogated sovereign immunity, see note 28 *infra*.

The reluctance of the states to relax their sovereign immunity can be credited to three factors: (1) the amorphous mass of unworkable self-contradicting language with which one is confronted when dealing with the rule and which is contradicted by modern legislation such as the Federal Tort Claims Act; (2) legislative and judicial inertia; (3) fears that the states could not afford to shoulder the burden of the expenditures which would be required should tort claims be allowed. Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. INTRA. L. REV. 1363, 1364 (1954).

7. See, *e.g.*, *Moody v. State's Prison*, 128 N.C. 12, 38 S.E. 131 (1901) (prison); *Rader v. Pennsylvania Turnpike Comm'n*, 407 Pa. 609, 182 A.2d 199 (1962) (commission for public works); *Jones v. Jones*, 243 S.C. 600, 135 S.E.2d 233 (1964) (hospital); *Alston v. Waldon Acad.*, 118 Tenn. 24, 102 S.W. 351 (1907) (educational institution); *Maia's Adm'r v. Eastern State Hosp.*, 97 Va. 507, 34 S.E. 617 (1899) (refusing to allow recovery against a state hospital for the wrongful death of an inmate) (the *Maia's Adm'r* case laid down the rule in Virginia that an agency of the state government is immune from suit in tort). See also *Phillips v. Rector & Visitors of the Univ. of Virginia*, 97 Va. 472, 34 S.E. 66 (1899) (state supported educational institution similarly protected).

8. Unqualified sovereign immunity has been granted only to higher echelon state officials. See, *e.g.*, *Paoli v. Mason*, 325 Ill. App. 197, 59 N.E.2d 499 (1945) (Liquor Control Commissioner held not liable for wrongful revocation of liquor license regardless of malicious conduct); *Schwartz v. Heffernan*, 304 N.Y. 474, 109 N.E.2d 68 (1952) (members of election board not liable for declaring an alleged valid nominating petition invalid). As to agent and employees of lower rank, see text and notes 9 and 10 *infra*.

9. See, *e.g.*, *Wilson v. Hirst*, 67 Ariz. 197, 193 P.2d 461, (1948). In holding the members of a hospital board not liable for wrongful conduct in their discharge of an employee, the court said:

In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; . . . [I]n order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. . . . *Id.* at 462-63.

Stevens v. North States Motor Co., 161 Minn. 345, 201 N.W. 435 (1925) (In constructing a highway, the degree of embankment required for a curve involves the discretion of the high-

only obedience to orders or in which the agent is left with no choice of his own, unqualifiedly calling for the doing of a certain thing.¹⁰ Liability is imposed upon the state employee only for negligent performance of ministerial acts. Since this distinction is at best one of degree, difficulty has been experienced in deciding how to distinguish discretionary and ministerial acts,¹¹ and different decisions have flowed from similar factual situations.¹² Difficult to apply as sovereign immunity appears to be, few viable alternatives have been advanced.¹³

With some qualifications, the sovereign immunity doctrine is firmly embraced by Virginia.¹⁴ The immunity granted state agents and employees

way official in charge, and damages for injuries resulting from negligent discharge of that duty cannot be recovered from him); *Harmer v. Peterson*, 151 Neb. 412, 37 N.W.2d 511 (1949) (In deciding where to construct a bridge, a road overseer was exercising discretionary powers, and he was held not liable for consequential water damage to plaintiff's adjacent property). See *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942), notes 20 and 25 *infra*.

10. See, e.g., *Whitt v. Reed*, 239 S.W.2d 489 (Ky. 1951) (duty to cut off boiling water improperly attached to drinking fountain was ministerial only, requiring no exercise of judgment); *Tholkes v. Decock*, 125 Minn. 507, 147 N.W. 648 (1914) (duty to repair hole left in highway by culvert removal was ministerial only); *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938) (In his failure to observe proper caution upon approaching an unruly group of children on a curb, the driver of a school bus was negligent in the discharge of a duty in which no discretion on his part was required, i.e. a ministerial duty, and consequently the protection of sovereign immunity was not available to him).

11. In grappling with the problem of whether the failure to promptly repair a bridge which had been partially damaged by a storm involved a ministerial or a discretionary duty, the court in *Ham v. Los Angeles County*, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920) said:

[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in its manner of performance, even if it involved only the driving of a nail."

12. See, e.g., as to the acts of state auditors in issuing and paying warrants, the opposing views expressed in *Fergus v. Brady*, 277 Ill. 272, 115 N.E. 393 (1917) (ministerial only) and *Hicks v. Davis*, 100 Kan. 4, 163 P. 799 (1917) (discretionary).

13. Some writers have suggested a simple test as to whether the agent has acted with due care in the performance of his duties without consideration of the nature of those duties. Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303 (1959); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Mathes and Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965).

A few cases have shown a tendency to move in this direction. See *Silva v. MacAuley*, 135 Cal. App. 249, 27 P.2d 791 (1933) (defendant officers held liable for damages resulting from their negligence; no consideration given to the ministerial-discretionary test); *Wallace v. Feehan*, 181 N.E. 862 (Ind. App. 1932) (officers held liable solely on the basis of negligence for unnecessary destruction of a field of corn). See also *Tyrell v. Burke*, 110 N.J.L. 225, 164 A. 586 (1933); *Lincoln Bus Co. v. Jersey Mut. Cas. Ins. Co.*, 10 N.J. Misc. 1114, 162 A. 915 (1932).

14. VA. CODE ANN. § 8-752 (Cum. Supp. 1973) provides for recovery of contract claims against the Commonwealth. That statute has, however, been consistently interpreted as not permitting tort actions. In *Commonwealth v. Chilton Malting Co.*, 154 Va. 28, 152 S.E. 336 (1930) the court held that while VA. CODE ANN. § 2578 (1919) (now VA. CODE ANN. § 8-752

in Virginia has generally followed the pattern of that of the majority of jurisdictions,¹⁵ but it has not been developed without some uncertainty.¹⁶ In the recent Virginia decision of *Lawhorne v. Harlan*,¹⁷ the Supreme Court of Virginia again addressed itself to this issue.

In *Lawhorne* the plaintiff's decedent allegedly died as a result of a delay in the diagnosing and treatment of a skull fracture, the presence of which the defendant, an intern at the University of Virginia hospital, had negligently failed to discover from x-rays taken upon the decedent's admission to the hospital emergency room. The plaintiff further alleged negligence of the defendant hospital and its administrators by virtue of the inadequate procedures employed to prevent such occurrences and the hospital's failure to notify the patient after the error was discovered.¹⁸

In sustaining the pleas of sovereign immunity of each of the defendants, the court noted that under Virginia law a hospital which is an agency of the state is immune from tort actions.¹⁹ The court also held that an employee of a state agency who performs "supervisory functions" or exercises "discretionary judgment" in the execution of his duties is entitled to

(1950)) authorized actions on contracts against the state, it did not authorize tort actions. See also *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942).

The following narrow statutory provisions provide for limited recoveries from the Commonwealth:

VA. CODE ANN. § 15.1-291 (1950) provides that cities and towns operating swimming pools and other recreational facilities shall be liable for gross negligence but not for ordinary negligence; VA. CODE ANN. § 22-290 (1950) requires all school boards operating school buses to carry insurance on them, but the school board shall not be liable above the statutory amount (as to the required amounts, see VA. CODE ANN. §§ 22-285 and 286 (1950)); VA. CODE ANN. § 33.1-200 (1950) authorizes the State Highway Commissioner in his discretion to pay claims arising against the Commonwealth as a result of damage caused to personal property by reason of highway work provided such demands do not arise as a result of the negligence of the person asserting such claim. The statute expressly negates legal liability and state suability.

15. See notes 7, 9 and 10 *supra*.

16. While the development of the discretionary employees rule in Virginia law has not been rapid, the general pattern laid down in the majority of jurisdictions has, as mentioned above, been adhered to. However, in 1968 in *Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968); Annot., 33 A.L.R.3d 697 (1968), the supreme court cast a bit of confusion onto the scene. For a full discussion of this case, see note 27 *infra*.

17. 214 Va. 405, 200 S.E.2d 569 (1973).

18. The x-rays, taken on March 8th, 1970, revealed a skull fracture, but the decedent's mother, who accompanied him, was not so advised. The decedent and his mother were advised that "nothing was wrong" with the decedent. Not until March 10th when the decedent's condition worsened was the fracture discovered. The decedent died on March 24th allegedly as a result of the delay in diagnosing and treating this skull fracture.

19. *Id.* at 407, 200 S.E.2d at 571. See *Maia's Adm'r v. Eastern State Hosp.*, 97 Va. 507, 34 S.E. 617 (1899), note 7 *supra*.

similar protection,²⁰ but that one whose task is "ministerial" acts negligently at his peril.²¹

The court held that the hospital administrators were exercising discretionary powers in performing their duties,²² but did not elaborate on this point.²³ The intern also was performing discretionary duties since his primary task in the emergency room was to treat incoming patients and determine whether their injuries would require hospitalization.²⁴ The court concluded that an employee of an agency of the Commonwealth who performs discretionary acts in the execution of his duties is entitled to the protection of the state's sovereign immunity unless he has committed an intentional tort or has been so negligent as to take his conduct outside of the scope of his employment.²⁵

Lawhorne provides a summary of all of the various aspects of the discre-

20. 214 Va. at 407, 200 S.E.2d at 571. The opinion cites two cases in support of this statement. In *Richmond v. Long's Adm'rs*, 58 Va. (17 Gratt.) 375 (1867), the court mentions the "discretionary" rule, but the discussion, though analogous to the present rule, is concerned with the liability of municipal corporations for the negligent acts of its employees rather than the circumstances under which the employees might be held personally liable. *Long* is therefore not clear authority for the court's position.

In *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942) the plaintiff was seeking damages from two state employees who, while routing a water pipe through limestone on the plaintiff's property to a state fish hatchery used dynamite charges which caused the plaintiff's well to cease to flow. The court held that the location of the pipe was a decision requiring an exercise of judgment on the employee's part, and that they should not be held liable therefor. This is more nearly the "discretion" rule as applied in *Lawhorne*.

21. 214 Va. at 407, 200 S.E.2d at 571. The opinion here cites three earlier decisions, most notable of which is *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938). See note 10 *supra*.

22. 214 Va. at 407, 200 S.E.2d at 572.

23. *Id.* The court said merely that their conclusion was "clear" or, in other words, was unquestionably compelled by the facts. The only substantive explanation given was that public policy dictates that this should be the rule. Apparently the court felt that the defendants' duties were necessarily discretionary due to the nature of the positions which they held.

24. *Id.* at 408, 200 S.E.2d at 572. The court held that the intern was "vested with and required to exercise discretion and judgment in connection with those persons who presented themselves as patients at the emergency room of the hospital. In performing these duties he was required, in the exercise of his best judgment, either to treat and release the patients or to treat and admit them to the hospital."

25. *Id.* at 407-08, 200 S.E.2d at 571-72. These "exceptions" to the discretionary employees rule, *i.e.*, intentional torts and gross negligence, are widely recognized and are generally justified on the basis that when a state employee acts thusly he acts outside of the scope of his employment and his acts are no longer those of the state. See *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942) in which the court, citing from the defendants brief, said, that "[t]he true rule would seem to require proof (and allegation) of some act done by the employee outside of the scope of his authority, or of some act . . . performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment." *Id.* at 229, 22 S.E.2d at 12. See note 20 *supra*.

tionary employees rule in Virginia,²⁶ and to that extent the previously mentioned uncertainty associated therewith has been lessened.²⁷ Regrettably, *Lawhorne* provides no test to distinguish discretionary from ministerial acts.²⁸ Determination of the character of various acts will still cause uncertainty in the application of sovereign immunity.

The sovereign immunity doctrine has come under attack in recent years and its abolition may ultimately occur in a majority of the states in this

26. Not until *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967), cited in *Lawhorne*, 214 Va. at 407, 200 S.E.2d at 572, in which a state police officer was sued for defamation, was it firmly established that sovereign immunity is not available to a state agent who commits an intentional tort. *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938) cited in *Lawhorne*, 214 Va. at 407, 200 S.E.2d at 572, represents the first unequivocal statement of the ministerial employees rule (see note 10 *supra*). Only in *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942) did the court give a more comprehensive statement of the rule (see note 25 *supra*). It was drawn, however, from the briefs of counsel rather than from previous decisions. *Id.* at 229, 22 S.E.2d at 12.

27. See note 16 *supra*. The uncertainty referred to is that created by the 1968 decision in *Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968); Annot., 33 A.L.R.3d 697 (1968). In holding that a high school shop teacher was *not* immune from liability for negligently allowing a student to use a power saw which the teacher knew was defective (as a result of which the plaintiff's hand was injured), the court made no mention of the ministerial-discretionary distinction. In the light of past decisions and the fact that an appropriate opportunity to apply the rule was missed, this seems odd. In applying the rationale of previous decisions, it would seem that the duties of the shop teacher in *Crabbe* were no less discretionary than those of the intern in *Lawhorne* (the teacher had to decide whether or not certain equipment could be used). This is precisely the point brought out in Justice Cochran's dissent in *Lawhorne*.

Apparently the court in *Crabbe* disregarded prior case law, and it is quite difficult to determine, on the basis of the imprecise language used just what rationale the court relied on in arriving at its decision. The court ruled that the fact that the defendant was performing a governmental function for his employer does not mean that he was exempt from liability for his own negligence in the performance of such duties (citing no authorities) and that a state employee *may* be held liable for negligent conduct in the performance of his duties although the state itself is immune therefrom (citing *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 639 (1967); as previously pointed out, *Elder* was an intentional tort case and negligence questions were not involved (see note 26 *supra*)). All of this is quite nebulous.

It is of interest that the opinion in *Lawhorne* passes *Crabbe* off as a possible case of gross negligence and therefore within one of the "exceptions" to the discretionary employees rule (see note 25 *supra*). 214 Va. at 407, 200 S.E.2d at 572. The *Crabbe* opinion, however, does not mention this possibility, and it is in no way apparent that the decision turned on it. Whether the discretionary employee argument was omitted in *Crabbe* as a result of oversights in the briefs of counsel or was actually a feeble attempt to change the law, the decision therein represents an inconsistency in Virginia case law, and to the extent that *Crabbe* conflicts therewith it would seem that the *Crabbe* decision has been impliedly overruled by *Lawhorne*.

28. Admittedly, the ministerial-discretionary distinction does not lend itself to a "test" type approach, and the cases have not dealt with the distinction in this manner. The decisions have turned on whether the state employee has been required to exercise his judgment in carrying out his duties. See note 9 *supra*.

country.²⁹ However, irrespective of the merits of such a change, the Virginia Supreme Court has been particularly strict in the application of stare decisis, and the possibility of judicial abolition of so firmly entrenched a doctrine as sovereign immunity seems remote.³⁰ The *Lawhorne* decision certainly gives no indication that the abolition of the doctrine of sovereign immunity is imminent in Virginia.³¹

A.D.B.

29. On the theory that it is obsolete and unresponsive to modern social needs, the following jurisdictions have abolished the sovereign immunity rule in whole or in part by judicial decision: Arizona, *Stone v. Arizona H'way Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963); Arkansas, *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); Florida, *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); Illinois, *Molliter v. Kaneland Comm. Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Kentucky, *Haney v. Lexington*, 386 S.W.2d 738 (Ky. 1964); Michigan, *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); Minnesota, *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); Nebraska, *Brown v. Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968); Wisconsin, *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

30. The reservations expressed by the Virginia court concerning the abolition of immunities in *Memorial Hosp., Inc. v. Oakes*, 200 Va. 878, 108 S.E.2d 388 (1959) fully sums up the problem. In refusing to abolish charitable immunities the court said:

[T]he doctrine . . . is firmly embedded in the law of this Commonwealth and has become a part of the general public policy of the state. The General Assembly, though composed of many lawyers of outstanding ability throughout the years, has not seen fit to enact legislation abrogating the doctrine. By its silence, approval might well be inferred. If it be considered desirable to abolish such immunity, it would be more appropriate for the General Assembly to act, for the effect would be to act prospectively. Abandonment of the rule by judicial decision would be retroactive and give life to tort claims not barred by the statute of limitation at the time of rendition of the opinion. *Id.* at 889, 108 S.E.2d at 396.

Such statements apply equally to sovereign immunity.

Fears of retroactivity are groundless. A decision to abrogate sovereign immunity may be made to operate prospectively. See *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962). Prospective abrogation could be undertaken in Virginia by either legislative or judicial initiative.

The courts of nine jurisdictions have felt no restraint in judicially abolishing their immunity rules. See note 29 *supra*. One of the chief problems in this area has been the Virginia legislature's failure to act. Other than to provide for waiver of immunity in school bus cases (see VA. CODE ANN. § 22-290 (1950) and note 14 *supra*), the General Assembly has acted only retrogressively. Shortly after *Hoggard v. Richmond*, 172 Va. 145, 200 S.E. 610 (1939), which allowed an action to be maintained against a city for negligence in the operation of a park, the General Assembly practically reinstated the immunity rule by requiring a showing of gross negligence as a prerequisite to such a suit. See VA. CODE ANN. § 15.1-291 (1950) and note 14 *supra*.

31. Of particular interest in this context is the Supreme Court of Wisconsin's statement in *Holytz v. Milwaukee*, 17 Wis. 26, 115 N.W.2d 618, 623 (1962): "We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments."

