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Torts - Survival of the Doctrine of Sovereign Immunity in Mississippi - Jones v. Knight

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TORTS—SURVIVAL OF THE DOCTRINE OF SOVEREIGN IMMUNITY IN MISSISSIPPI—*Jones v. Knight*, 373 So. 2d 254 (Miss. 1979).

In the summer of 1976 an altercation occurred between picnicker Ernest Jones and Kevin Knight, a state park ranger, which called into question the validity of the doctrine of sovereign immunity. Jones was attending a family outing at Enid Reservoir in Yalobusha County. As he walked near a picnic area he was approached by Knight who directed him to remove his motorcycle from a restricted parking area. A confrontation ensued. Jones brought suit for intentional assault and battery against Knight individually and in his official capacity as a Mississippi Park Commission ranger. The Park Commission, its director and Commission members individually and in their official capacity were also named as defendants by Jones who claimed they employed the ranger knowing him to be unqualified, of a violent nature and lacking proper training. The defendants demurred and set up the bar of sovereign immunity. The demurrer was granted and Jones appealed.[1]

On appeal, a majority of the Mississippi Supreme Court, per Justice Broom, upheld the applicability of the immunity doctrine as to the Park Commission, the director and its members. As to Knight the court remanded the case to the lower court to determine whether he was cloaked by the sovereign's immunity or whether he should stand personally liable for his conduct. Justice Bowling joined by Chief Justice Patterson dissented presenting a detailed analysis of the doctrine and advocating its abrogation.[2]

HISTORICAL BASIS FOR THE DOCTRINE

With the exception of Missouri,[3] the general belief among state courts is that immunity of the state was derived from the decision in the English case of *Russell v. Men of Devon*.[4] In *Russell* the plaintiff sought to recover damages from the inhabitants of the County of

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[1]Jones v. Knight, 373 So. 2d 254 (Miss. 1979).

[2]*Id.* at 257 (Bowling, J., dissenting).

[3]The Missouri court believes the doctrine of sovereign immunity preceded *Russell* because it found language in *Russell* naming a prior precedent. The court noted that the common law of England before *Russell* supported sovereign immunity. The State of Missouri adopted the common law when it entered the union. Therefore, since Missouri adopted the common law by legislative act the court could not abrogate it judicially. O'Dell v. School Dist. of Independence, 521 S.W.2d (Mo. 1975). *But see* Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977), which held that the common law adopted in Missouri was "decisional" thereby granting the court as the judicial branch power to abrogate the doctrine. *Id.* at 228.

[4]100 Eng. Rep. 359 (1788).

Devon for injury to his wagon caused by a bridge being out of repair. Chief Justice Kenyon denied relief. His opinion concluded:

> [W]here an action is brought against a corporation for damages, those damages are not to be recovered against the incorporators in their individual capacity, but out of their corporate estate; but if the county is to be considered as a corporation, there is no corporate fund out of which satisfaction is to be made.[5]

Critics of this opinion and of the doctrine of sovereign immunity agree that a different conclusion would have resulted had the county been incorporated.[6] Incorporated or not, the rule was established that no action would lie by an individual against the inhabitants of a county for injuries sustained as a consequence of a bridge being out of repair.

Sovereign immunity subsequently found acceptance in the United States. The case of first impression was *Mower v. Inhabitants of Leicester*.[7] This 1812 Massachusetts case created no liability for the town's neglect in repairing yet another bridge. The court held that the town was a "quasi corporation" and as such, was subject to the common law, however, the town would not be held liable unless the action was given by statute.[8] This opinion laid the foundation in the United States for sovereign immunity, a doctrine a later Mississippi court would characterize as "that doctrine under which the sovereign, be it country, state, county or municipality may not be sued without its consent."[9]

Since its establishment in the United States, the doctrine has found acceptance in many state courts. Several factors have led to this acceptance. A synopsis of the factors includes, the precedence of *Russell*; the maxim that the king can do no wrong; the rationale that it is better for one individual to suffer as opposed to many individuals suffering; the fact that officers or agents of a sovereign cannot bind a sovereign by their individual conduct without statutory authority; what is commonly referred to as the trust fund theory; and finally, the effects abrogation of the doctrine would have on the financial stability of the sovereign.[10]

Critics of the immunity doctrine as a valid rule of law make several

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[5]*Id.* at 362.

[6]Long v. City of Weirton, 214 S.E.2d 832, 852-53 (W. Va. 1975); Mayor and Burgesses of Lyme Regis v. Henley, 110 Eng. Rep. 29 (1832).

[7]9 Mass. 247 (1812). It should be noted that here the county was incorporated and there was a corporate fund out of which judgment could be satisfied, yet the court adopted the rule of *Russell*.

[8]*Id.* at 250.

[9]Davis v. Little, 362 So. 2d 642, 643 (Miss. 1978).

[10]557 S.W.2d at 228-29. *Accord*, Brown v. City of Craig, 350 Mo. 836, 841, 168 S.W.2d 1080, 1083 (1943); Adams v. University Hosp., 122 Mo. App. 675, 99 S.W. 453 (1907); Mayle v. Penn. Dep't of Highway, 479 Pa. 384, 387-99, 388 A.2d 709, 710-16 (1978).

arguments. First they say that while following the holding of *Russell* employs the rule of precedent, courts should not feel "compelled to sacrifice their sense of reason and justice upon the altar of the Golden Calf precedent."[11] The principle of stare decisis should not render law static. Courts have recognized the value of stare decisis, but at the same time equally realized its limitations. It has been stated:

> The doctrine of stare decisis serves a very useful and desirable purpose in our jurisprudence by establishing needed stability and predictability in the law. However, the doctrine is not intended to provide rigidity in the law and must not be permitted to do so in cases where an existing rule or doctrine results in unfair and outmoded discriminatory treatment of persons.[12]

Critics also contend that the governmental entities which exist today should not be allowed to lay claim to the inheritance of immunity granted the kings of England.[13] "[R]ecent events have demonstrated dramatically that the 'king can do wrong' in America; and when he does, he must pay the penalty for such wrongdoing."[14] It should be noted, ironically, that sovereign immunity for torts is no longer recognized in England.[15]

The rationale that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience" was presented as a general principle of law in *Russell.* Proponents of abrogation suggest that inconvenience should not outweigh an individual's right to be compensated for actual damages sustained.[16] Adherence to

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[11]Lorence v. Hospital Bd. of Morgan County, 320 So. 2d 631, 634 (Ala. 1975). The court concluded that "[W]here precedent can no longer be supported by reason and justice, we perceive it our duty to reexamine, and if need be, overrule court made law." The "Golden Calf precedent" phraseology is from a poem by Sam Walter Foss in 1 B. E. STEVENSON, THE HOME BOOK OF VERSE 1896 (7th ed. 1940).

[12]521 S.W.2d at 420-21 (Finch, J., dissenting). In quoting Mr. Justice Holmes, the dissenting opinion stated:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id. at 421.

[13]557 S.W.2d at 228; Spencer v. General Hosp. of D.C., 425 F.2d 479, 487 (1969); Molitor v. Kaneland Community Unit Dist. Number 302, 18 Ill. 2d 11, 21, 163 N.E.2d 89, 94 (1959); Hicks v. State, 544 P.2d 1153, 1155 (N.M. 1976). *See also* Annot., 75 A.L.R. 1196 (1931).

[14]Jackson v. City of Florence, 320 So. 2d 68, 78 (Ala. 1975). This decision abolished municipal immunity in the State of Alabama.

[15]*See,* e.g., Hillyer v. St. Bartholomew's Hosp. [1909] 2 K.B. 820, 825. "It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances . . . like a public hospital." *Id.* at 825.

[16]Muskoph v. Corning Hosp. Dist., 359 P.2d 457, 459, 11 Cal. Rptr. 89, 91 (1961); Molitor v. Kaneland Community Unit Dist. Number 302, 18 Ill. 2d at 22, 163 N.E.2d at

this antiquated theory is incongruous with our democratic system of government.[17] It has been held that it is better for an individual to suffer than for people to suffer vicariously through their government.[18] This ruling has been held to be a sham on the constitutional right that courts should always be open to redress wrongs[19] and cites the fact that sovereign immunity represents a significant departure from the common law doctrine of respondeat superior.[20]

Much confusion has arisen from the contention that a sovereign cannot be held accountable for the conduct of its officers or agents. In order to clarify exactly which capacity imputes the officers' conduct to the sovereign, certain classifications have been developed. The terms governmental or ministerial connote that the negligence of agents will not be imputed to the sovereign, while the terms proprietary or corporate connote that such conduct will be imputed. When applied, the terms yield varying results. Garbage collecting has been held to be governmental[21] and hence not imputable, yet sewer disposing is proprietary and imputable.[22] Likewise, it has been held that repairing and maintaining streets is a function of the sovereign deemed proprietary or corporate,[23] while operating a street sweeper to clean streets is governmental.[24] It has been suggested that the only clue as to whether a particular function is governmental or corporate must be found in cases addressing that particular function.[25] These classifications have been deemed "not only baffling, but arbitrary, discriminatory and unreasonable."[26]

> In an unsophisticated time when demands for governmental services were few and simple of description, perhaps it was correct to say that extinguishing fires, caring for the sick, protecting the citizens in their personal rights and keeping the peace represented the full range of government's mandated responsibilities to its citizens. Perhaps then it was easy to say that any other activity, for example, constructing works of improvement, building roads and streets, supplying water to residences within the municipality and retrieving sewage were completely discretionary with the governmental body. It is obviously not so today.[27]

94; Brown v. Wichita State Univ., 217 Kan. 279, 299, 540, P.2d 66, 83 (1975); Hicks v. State, 544 P.2d at 1156.

[17]Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957).

[18]*Id.*

[19]*Id.* at 133.

[20]217 Kan. at 291, 540 P.2d at 77.

[21]City of Tuscaloosa v. Fitts, 209 Ala. 635, 96 So. 771 (1925).

[22]Brown v. City of Fairhope, 265 Ala. 596, 93 So. 2d 419 (1957).

[23]City of Birmingham v. Whitworth, 218 Ala. 603, 119 So. 841 (1929).

[24]Densmore v. City of Birmingham, 223 Ala. 210, 135 So. 320 (1931).

[25]320 So. 2d at 72.

[26]217 Kan. at 297, 540 P.2d at 81.

[27]214 S.E.2d at 857.

It seems illogical that a governmental body may not be held accountable for the conduct of its employees when a governmental entity can act only through its officers and employees.[28] There also appears to be a double standard existing in not holding a government liable for conduct when, if an individual were involved, the individual would be held liable for his conduct. The rule of law governing individuals dictates that an absolute duty exists to act in a manner conducive with the avoidance of injury to others, and that if such injury occurs, the individual will answer for his conduct.[29] Nothing less should be demanded of a sovereign. Governments were not established to condone the deliberate failure of government bodies to comply with the law.[30] It has been argued instead that lifting the mantle of immunity would tend to promote care and caution.[31]

A justification offered by those in favor of sustaining the doctrine is the so-called trust theory which originated as a reason to shield charitable institutions against tort liability.[32] The crux of the theory is that funds entrusted to charitable institutions should remain in trust for charitable uses and not be depleted by satisfying judgments.[33] The rationale of the theory has been applied as a reason for sustaining governmental immunity,[34] i.e., public funds should be used for public purposes and not be unduly drained to pay private judgments. However, the fears of draining the public coffer can easily be quelled by legislative enactment of liability insurance laws.[35]

ANALYSIS BY THE COURT

In *Jones*, the majority opinion held that the doctrine of sovereign immunity was still applicable in Mississippi. In an earlier opinion the court had noted "growing criticism" of the doctrine, but took no action to end it.[36] However, for the first time in *Jones* two members of the court called for its demise. Up until this decision there had been few suggestions that the court itself would take the lead in ending the immunity. The court had held that legislative action rather than judicial conduct was the appropriate means for eliminating the doctrine and noted in a recent opinion that the court would not abolish it "at

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[28]521 S.W.2d at 415.

[29]Dr. Pepper Bottling Co. of Miss. v. Bruner, 245 Miss. 276, 282, 148 So. 2d 199, 201 (1962).

[30]217 Kan. at 302, 540 P.2d at 85.

[31]18 Ill. 2d at 25, 163 N.E.2d at 95. *See also* Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603-04.

[32]18 Ill. 2d at 22, 163 N.E.2d at 94.

[33]122 Mo. App. at 679-80, 99 S.W. at 456.

[34]Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 575, 109 N.E.2d 636, 640 (1952).

[35]320 So. 2d at 75, 544 P.2d at 1155.

[36]Berry v. Hinds County, 344 So. 2d 146 (Miss. 1977).

this time."[37] Following this reasoning the court held in a case decided the same day as *Jones* that "[a]ppellants may find that their claim here pressed lends itself to an effort to obtain a special appropriation by legislative act."[38] The dissenters in *Jones*, however, recognized the power, need and duty of the judiciary to act on abolishing the doctrine in Mississippi.[39]

The dissenting opinion noted actions taken by sister states in dealing with the doctrine. The Alabama Supreme Court after wading through an historical analysis of the doctrine came to the conclusion that its ill effects could no longer be supported.[40] Realizing that it had previously upheld the doctrine, the Alabama court declared that the abolition would only apply prospectively thereby padding the effects of its decision.[41]

The Florida Supreme Court was cognizant of the probable confusion and difficulties which would result from partial abrogation of the doctrine. Therefore, the court decided upon uprooting the rule bodily and laying it aside as any other "archaic and outmoded concept" rather than just making a "pruning and paring effort."[42] Mississippi lawmakers have apparently chosen the latter course. The Mississippi Supreme Court has characterized legislative action as "chipping away at [the] doctrine of governmental immunity in appropriate areas."[43] An example of this conduct is the fact that suits may be maintained against the sovereign pursuant to express and/or implied authority by statutes.[44]

Louisiana weighed policy considerations, then decided to discard the doctrine. "[W]hen an unfair doctrine does not function for the public good, but only for the administrative convenience of a State agency, the court should do whatever it can to infuse justice in the relationship between the state agency and the private person."[45] Both

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[37]*Id.* at 151.

[38]Jagnandan v. Miss. State Univ., 373 So. 2d 252, 254 (Miss. 1979).

[39]373 So. 2d 257 (Bowling, J., dissenting).

> With deference to the majority, its opinion impliedly admits that the nonprotection of our people is wrong, but shifts the burden to the legislature. I certainly agree that the legislature should act; however, I can understand why it would be reluctant to do so. That does not relieve this [c]ourt of its duty. I believe it is the [c]ourt's duty to protect our citizens from wrongs and should act so to do.

Id. at 267.

[40]320 So. 2d 68.

[41]*Id.* at 75.

[42]96 So. 2d at 132.

[43]344 So. 2d at 148.

[44]Ayres v. Board of Trustees of Leake County Agricultural High School, 134 Miss. 363, 372, 98 So. 847, 848 (1924). *But cf.* Smith v. Doehler Metal Furniture Co., 195 Miss. 538, 545, 15 So. 2d 421, 421 (1943); State v. Woodruff, 170 Miss. 744, 766, 150 So. 760, 762 (1934).

[45]Board of Comm'r of Port of New Orleans v. Splendour Shipping and Enterprises Co., 273 So. 2d 19, 25 (La. 1973).

the majority and dissenting opinions in *Jones* recognized the duty to protect citizens of the state as well as allowing them forums for redressing wrongs done them.

IF MISSISSIPPI ABROGATES SOVEREIGN IMMUNITY

If abrogation is the result of this first rippling of waters the supreme court will not be without guidance in implementing an abrogation decision. The court could follow decisions from states that have previously scuttled the doctrine. When determining the time span for carrying out abolition, courts have generally chosen three paths.

> Some have abolished the doctrine retrospectively, permitting utilization of the change as to all claims not barred by limitation. . . .Others have abolished the rule prospectively, effective on either the date of filing or publication of the opinion. . . .A third approach has been to discard the rule prospectively on a specified date in the future, giving governmental units time to adjust their financial planning and perhaps obtain insurance.[46]

A means for satisfying judgments would have to be established if the immunity is ended. The Mississippi legislature has provided that funds be set aside to satisfy certain judgments.[47] Likewise, authorization has been given for the procurement of insurance coverage for county owned motor vehicles.[48] The accident contingent fund legislation allows an injured person a right of action against counties arising from accidents involving county buses.[49] To fund these judgments an accident contingent fund was set up in the state treasury.[50] Monetary limits were placed on all claims arising under this enactment.[51] Enactments allowing hospitals to purchase liability insurance have also gained passage.[52] With these examples in mind, it appears that the legislature recognizes the duty to provide means for sustaining a remedy for the wrong done an individual. Perhaps the partial actions of the legislature have led the Mississippi judiciary to believe that total abrogation of sovereign immunity rests within the powers of the legislature. The supreme court has concluded that the legislature is in a bet-

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[46]521 S.W.2d at 421. This language was later adopted in *Jones*, 557 S.W.2d at 231, wherein the court abolished sovereign immunity prospectively except for the cases decided that day. *See also* Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Muskoph v. Corning Hosp. Dist., 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971).

[47]MISS. CODE ANN. § 37-41-39 (Supp. 1979), §§ 19-13-49, 19-13-51 (1972).

[48]MISS. CODE ANN. § 19-7-8 (Supp. 1979).

[49]MISS. CODE ANN. § 37-41-37 (Supp. 1979).

[50]MISS. CODE ANN. § 37-41-39 (Supp. 1979).

[51]MISS. CODE ANN. § 37-41-41 (Supp. 1979).

[52]MISS. CODE ANN. § 41-13-37 (1972). *See generally* Rolph v. Board of Trustees of Forrest County Gen. Hosp., 346 So. 2d 377, 378 (Miss. 1977).

ter position to limit and restrict claims and to provide the ways and means for paying such claims.[53] The dissenting opinion in *Jones*, however, concluded that since the doctrine was judicially created it may be judicially abrogated,[54] thus following the reasoning that, "The judicial branch of the government need not call upon the legislative branch to rectify an error which the judicial branch itself created."[55]

Even more applicable to the existing condition in Mississippi is the argument that "[i]f there is the power to abrogate in part, there is a right to abrogate completely."[56]

CONCLUSION

A recent Mississippi Supreme Court decision[57] reveals the infirmity of the doctrine of sovereign immunity. The court concluded that "[t]here is no defense offered in this case except the State's sovereign immunity from suit. Otherwise, . . . [the appellee] would, under principles of natural justice be entitled to recover."[58]

Partial abrogation has been effectuated by prior legislative enactments in Mississippi. The dissenting opinion in *Jones* exemplifies a growing concern of whether partial legislative abrogation is substantial enough to protect the rights of individuals. The fact that there is a call for an end to governmental immunity, even though the voice is a minority, suggests that the court realizes the innate problems surrounding the doctrine which have not been solved by partial abrogation.

M. Elizabeth Bourland

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[53]344 So. 2d at 151.

[54]373 So. 2d at 265 (Bowling, J., dissenting).

[55]Adkins v. St. Francis Hosp. of Charleston, 149 W. Va. 705, 720, 143 S.E.2d 154, 163 (1965).

[56]521 S.W.2d at 419.

[57]342 So. 2d 290.

[58]*Id.* at 294.