PART II
DEFENSES TO A PERSONAL INJURY CASE

Introductory Note

Even where the plaintiff is able to show that the defendant's conduct meets the criteria in the previous chapters and thus establishes a prima facie case of liability, the defendant may deny liability on the ground that he is entitled to some kind of affirmative defense. The term "defense" is sometimes used generically to mean the defendant's strategy at trial: for example, where the plaintiff claims that a driver was negligent, the driver may pursue the "defense" of denying that he was negligent, or denying that his negligence caused the accident. This isn't the kind of defense we will be looking at in Part II, because to that extent we would simply be looking at a mirror image of the issues as have been previously discussed. Instead, we are interested here in affirmative defenses. The affirmative defense differs from the simple denial of the plaintiff's case in two respects: First, it is usually based upon some new principle of law, such as the ones discussed in the next four chapters — immunity, contributory fault, multiple tortfeasor liability, and statutes of limitation. Second, the defendant usually bears the burden of proof for an affirmative defense. Thus, it is up to the defendant to plead and prove the existence of circumstances exonerating him from liability.
Chapter 4
Immunity

§ A. Governmental Immunity

Federal Tort Claims Act
28 U.S.C. § 1346 et seq. (1946)

§ 1346. United States as Defendant

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(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46,
relating to claims or suits in admiralty against the United States.
(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
(g) [Repealed.]
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
(k) Any claim arising in a foreign country.
(l) Any claim arising from the activities of the Tennessee Valley Authority.
(m) Any claim arising from the activities of the Panama Canal Company.
(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Questions and Notes

1. Claims based on the FTCA are tried by the Court sitting without a jury.

2. The federal government and many states impose special procedural requirements before a suit can be filed. Often the claimant must first file an administrative claim for compensation. See, e.g., R.C.W. 4.92.110. There are also unique statutes of limitation. See, e.g., 28 U.S.C. § 2401 (15). See generally, Tillman, Presenting a Claim Under the FTCA, 43 LA. L. REV. 961 (1983).

**LAIRD v. NELMS**

406 U.S. 797 (1972)

Mr. Justice REHNQUIST delivered the opinion of the Court

Respondents brought this action in the United States District Court under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. They sought recovery for property damage allegedly resulting from a sonic boom caused by California-based United States military planes flying over North Carolina on a training mission. The District Court entered summary judgment for petitioners, but on respondents' appeal the United States Court of Appeals for the Fourth Circuit reversed. That court held that, although respondents had been unable to show negligence "either in the planning or operation of the flight," they were nonetheless entitled to proceed on a theory of strict or absolute liability for ultrahazardous activities conducted by petitioners in their official capacities. That court relied on its earlier opinion in United States v. Praylou, 4 Cir., 208 F.2d 291 (1953), which in turn had distinguished this Court's holding in Dalehite v. United States, 346 U.S. 15, 45, 73 S. Ct. 956, 972, 97 L. Ed. 1427 (1953). We granted certiorari. 404 U.S. 1037, 92 S. Ct. 711, 30 L. Ed. 2d 728.

Dalehite held that the Government was not liable for the extensive damage resulting from the explosion of two cargo vessels in the harbor of Texas City, Texas, in 1947. The Court's opinion rejected various specifications of negligence on the part of Government employees that had been found by the District Court in that case, and then went on to treat petitioners' claim that the Government was absolutely or strictly liable because of its having engaged in a dangerous activity. The Court said
with respect to this aspect of the plaintiffs' claim:

[T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity." 346 U.S., at 44, 73 S. Ct., at 972.

This Court's resolution of the strict-liability issue in Dalehite did not turn on the question of whether the law of Texas or of some other State did or did not recognize strict liability for the conduct of ultrahazardous activities. It turned instead on the question of whether the language of the Federal Tort Claims Act permitted under any circumstances the imposition of liability upon the Government where there had been neither negligence nor wrongful act. The necessary consequence of the Court's holding in Dalehite is that the statutory language "negligent or wrongful act or omission of any employee of the Government," is a uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued. Regardless of state law characterizaiton, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance," 346 U.S., at 45, 73 S. Ct. at 972, on the part of the Government.

It is at least theoretically possible to argue that since Dalehite in discussing the legislative history of the Act said that "wrongful" acts could include some kind of trespass, and since courts imposed liability in some of the early blasting cases on the theory that the plaintiff's action sounded in trespass, liability could be imposed on the Government in this case on a theory of trespass which would be within the Act's waiver of immunity. We believe, however, that there is more than one reason for rejecting such an alternate basis of governmental liability here.

The notion that a military plane on a high-altitude training flight itself intrudes upon any property interest of an owner of the land over which it flies was rejected in United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). There this Court, construing the Air Commerce Act of 1926, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. § 401, said:

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." 328 U.S., at 260-261, 66 S. Ct., at 1065.

Thus, quite apart from what would very likely be insuperable problems of proof in connecting the passage of the plane over the owner's air space with any ensuing damage from a sonic boom, this version of the trespass theory is ruled out by established federal law. Perhaps the precise holding of United States v. Causby, supra, could be skirted by analogizing the pressure wave of air characterizing a sonic boom to the concussion that on occasion accompanies blasting, and treating the air wave striking the actual land of the property owner as a direct intrusion caused by the pilot of the plane in the mold of the classical common-law theory of trespass.

It is quite clear, however, that the presently prevailing view as to the theory of liability for blasting damage is frankly conceded to be strict liability for undertaking an ultrahazardous activity, rather than any attenuated notion of common law trespass. See Restatement of Torts §§ 519, 520(e); W. PROSSER, LAW OF TORTS § 75 (4th ed. 1971). While a leading North Carolina case on the subject of strict liability discusses the distinction between actions on the case and actions sounding in trespass that the earlier decisions made, it, too, actually grounds liability on the basis that he who engages in ultrahazardous activity must pay his way regardless of what precautions he may have
taken. Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963). More importantly, however, Congress in considering the Federal Tort Claims Act cannot realistically be said to have dealt in terms of either the jurisprudential distinctions peculiar to the forms of action at common law or the metaphysical subtleties that crop up in even contemporary discussions of tort theory. See Prosser, supra, at 492-496. The legislative history discussed in Dalehite indicates that Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of respondeat superior, but to exclude liability based solely on the ultrahazardous nature of an activity undertaken by the Government.

A House Judiciary Committee memorandum explaining the "discretionary function" exemption from the bill when that exemption first appeared in the draft legislation in 1942 made the comment that "the cases covered by that subsection would probably have been exempted ... by judicial construction" in any event, but that the exemption was intended to preclude any possibility

that the act would be construed to authorize suit for damages against the Government growing out of a legally authorized activity, such as a floodcontrol or irrigation project, where no wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious...." Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, pp. 65-66 (1942).

The same memorandum, after noting the erosion of the doctrine of sovereign immunity over the years, observed with respect to the bill generally:

Yet a large and highly important area remains in which no satisfactory remedy has been provided for the wrongs of Government officers or employees, the ordinary 'commonlaw' type of tort, such as personal injury or property damage

caused by the negligent operation of an automobile." Id., at 39.

The type of trespass subsumed under the Act's language making the Government liable for "wrongful" acts of its employees is exemplified by the conduct of the Government agents in Hatahley v. United States, 351 U.S. 173, 181, 76 S. Ct. 745, 751, 100 L. Ed. 1065. Liability of this type under the Act is not to be broadened beyond the intent of Congress by dressing up the substance of strict liability for ultrahazardous activities in the garments of common-law trespass. To permit respondent to proceed on a trespass theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result.

Shortly after the decision of this Court in Dalehite, the facts of the Texas City catastrophe were presented to Congress in an effort to obtain legislative relief from that body. Congress, after conducting hearings and receiving reports, ultimately enacted a bill granting compensation to the victims in question. 69 Stat. 707; H.R. Rep. No. 2024, 83d Cong., 2d Sess. (1954); S. Rep. No. 2363, 83d Cong., 2d Sess. (1954); H.R. Rep. No. 1305, 84th Cong., 1st Sess. (1955); H.R. Rep. No. 1623, 84th Cong., 1st Sess. (1955); S. Rep. No. 684, 84th Cong., 1st Sess. (1955). At no time during these hearings was there any effort made to modify this Court's construction of the Tort Claims Act in Dalehite. Both by reason of stare decisis and by reason of Congress' failure to make any statutory change upon again reviewing the subject, we regard the principle enunciated in Dalehite as controlling here.

Since Dalehite held that the Federal Tort Claims Act did not authorize suit against the Government on claims based on strict liability for ultrahazardous activity, the Court of Appeals in the instant case erred in reaching a contrary conclusion. While as a matter of practice within the Circuit it may have been proper to rely upon United States v. Praylou, 208 F.2d 291, it is clear that the holding of the latter case permitting imposition of strict liability on the Government where state law permits it is likewise inconsistent with Dalehite. Dalehite did not depend on the factual question of whether the Government was handling dangerous property, as opposed to operating a dangerous instrument but, rather, on
the Court's determination that the Act did not authorize the imposition of strict liability of any sort upon the Government. Indeed, even the dissenting opinion in Dalehite did not disagree with the conclusion of the majority on that point.

Our reaffirmation of the construction put on the Federal Tort Claims Act in Dalehite, makes it unnecessary to treat the scope of the discretionary-function exemption contained in the Act, or the other matters dealt with by the Court of Appeals.

Reversed.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN joins, dissenting.

Under the Federal Tort Claims Act, the United States is liable for injuries to persons or property caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b).

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The rule announced by the Court today seems to me contrary to the whole policy of the Tort Claims Act. For the doctrine of absolute liability is applicable not only to sonic booms, but to other activities that the Government carries on in common with many private citizens. Absolute liability for injury caused by the concussion or debris from dynamite blasting, for example, is recognized by an overwhelming majority of state courts. A private person who detonates an explosion in the process of building a road is liable for injuries to others caused thereby under the law of most States even though he took all practicable precautions to prevent such injuries, on the sound principle that he who creates such a hazard should make good the harm that results. Yet if employees of the United States engage in exactly the same conduct with an identical result, the United States will not, under the principle announced by the Court today, be liable to the injured party. Nothing in the language or the legislative history of the Act compels such a result, and we should not lightly conclude that Congress intended to create a situation so much at odds with common sense and the basic rationale of the Act. We recognized that rationale in Rayonier, [Rayonier v. U.S., 352 U.S. 315 (1957)], a case involving negligence by employees of the United States in controlling a forest fire:

Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees. 352 U.S., at 320, 77 S. Ct., at 377.

For the reasons stated, I would hold that the doctrine of absolute liability is applicable to conduct of employees of the United States under the same circumstances as those in which it is applied to the conduct of private persons under the law of the State where the conduct occurs. That holding would not by itself be dispositive of this case, however, for the petitioners argue that liability is precluded by the "discretionary function" exception in the Act. While the Court does not reach this issue, I shall state briefly the reasons for my conclusion that the exception is inapplicable in this case.

No right of action lies under the Tort Claims Act for any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to

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exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a).

The Assistant Attorney General who testified on the bill before the House committee indicated that this provision was intended to create no exceptions beyond those that courts would probably create without it:

"[I]t is likely that the cases embraced within that subsection would have been exempted from [a bill that did not include the exception] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but [the recommended bill] makes this specific. *Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, p. 29.*

The *Dalehite* opinion seemed to say that no action of a Government employee could be made the basis for liability under the Act if the action involved "policy judgment and decision." 346 U.S., at 36, 73 S. Ct., at 968. Decisions in the courts of appeals following *Dalehite* have interpreted this language as drawing a distinction between "policy" and "operational" decisions, with the latter falling outside the exception. That distinction has bedeviled the courts that have attempted to apply it to torts outside routine categories such as automobile accidents, but there is no need in the present case to explore the limits of the discretionary function exception.

The legislative history indices that the purpose of this statutory exception was to avoid any possibility that policy decisions of Congress, of the Executive, or of administrative agencies would be second-guessed by courts in the context of tort actions. There is no such danger in this case, for liability does not depend upon a judgment as to whether Government officials acted irresponsibly or illegally. Rather, once the creation of sonic booms is determined to be an activity as to which the doctrine of absolute liability applies, the only questions for the court relate to causation and damages. Whether or not the decision to fly a military aircraft over the respondents' property, at a given altitude and at a speed three times the speed of sound, was a decision at the "policy" or the "operational" level, the propriety of that decision is irrelevant to the question of liability in this case, and thus the discretionary function exception does not apply.

**Questions and Notes**

1. In Berkowitz v. United States, 108 S. Ct. 1954 (1988), the Supreme Court considered a polio victim's claim that the FDA and other federal agencies had negligently sanctioned the release of a defective lot of polio vaccine. The court rejected the government's argument that any actions of a regulatory agency should be immune. "[T]he discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 1959 (case remanded for further factual determination). *See* Note, 20 St.

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3. The policy behind the exception is explained by one leading commentator as follows: [A]most no one contends that there should be compensation for all the ills that result from governmental operations. No one, for instance, suggests that there should be liability for the injurious consequence of political blunders such as the unwise imposition of tariff duties or the premature lifting of OPA controls.... The separation of powers in our form of government and a decent regard by the judiciary for its co-ordinate branches should make courts reluctant to sit in judgment on the wisdom or reasonableness of legislative or executive political action. Moreover, courts are not particularly well suited to pursue the examinations that would be necessary to make this kind of judgment. *James, The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. Fla. L. Rev. 184 (1957).


3. A medical aide for the U.S. Navy got drunk and was seen in the hospital by fellow hospital employees, who saw a rifle in his duffel bag. They tried to detain him and get him treated, but the aide escaped. They then negligently failed to report his escape, and shortly thereafter the aide shot the plaintiff. Is the claim covered by the Federal Tort Claims Act? See *Sheridan v. United States*, 108 S. Ct. 2449 (1988).


**VANDERPOOL v. STATE**
672 P.2d 1153 (Okla. 1983)

LAVENDER, Justice

This is an appeal from an order of the trial court granting summary judgment in favor of defendants below, State of Oklahoma and the Oklahoma Historical Society.

The facts are not in dispute. Appellant and plaintiff below while employed as an office worker by the Oklahoma Historical Society at a state historical site known as Fort Washita was en route to deliver a telephone message. While traversing the grounds, she was struck in the eye by a rock thrown up by a "Brush Hog" mower operated by a fellow employee while mowing weeds on the site, resulting in permanent loss of sight in her right eye. Plaintiff alleged negligence in that a protective shield on the mower had been removed by an employee of the State making the brush hog defective and allowing objects to be propelled from the mower, thus rendering the mower totally unfit, unsafe and highly dangerous. Plaintiff seeks damages from the State and from the Society. The district court granted defendants' motion for summary judgment and dismissed the cause, holding that the doctrine of governmental immunity bars the action. Plaintiff appeals.

The nature, purposes, powers and duties of the Oklahoma Historical Society are statutory and are set forth in 53 O.S. 1981, § 1, *et seq*. For the purposes of this appeal, suffice it to say:

The Society is authorized to acquire, operate and maintain real and personal property pertaining and relating to the history of Oklahoma, for the benefit of the public, to purvey the same, and to charge reasonable visitation fees. The Society is empowered to grant concessions, leases or permits after competitive bids, and to develop an education program and service for the purpose of publishing facts regarding Oklahoma historic sites, buildings and property of state significance. Reasonable charges may be made for the dissemination of any such facts or information. The Society is declared to be an agency of the State.

Fort Washita was purchased by the Merrick Foundation of Ardmore, Oklahoma, in 1962 from Douglas and Billie Colbert, and deeded to the Oklahoma Historical Society in April, 1962. Since 1968, the Fort Washita historical site has been staffed, maintained and operated by the Oklahoma Historical Society through state appropriations. Its purpose is to tell that particular aspect of Oklahoma history — antebellum military history in the Indian Territory — to the general public.

The case before us places squarely in issue the doctrine of sovereign immunity and impels us to reexamine the viability and efficacy of that doctrine as applied to tort liability of the State, the counties and of other governmental entities within the State of Oklahoma.

The doctrine of sovereign immunity was first recognized in early England and required that the sovereign could not be sued without his permission. It was not so much a matter of the king being above the law, embodied in the maxim, "the king can do no wrong," as it was in the oft-expressed concept that the courts were a part of the

**VANDERPOOL v. STATE**
government and could not be used to enforce claims against the government — without the express permission of that government.

The doctrine found its way into the common law of the United States, and in 1821, in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257, Chief Justice Marshall applied it in suits against the United States, declaring that suits could not be commenced or prosecuted against the federal government without its consent. Subsequently, the doctrine was applied to the states. In applying the doctrine to local government entities, it was early recognized that local government entities occupy a dual character which affected its liability in tort. On the one hand it is a subdivision of the State, endowed with governmental and political powers, and charged with governmental functions and responsibilities. On the other hand, it is a corporate body, capable of much the same acts as a private corporation, and capable of much the same special and local interests and relations, not shared by the State at large. This duality resulted in the attempted differentiation between governmental and proprietary functions, the first generally protected by immunity, the second generally not. *Restatement of the Law of Torts*, 2d ed., § 895B; *City of Purcell v. Hubbard*, Okl., 401 P.2d 488 (1965); *Oklahoma City v. Baldwin*, 133 Okl. 289, 272 P. 453 (1928).

Meanwhile, the expansion of governmental functions with its attendant complexities gave rise to a plethora of governmental agencies whose purpose and function took on characteristics of both governmental and proprietary. Judicial attempts to grapple with what has become a multi-armed medusa has resulted in confusion and uncertainty all too painfully apparent to legal scholars, and an inability on the part of the courts to evolve any definitive guidelines for the demarcation between governmental and proprietary functions.

Reexamination of the soundness of the concept of governmental immunity in the light of the expanded role of government in today's society has, for various reasons, the enumeration of which would unduly lengthen this opinion, resulted in a retreat from the concept both legislatively and by case law.

In 1946, by the adoption of the Federal Tort Claims Act, Congress gave its consent for the United States to be sued in the district courts, and waived its governmental immunity, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Various states have enacted statutes imposing more or less general liability in tort on local governmental entities and abrogating governmental immunity, generally or under prescribed circumstances.

In 1957, the Florida Supreme Court in the case of *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957), declared that there was no valid distinction between governmental and proprietary functions and determined that under the facts of that case the municipality had no immunity from tort liability, thus presaging a steady flow of case law away from the concept of governmental immunity and abrogating it in whole or in part, until today, there are not more than five states, including Oklahoma, which have not abolished the doctrine or have not, in some manner, retreated from its universal application as an immutable concept of the law. *See Pruitt v. City of Rosedale*, Miss., 421 So. 2d 1046 (1982).

While Oklahoma has been more cautious in its retreat from governmental immunity as a bar to actions for tort, it has not been heretofore totally immune from inroads upon the doctrine.

In 1978, the Oklahoma Legislature enacted the Political Subdivision Tort Claims Act (51 O.S. 1981 § 151, *et seq.*) extending political subdivision tort liability for loss resulting from its torts or the torts of its employees acting within the scope of their employment or duties subject to the limitations specified in the Act. Included in the political subdivisions covered by the act are municipalities, school districts, counties and public trusts where a city, town, school district or county is a beneficiary.

In *Hershel v. University Hospital Foundation*, 610 P.2d 237 (Okl. 1980), we brought the application of the doctrine of sovereign immunity of the State of Oklahoma for tort into lock-step with the doctrine as it is applied to counties and municipalities where each is engaged in proprietary functions, thus holding that the State is liable for
injuries committed by the State arising from proprietary functions. We thus repudiated the idea the State may not be sued without its consent, express or implied.

We have further held that in certain instances where the State insures itself against liability under legislative authority to do so, governmental immunity is waived by implication to the extent of its insurance coverage. Schrom v. Oklahoma Industrial Development, Okl., 536 P.2d 904 (1975).

While in the case of Gable v. Salvation Army, 186 Okl. 687, 100 P.2d 244 (1940), the doctrine of charitable immunity and not governmental immunity was challenged and repudiated in a personal injury action brought against a charitable corporation for activities within the corporate powers and carried on to accomplish its charitable purposes, this Court did not hesitate to strike down the alleged immunity where upon critical examination the immunity was found to be unjust and unwarranted on every basis postulated in its favor.

We hold that the governmental-proprietary-function inquiry shall no longer be determinative in assessing liability for tort as to all levels of government in this State.

The doctrine of governmental immunity is hereby modified to bring it in line with what we perceive to be the more just and equitable view, and that which is in conformity with the generally prevailing view determined by the highest courts of our sister states.\(^1\)

\(^1\) In the absence of a statute granting partial or total immunity, a municipality has been held to be liable for its negligence in the same manner as a private person or corporation in the following cases:

- Jackson v. Florence, 294 Ala. 592, 320 So.2d 68 (1975);
- City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962);
- Peck v. Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967);
- Div. of Admin. v. Olliff, 350 So.2d 484 (Fla. App. 1977);
- Runnels v. Okamoto, 56 Haw. 1, 525 P.2d 1125 (1974);
- Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970);
- Klepinger v. Bd. of Comm’rs, 143 Ind. App. 155, 239 N.E.2d 160 (1968);
- Goodwin v. Bloomfield, 203 N.W. 2d 582 (Iowa)

(continued…)

In light of the foregoing, it is the finding and

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1973;
- Gorrell v. City of Parsons, 223 Kan. 645, 576 P.2d 616 (1978);
- Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964);
- Bd. of Comm’rs v. Splendour Shipping & Enterprises Co., Inc., 255 So.2d 869 (La. App. 1971);
- Davies v. Bath, 364 A.2d 1269 (Me. 1976);
- Hoffert v. Ovatonna Inn Towne Motel, Inc., 293 Minn. 220, 199 N.W.2d 158 (1972);
- Jones v. State Highway Comm’n, 557 S.W.2d 225 (Mo. 1977);
- Webber v. Anderson, 187 Nev. 9, 187 N.W.2d 290 (1971);
- Turner v. Stags, 89 Nev. 230, 510 P.2d 879 (1973);
- Merrill v. Manchester, 114 N.H. 722, 332 A.2d 378 (1974);
- Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975);
- Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.W.2d 63 (1960);
- Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974);
- Fry v. Williamsalane Park & Rec. Dist., 4 Or. App. 575, 481 P.2d 648 (1971);
- Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970);
- Beaumont v. Fuentez, 582 S.W.2d 221 (Tex. Civ. App. 1979);
- Kelso v. Tacoma, 63 Wash.2d 913, 390 P.2d 2 (1964);
- Long v. Weirton, 214 S.E.2d 832 (W. Va. 1975);
- Holysz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

Judicial abolition of governmental immunity as applied to municipalities has been decreed in the following states in the following cases:

- City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962);
- Stone v. Arizona Highway Comm’n, 93 Ariz. 384, 381 P.2d 107 (1963);
- Davies v. Bath, 364 A.2d 1269 (Me. 1976);
- Jones v. State Highway Comm’n, 557 S.W.2d 225 (Mo. 1977);
- Merrill v. Manchester, 114 N.H. 722, 332 A.2d 378 (1974);
- Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974);
- Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970);
- Long v. Weirton, 214 S.E.2d 832 (W. Va. 1975);
- Holysz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

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determination of this Court that:

A STATE OR LOCAL GOVERNMENTAL ENTITY IS LIABLE FOR MONEY DAMAGES FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY OR DEATH CAUSED BY THE NEGLIGENT OR WRONGFUL ACT OR OMISSION OF ANY GOVERNMENTAL ENTITY OR ANY EMPLOYEE OR AGENT OF THE GOVERNMENTAL ENTITY WHILE ACTING WITHIN THE SCOPE OF THE GOVERNMENTAL ENTITY’S OFFICE, AND PURPOSE FOR WHICH IT IS CREATED, UNDER CIRCUMSTANCES WHERE THE ENTITY, IF A PRIVATE PERSON, WOULD BE LIABLE TO THE CLAIMANT IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED.

PROVIDED, HOWEVER, SAID GOVERNMENTAL ENTITY IS IMMUNE FROM TORT LIABILITY FOR ACTS AND OMISSIONS CONSTITUTING

(A) THE EXERCISE OF A LEGISLATIVE OR JUDICIAL FUNCTION, AND

(B) THE EXERCISE OF AN ADMINISTRATIVE FUNCTION INVOLVING THE DETERMINATION OF FUNDAMENTAL GOVERNMENTAL POLICY.

AND FURTHER PROVIDED, THAT THE REPUTATION OF GENERAL TORT IMMUNITY AS HEREBIN ABOVE SET FORTH DOES NOT ESTABLISH LIABILITY FOR AN ACT OR OMISSION THAT IS OTHERWISE PRIVILEGED OR IS NOT TORTIOUS.2

In rendering this opinion, this Court is mindful of the oft-expressed view of this Court that if the doctrine of governmental immunity is to be totally abrogated, such should be done by the Legislature and not by the courts of this State. See Spaulding v. State ex rel. Dept. of Transp., Okl., 618 P.2d 397 (1980); Ruble v. Dept. of Transportation of the State of Oklahoma, 660 P.2d 1049 (1983). But having come to the conclusions that the judicially recognized doctrine of governmental immunity in its present state under the case law is no longer supportable in reason, justice or in light of the overwhelming trend against its recognition, our duty is clear. Where the reason for the rule no longer exists, that alone should toll its death knell.

Our decision is limited in its effect to the heretofore judicially created and recognized doctrine of governmental immunity and is not to be taken as in any way rendering ineffective any act of the Legislature in the area of governmental immunity whether presently in effect or hereafter passed.

We are aware of and sensitive to the effect that the immediate application of the rules of law herein enunciated would have upon the various governmental entities affected thereby. These are matters which lie within the sphere of the Legislature alone. We invoke its consideration of the many problems presented, including whether some or all of the governmental entities should be insulated from unlimited tort liability through the enactment of comprehensive or specific Tort Claims Acts which limit or prescribe conditions of liability, their insurance against loss, the maximum monetary liability to be allowed, or, indeed, whether it is the will of the People of the State of Oklahoma, as expressed through the Legislature, that governmental immunity be established by statute, and the terms and conditions thereof. Ample time for consideration of these matters must be afforded.

Except as to the case before us, this opinion shall be effective only as to those claims or causes of action which accrue after 12:01 A.M., October 1, 1985. Great Northern Railway Co. v. Sunburst Oil & Refining Company, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

All previous opinions of this Court which are in conflict with the views herein expressed are hereby overruled.

Reversed and remanded.

IRWIN, Justice, dissenting

As late as March 15, 1983, this court recognized the doctrine of governmental immunity and said that if sovereign immunity is to be

2 Enunciation of the foregoing rule is not to be construed as abrogating or modifying our holding in Nixon v. Oklahoma City, Okl., 555 P.2d 1283 (1976) pertaining to the non-liability of governmental sub-divisions including municipalities for exemplary damages, and the reasons therein set forth for denying such a recovery. Nixon comports with what appears to be the majority view. 1 A.L.R. 4th 454, et seq.

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abrogated, it should be done by the Legislature and not by the courts. *Ruble v. Department of
Transportation of the State of Oklahoma, Okl., 660 P.2d 1049 (1983).*

Various statutes have been enacted by the Legislature which demonstrate legislative intent that the State remain immune from suit on tort claims arising from governmental functions. Some of these are:

(A) 51 O.S. 1981, §§ 151-170, "The Political Subdivisions Tort Claims Act." This legislation became effective July 1, 1978, and abolished the sovereign/governmental immunity of municipalities, school districts, counties, and public trusts where a city, town, school district or county is a beneficiary; and all their institutions, instrumentalities or agencies, to the extent of the limitation on liability contained in § 154 of the Act. Governmental immunity continues to bar claims in excess of § 154 limitations. The Legislature could have included the State in this limited waiver of sovereign immunity but chose not to do.

(B) 47 O.S. 1981, §§ 157.1-158.2, Liability Insurance for State-owned motor vehicles and equipment. Sections 157.1 and 158.1 contain identical provisions: the governmental immunity of such department or state agency shall be waived only to the extent of the amount of insurance purchased. Such department or state agency shall be liable for negligence only while such insurance is in force, but in no case in any amount exceeding the limits of coverage or any such insurance.

(C) 74 O.S. 1981, §§ 20f-20h, which provide for the Legal Defense of State Officers and Employees Sued in Performance of Official Duties. This legislation requires the Attorney General or state agency staff attorneys to defend state officials who are sued upon causes of action arising from the performance of official duties. Under § 20h(A), the cost of the litigation is paid out of the Attorney General’s Evidence fund. However, § 20h(B) contains this proviso:

except that this act shall not be construed as authorizing the payment by the State of Oklahoma or any agency thereof of any judgment making an award of money damages.

In my opinion if sovereign immunity is to be abrogated, it should be done by the Legislature and not by the courts. If the Legislature had wanted to abrogate sovereign immunity, it would have done so. I respectfully dissent.

Questions and Notes

1. Remember that each state (and Native American tribe) is sovereign, and so the enactment of the Federal Tort Claims Act did not affect the individual states' or tribes' ability to claim sovereign immunity. However, as Vanderpool illustrates, the approach to waiving sovereign immunity often follows the general pattern established in the FTCA. Nonetheless, since such waivers are usually a creature of statute, the waiver (if there is one) must be carefully scrutinized to determine whether the grant is broader (or narrower) than the FTCA provides.

§ B. Family Immunities

**HOLODOOK v. SPENCER**


SAMUEL RABIN, Judge

* * *

The Holodook infant, at age four, allegedly darted out from between parked cars and was struck by an automobile driven by defendant. The infant, by his father, sued for personal injuries and his father brought a derivative action for both medical expenses and loss of services. The defendant then brought a third-party action for indemnification and apportionment of responsibility pursuant to *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, *supra* against the infant’s mother alleging that at the time of the accident the infant was in her custody and that she negligently failed to perform her parental

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duty to instruct, control and maintain her child. Defendant also counterclaimed for Dole apportionment and contribution against the infant's father alleging negligent failure to provide for the proper care, maintenance and supervision of his child. The infant's parents then moved to dismiss the third-party complaint and the counterclaim for failure to state a cause of action. Special Term denied the motion finding that Gelbman [Gelbman v. Gelbman, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 (1969)] had completely removed the bar against intrafamilial suits, that Dole permitted the claims over against the parents and that a parent's negligent supervision of his child is an actionable tort. The Appellate Division reversed, one Justice dissenting, stating that while Gelbman might be read to allow survival of the immunity rule in the area of parental functions, this was unnecessary since a parent's misjudgment in supervising his child does not amount to the breach of a legal duty and therefore is not a tort. As a consequence, the court granted the parents' motion to dismiss the Dole counterclaim and third-party complaint for failure to state a cause of action. Defendant, third-party plaintiff, appeals as of right and is opposed not only by the third-party defendant, Mrs. Holodook, but, unlike the Graney and Ryan cases, by the infant plaintiff and his father as well.

I. Background

As stated, in Gelbman we abrogated the defense of intrafamilial immunity for nonwillful torts.

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II. A parent's negligent failure to supervise his child is not presently recognized in New York as a tort, actionable by the child.

In abolishing the immunity defense, Gelbman allows suits between parents and children which would previously have been actionable between the parties absent the family relationship. It also opens for exploration the area of duties which exist because of the family relationship, and which, if breached, entail legal consequences. We ask whether a parent owes a legal duty to supervise his child giving rise to an action for damages for negligent performance of that duty, and if so, to whom that duty is owed — whether only to third parties who may be injured by a negligently supervised child, or whether the duty is also owed personally to the child to be protected by his parent from accidental injury.

Of the many duties arising from the parent-child relation, only very few give rise to legal consequences for their breach. Parents are obligated in accordance with their means to support and maintain their children — i.e., to furnish adequate food, clothing, shelter, medical attention and education. A parent's failure to observe minimum standards of care in performing these duties entails both remedial sanctions, such as the forfeiture of custody, and criminal sanctions. (See Family Ct. Act, § 1012, subd. f, par. (i), cl. (A); Penal Law, Consol. Laws, c. 40, § 260.05.) Parents are also obligated to provide proper guidance and guardianship of their children and are vulnerable to legal sanction for failure to meet minimum standards of care, for example, by the excessive infliction of corporal punishment, by the excessive use of drugs or alcohol, or by directing or authorizing a child under 16 to engage in an occupation involving substantial risk of danger to his life or health. (See Family Ct. Act, § 1012, subd. f, par. (i), cl. (B); Penal Law, § 260.10.) Parents are also obligated to supervise their children. Failure to supervise may entail legal consequence where injury to a third party results, for example, under circumstances where a parent negligently entrusts to his child a dangerous instrument, or an instrument potentially dangerous in the child's hands, so as to create an unreasonable risk to others.

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III. A parent's negligent failure to supervise his child should not now be recognized as a tort, actionable by the child.

The element which persistently stands out as we consider and contrast these cases and the implications of our decision on future cases, is the potential impact of Dole apportionment and contribution upon the fundamental family relation between parent and child. We can conceive of few, if any, accidental injuries to children which could not have been prevented, or substantially mitigated, by keener parental guidance, broader foresight, closer protection and better example. Indeed, a child could probably avoid most physical harm were he under his parents' constant surveillance
and instruction, though detriment more subtle and perhaps more harmful than physical injury might result. If the instant negligent supervision claims were allowed, it would be the rare parent who could not conceivably be called to account in the courts for his conduct toward his child, either by the child directly or by virtue of the procedures allowed by Dole.

* * *

The mutual obligations of the parent-child relation derive their strength and vitality from such forces as natural instinct, love and morality, and not from the essentially negative compulsions of the law's directives and sanctions. Courts and Legislatures have recognized this, and consequently have intruded only minimally upon the family relation. This is so, and properly, because the law's external coercive incentives are inappropriate to assuring performance of the subtle and shifting obligations of family. Of course, where the duty is ordinarily owed, apart from the family relation, the law will not withhold its sanctions merely because the parties are parent and child. This is the consequence of Gelbman. There, the duty to drive carefully was owed to the world at large and derived from the parties' relation as driver and passenger; that the parties were also child and parent was a fortuitous fact, irrelevant to both the duty and to a determination of its breach. By contrast, the cases before us involve a parent's duty to protect his child from injury—a duty which not only arises from the family relation but goes to its very heart. Gelbman did not pave the way for the law's superintendence of this duty.

Like the Appellate Divisions, which so thoughtfully approached these cases before they came to us (see, also, the analysis of the Second Department in the similar case of Lastowski v. Norge Coin-O-Matic, 44 A.D.2d 127, 355 N.Y.S.2d 432), we are not persuaded that a parent's failure to supervise his child is, or on balance should be, a tort actionable by the child. We hold, therefore, that the infant plaintiffs have no cause of action against their parents for negligent supervision in the cases before us. Because the secondary right to contribution in these cases is dependent upon the parent's alleged failure to perform a duty owing to the plaintiff child, the absence of the primary cause of action defeats the counterclaim and third-party complaint in Holodook and, if made, the cross claim in Ryan.

Accordingly, in each case, we affirm the order of the Appellate Division.

JASEN, Judge (dissenting)

I cannot ascribe to the policy reasons assigned by the majority for today's holding that negligent parental supervision is not actionable and that a negligent parent is not subject to a claim for apportionment of responsibility.

The parental duty to supervise was recognized in our early law (e.g., Longacre v. Yonkers R.R. Co., 236 N.Y. 119, 123, 140 N.E. 215, 216; see, also, Mangam v. Brooklyn R.R. Co., 38 N.Y. 455, 457) although usually in conjunction with the issue of the child's own negligence, commonly on the now disapproved imputed negligence theory (Ann., 51 A.L.R. 209, 223; cf. General Obligations Law, § 3-111). But it should not matter that the parental conduct under review has not previously been explicitly denominated a tort. Nor for that matter should, as is implied by the majority, violation of a statute be the sole measure of tortious parental conduct. The fundamental issue is whether, under all the circumstances, there has been a breach of the duty of care reasonably to be expected. Gelbman v. Gelbman, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 having removed the bar of intrafamily negligence immunity in New York, the duty of supervision persists unconfined by that defense. Where that duty is breached, only the most cogent reasons of public policy should warrant denial of a remedy and consequent deviation from the central principle of Anglo-American tort law, which is that wrongdoers should bear the losses they cause.

* * *

To the assertion that the duty to supervise cannot be delineated or applied, I answer that juries daily perform greater miracles. What a reasonable and prudent parent would have done in similar circumstances should be the test and jurors, many of them parents themselves, drawing on their life experiences, should not find the task insuperable....

Moreover, the concept of elemental fairness underlying our decisions in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 and Kelly v. Long Is. Light Co., 31 N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241 impels recognition of the tort. For as is so well illustrated by the Holodook case now before the

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court, what logic can there be for a rule that denies the negligent driver recourse against the parent whose responsibility for the child’s injuries may be greater?

... That the nonparent defendant should bear the full loss to which the parent has contributed runs counter to the evolution in our law which is toward a system of comparative fault.

BREITEL, C.J., and GABRIELLI, JONES and WACHTLER, JJ., concur with SAMUEL RABIN, J.
JASSEN, J., dissents and votes to reverse in a separate opinion in which STEVENS, J., concurs.

Questions and Notes

1. Which of the following caretakers would be entitled to parental immunity?
   a) grandmother who lives in the home and cares for the child without pay while the parents are at work;
   b) same as (a), except grandmother doesn’t live at home;
   c) an aunt who lives in the home but receives compensation for day care;
   d) a neighbor who cares for the child in exchange for similar services for her own child; and
   e) a day care center owned by a for profit corporation?

2. Although parents may be immune from suits by their children for negligent parenting, third parties may sue the parents if the third party is injured due to a parent’s negligence. However, such claims are limited; see RESTATEMENT (2D), TORTS:

§ 316. Duty of Parent to Control Conduct of Child

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

See Carey v. Reeve, 56 Wash. App. 18, 781 P.2d 904 (1989) (child’s parents sued playmate’s mother and grandparents for burn injuries sustained from allegedly negligent supervision). Is the imposition of this obligation inconsistent with the concern expressed elsewhere that courts ought to grant families some discretion in decisions regarding childrearing?

3. Other intra-family immunities (e.g., spousal immunity) have largely been eliminated. See, Carl Tobias, The Imminent Demise of Interspousal Immunity, 60 MONT. L. REV. 101 (1999).

4. Some jurisdictions have enacted statutes that make parents strictly liable for malicious torts committed by their children, but typically the statutes place modest upper limits on the parents’ liability; see, e.g., CAL. CIV. CODE § 1714.1. (maximum $25,000).

5. It is possible for courts or legislatures to reduce rather than eliminate the duty to use reasonable care. A prominent example is the "automobile guest statute," which has declined in popularity over the years. As automobiles came into general use, a variety of legislatures enacted statutes which lowered the standard of care drivers owed to “guest passengers” (defined as those who were transported gratuitously, rather than as fare-paying patrons of a railroad, taxicab, etc.). Failure to use ordinary care was insufficient to establish liability; instead, a plaintiff needed to establish that the driver acted with either willful, wanton, or reckless (or all three!) behavior regarding the passenger’s safety. The rationale for such statutes was to protect and encourage the hospitable sharing of automobiles and to prevent collusion between a driver and a passenger in seeking insurance awards.

More recently, these statutes have been superseded, either through legislative reform (as in Washington (RCW 46.080.080, repealed, Laws of 1974)) or through equal-protection constitutional challenges (as in Utah, Malan v. Lewis, 693 P.2d 661 (Utah 1984)). Only a few states still have such
§ C. Worker's Compensation

WOLF v. SCOTT WETZEL SERVICES, INC.
113 Wash. 2d 665, 782 P.2d 203 (1989)

ANDERSEN, Justice

In this case we are presented with the question of whether the Industrial Insurance Act bars an employee from bringing a civil action, outside the workers' compensation system, against the claims administrator of a self-insured employer for wrongful delay or termination of workers' compensation benefits.

The parties have stipulated to the following facts. On April 27, 1979, Scott Wolf injured his lower back while working as a truck driver for St. Regis Lumber Company in Marysville. While driving his truck near Mt. Vernon, he noticed that his load of lumber had shifted. He injured his lower back while attempting to lift a 4x16x22 timber back into place. Mr. Wolf's claim was administered by Scott Wetzel Services, Inc. Scott Wetzel Services contracted with St. Regis to manage its worker's compensation claims, for which St. Regis is self-insured pursuant to R.C.W. Chapter 51.14. From the date of his injury until November 7, 1979, Mr. Wolf received time loss compensation and payment of medical bills from St. Regis. On November 7, 1979, Gary Ladd of Scott Wetzel Services terminated time loss compensation to Mr. Wolf based on a report from Wolf's attending physician, Dr. Charles Anderson, that Mr. Wolf was capable of gainful employment. In January 1980, Mr. Wolf and his new treating physician, Dr. Richard McCollum, asked Scott Wetzel Services to pay for psychiatric treatment, suggesting that his back injury may have contributed to psychological problems. At that time, Mr. Ladd denied this request. On February 14, 1980, Mr. Ladd recommended to the Department of Labor & Industries that the claim be closed. The Department closed the claim by order dated that same day, February 14, 1980, with time loss compensation as paid and a permanent partial disability award for five percent of the maximum for unspecified disabilities. This was for low back injuries only and did not contemplate any award for psychological impairments. On appeal, the Board of Industrial Insurance Appeals reversed the Department by order dated June 25, 1980, re-opening the claim for all purposes, including psychiatric care. Since that time, Scott Wetzel Services has paid for Mr. Wolf's visits with his psychiatrist, Dr. Jules Sicotte, pursuant to the Board's order. At this time, Mr. Wolf's worker's compensation claim is still open. Mr. Wolf filed the present lawsuit [in Superior Court] in November 1982, alleging that the initial refusal by Scott Wetzel Services to pay for psychiatric care constitutes bad faith administration of his worker's compensation claim. The specific allegation in the complaint is that "within three years last past, defendant has, by many words, acts and deeds (of omission as well as commission), tortiously withheld and/or delayed plaintiff's workmen's compensation benefits proximately resulting in great injury to plaintiff...." Mr. Wolf's claims in this lawsuit are based only on the initial refusal to pay for psychiatric care and what Mr. Wolf believes was premature claim closure, and not on any other alleged conduct.

Scott Wetzel Services, Inc., which administered the self-insurer's workers' compensation claims (and which was the defendant below and is the respondent in this court), moved for summary judgment in the trial court. The motion was based on its claim that exclusive subject matter jurisdiction over disputes of this kind is vested in the Department of Labor and Industries. The Superior Court granted the motion and dismissed Mr. Wolf's claims for lack of subject matter jurisdiction. Mr. Wolf then sought direct review in this court. We agreed and retained the case for decision.¹

One principal issue is presented.

¹ RAP 4.2.

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Issue

Does the Industrial Insurance Act bar an employee from bringing a civil action against a company, which was hired by a self-insured employer to administer workers' compensation claims, for wrongful delay or termination of benefits?

Decision

Conclusion. The Industrial Insurance Act expressly provides a remedy within the workers' compensation system for wrongful delay or termination of workers' compensation benefits; that is the exclusive remedy for any such wrongful delay or termination.

It has long been recognized that the Industrial Insurance Act (IIA) (RCW Title 51) reflects a quid pro quo compromise between employees and employers. Under the IIA, the employer pays some claims for which it would not be liable under the common law in exchange for limited liability. The employee, on the other hand, gives up common law actions and remedies in exchange for sure and certain relief. As enacted by the Legislature, the IIA accomplishes this quid pro quo compromise through the following exclusive remedy provisions:

The state of Washington, ... exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided. (Italics ours.) R.C.W. 51.04.010 (part).

Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.... (Italics ours.) R.C.W. 51.32.010 (part).

Mr. Wolf contends in effect, however, that a civil action for wrongful delay or termination of workers' compensation benefits is not one of the actions abolished by these exclusive remedy provisions. Thus, according to his view, he should be able to maintain the present civil action in the Superior Court, quite apart from the statutory workers' compensation system. We disagree.

Several courts in other jurisdictions have addressed the issue of whether a civil cause of action lies for wrongful delay or termination of workers' compensation benefits. According to Professor Arthur Larson, a leading authority on workers' compensation law, and one whose teachings we have often quoted with approval, "[i]n the great majority of these cases, for one reason or another, a cause of action was held not to lie." (Italics ours.) 2A A. LARSON, WORKMEN'S COMPENSATION § 68.34(c), at 13-127 to 13-128 (1988).

Courts have held against the existence of such a cause of action for essentially two reasons. First, they have been persuaded by the policies underlying the exclusive remedy provisions of their state workers' compensation statutes. As Professor Larson explains in this connection:

The temptation to shatter the exclusiveness

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3 McCarthy, 110 Wash. 2d at 816, 759 P.2d 351; Stertz, 91 Wash. at 590, 158 P. 256.

4 McCarthy, at 816, 759 P.2d 351; Stertz, at 590-91, 158 P. 256.

5 See 2A A. LARSON, WORKMEN'S COMPENSATION § 68.34(c) (1988); Annot., Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal To Make Payments Due, 8 A.L.R. 4th 902 (1981).

principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality. (Footnote omitted.) 2A A. LARSON, § 68.34(c), at 13-145.

Second, courts have been greatly influenced by the fact that workers' compensation statutes typically contain provisions that impose a penalty for wrongful delay or termination of benefits. Courts generally take the view that the presence of such a penalty provision in the workers' compensation statute evinces a legislative intent that the remedy for wrongful delay or termination of benefits remain within the workers' compensation system. Significantly, as will be further discussed in some detail, our IIA contains just such a provision.

Consistent with the foregoing, the Illinois Supreme Court, after exhaustively reviewing the cases on the subject, aptly summarized the reasons for the majority view:

The rationale of these cases has typically been that the legislature, anticipating that bad faith in delaying payment of benefits would occur on occasion, provided a quick, simple and readily accessible method of resolving disputes over such payments without the proof and defenses incident [to a common law action], the intolerable delay in resolution of a lawsuit, economic waste to all and expense to the worker or the spectre of multiple jurisdictions being engaged in the resolution of the same basic questions with the possibility of conflicting results. (Citations and internal quotation marks omitted.) Robertson v. Travelers Ins. Co., 95 Ill. 2d 441, 448, 69 Ill. Dec. 954, 448 N.E.2d 866 (1983).

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7 2A A. LARSON § 68.34(c), at 13-145; Annot., 8 A.L.R. 4th 902, § 2.
8 2A A. LARSON § 68.34(c), at 13-145.
9 See RCW 51.48.017 (penalty of $500 or 25 percent of amount due assessed for unreasonable delay or refusal to pay benefits).

A minority of courts, on the other hand, have permitted a civil cause of action to lie for the wrongful delay or termination of benefits. It has been the reasoning of these courts that the injury at issue does not arise out of the employment relationship, but rather out of the worker's status as a claimant seeking benefits. They thus conclude that the injury complained of does not fall within the purview of the exclusive remedy provisions of the workers' compensation statute.

* * *

[The court further affirmed the finding that defendant did not engage in outrageous conduct. Such a finding would have allowed the plaintiff to sue outside the IIA.]

Mr. Wolf further argues, however, that the exclusive remedy provisions of the IIA apply only to an employer, not to a company hired by the employer to administer workers' compensation claims. Thus, as his argument goes, he should not be barred by the IIA from bringing a civil action against Scott Wetzel Services, Inc., the claims administrator hired by his employer. This argument lacks merit. It is true that the exclusive remedy provisions of the IIA appear to be directed to actions against the employer. It is also true that the IIA allows actions to be brought against "a third person, not in a worker's same employment". R.C.W. 51.24.030(1). However, as Judge Grosse of the Court of Appeals responded to a similar argument in his concurring opinion in Deeter, "[t]o permit a right of action against the claims adjuster merely because it is a third party would vitiate the policy of [the] IIA." Deeter v. Safeway Stores, Inc., 50 Wash. App. 67, 84, 747 P.2d 1103 (1987) (GROSSE, J., concurring), review denied, 110 Wash. 2d 1016 (1988).

* * *

Affirmed.

CALLOW, C.J., and DORE, BRACHTENBACH, DOLLIVER, UTTER, PEARSON, DURHAM and

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10 2A A. LARSON § 68.34(c), at 13-137 to 13-138.
13 See RCW 51.04.010, 51.32.010.

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SMITH, JJ., concur.

Questions and Notes

1. In *Birklid v. Boeing Co.*, 127 Wash.2d 853, 904 P.2d 278 (1995), the Washington Supreme Court permitted employees to sue for injuries received when employees breathed noxious fumes from phenol-formaldehyde resin. Prior to employing this chemical in building airplanes, Boeing had conducted preproduction testing, which was described by Dan Johnson, a Boeing supervisor: "During MR & D layup of phenolic pre-preg, obnoxious odors were present. Employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach. We anticipate this problem to increase as temperatures rise and production increases." When the production process began, several workers requested more effective ventilation, but Boeing declined to provide it, apparently for economic reasons. The court described what happened next: "As Boeing's supervisor predicted, when full production began, workers experienced dermatitis, rashes, nausea, headaches, and dizziness. Workers passed out on the job. Mr. Johnson said he knew these complaints were reactions to working with the phenolic material."

Under the standard announced in *Wolf*, would the employees have a tort claim against their employer, or is it barred by the statutory immunity under the worker's compensation statute?

2. In *Vallandigham v. Clover Park School Dist. No. 400*, 79 P.3d 18 (Wash. App. 2003), special education teachers sued their employer after suffering harm from intentional assaults by students. The teachers claimed that, based on the behavioral profile of the students, the abuse was certain to occur and fell with in the “deliberate intent” exception to the statutory immunity granted to employers. Do you think the teachers’ claims would survive the immunity defense?