Recent Decision

TAking the chartered route around municipal immunity —

James v. Prince George's County and Dawson v. Prince George's County

I. INTRODUCTION

In recent years, the doctrine of municipal immunity has been subject to considerable scrutiny and substantial change. Municipal governments originally enjoyed a qualified immunity from tort liability because the courts respected their overriding interest in preserving the security of the public fisc. Recently, however, courts have suggested that insulating municipalities from tort liability unjustly and unreasonably renders a tort victim remediless. In examining the propriety of continued adherence to the municipal immunity doctrine, the courts

1. For purpose of analysis, this Recent Decision does not distinguish the immunity accorded to county governments from the immunity granted to municipal governments. Because Maryland common law and statutory law generally treat these two subgovernments analogously, any reference, unless otherwise specified, presumes an application of that analysis to the other.

2. Legal scholars have long criticized the doctrine of governmental immunity as irrational and unworkable. See, e.g., 3 K. Davis, Administrative Law Treatise §§ 25.00-01 (1958 & Supp. 1980); 2 F. Harper & F. James, The Law of Torts §§ 29.1-10 (1956); Borchard, Governmental Responsibility in Tort VI, 36 Yale L.J. 1039 (1927); Borchard, Government Liability in Tort, 34 Yale L.J. 1 (1924); Fuller & Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941); Green, Freedom of Litigation (III): Municipal Liability for Torts, 38 Ill. L. Rev. 355 (1944); Comment, The State as Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland, 36 Md. L. Rev. 653 (1977). Although the courts have been slow to embrace the academic criticism of municipal immunity, they have begun to accept many of the basic rationales for eroding the municipality's insulation from liability. This trend is particularly prevalent in 42 U.S.C. § 1983 actions. For a general history of municipal liability under § 1983, see infra note 4.

3. Additionally, the courts are concerned with the need for administrative convenience and safeguards that prevent a chilling effect upon governmental decisionmaking. See W. Prosser, Handbook of the Law of Torts § 131, at 977-78 (4th ed. 1971).

4. Actions under 42 U.S.C. § 1983 illustrate the movement toward holding municipal governments susceptible to suit. These § 1983 suits permit aggrieved citizens to seek a remedy for a public employee's constitutional tort through an action against a municipality. Section 1983 today provides the aggrieved party the opportunity for compensatory or equitable relief when "persons" acting under color of state law deprive another of a federally protected right. For over a century, since the ratification of the Civil Rights Act of 1871, now codified as 42 U.S.C. §§ 1981-2000, municipalities enjoyed immunity from liability for violations of a citizen's constitutional and civil rights. This general rule applied even where
have become more sensitive to the tort victims' countervailing interests.\footnote{5} Two companion cases, *James v. Prince George's County* and *Dawson v. Prince George's County*\footnote{6} illustrate one of the ways in which Maryland's municipalities have struck the delicate balance between these competing interests.

In March of 1976, Douglas Dawson was a passenger in an automobile that collided with a fire truck and was propelled across an intersection into an electric pole.\footnote{7} Dawson alleged that a volunteer firefighter had operated a fire truck negligently while responding to an emergency call.\footnote{8} He brought suit against Prince George's County and the Volunteer Fire Department of West Lanham Hills, Maryland, Inc.,\footnote{9} seeking two million dollars in personal injury damages.\footnote{10}
In November of 1978, an automobile driven by Kenneth James collided with a Prince George's County ambulance. James alleged that the ambulance operator had driven negligently while responding to an emergency call. James brought suit against the county for one million dollars in personal and property damages. He and his wife jointly sought an additional twenty-five thousand dollar recovery for the loss of consortium. In both cases, Prince George's County asserted that despite the county charter's waiver of governmental immunity, the county could not be held liable for any damages resulting from the negligent conduct of its immune agents. The county alleged that its firefighters and ambulance drivers were "public officials" entitled to a qualified personal immunity for their acts. As a consequence, the county argued that under the principle of respondeat superior, it was charitable institution under Md. Ann. Code art. 41, § 103C(a)(7) (1978), it was immune from tort liability. West Lanham reasoned that since the seminal case of Perry v. House of Refuge, 63 Md. 20 (1885), charitable immunity has been firmly embedded in Maryland common law. Despite frequent attacks, the Maryland Court of Appeals persistently has reaffirmed this doctrine's fixed position in the common law. See Howard v. Bishop Byrne Council Home, Inc., 249 Md. 233, 238 A.2d 863 (1968). The James court remanded the action against the fire company for further findings of fact. 288 Md. at 315, 418 A.2d at 1185.

10. 288 Md. at 318, 418 A.2d at 1175. Although the Prince George's County Charter waives governmental immunity for actions sounding in tort, the charter expressly limits the county to "a maximum liability of Two-Hundred Fifty Thousand Dollars ($250,000) per individual, per occurrence," PRINCE GEORGE'S COUNTY, MD., CHARTER art. 10, § 1013 (1979). The Court of Appeals stated, however, that it need not consider the monetary limitation in this case because the limitation would arise only if the damages actually awarded exceeded the restriction. 288 Md. at 321 n.7, 418 A.2d at 1177 n.7.

11. See supra note 8.

12. 288 Md. at 318, 418 A.2d at 1175.

13. Prince George's County, in its amended charter, has waived its immunity from liability for tort claims:

The County may be sued in action sounding in tort by actions filed in the courts of the State of Maryland, or in the United States District Court for the District of Maryland, with a maximum liability of Two-Hundred Fifty Thousand Dollars ($250,000) per individual, per occurrence . . . to the extent of its insurance coverage, whichever may be greater. The County shall carry liability insurance to protect itself, its officers, agents, and employees. Nothing herein shall preclude the County from meeting the requirements of this section by a funded self-insurance program, and nothing herein shall be deemed to be a waiver of any charitable, governmental, or sovereign immunity which any officer, agent, or employee shall otherwise have, by reason of any Statute of the United States of America, public general law of the State of Maryland, or common law as determined by the Courts of the State of Maryland.


14. The court has long recognized that in order to ensure unencumbered governmental decisionmaking, public officers who exercise judgment in executing their duties must be granted a qualified immunity. In the absence of malice, public officials are personally immune from suit. See, e.g., Robinson v. Board of County Comm'rs, 262 Md. 342, 346-47, 278 A.2d 71, 74 (1971).

15. The term respondeat superior is used here interchangeably with the term vicarious
not vicariously liable for the plaintiffs' damages when the actual tortfeasor also would not be liable. In separate rulings, the Circuit Court for Prince George's County accepted each defendant's assertion and dismissed the actions.

The Maryland Court of Appeals reversed and remanded the judgments to the circuit court. The court grounded its decision on two alternative holdings. First, the court held that ambulance drivers and fire truck operators were not entitled to a qualified immunity for their alleged negligent conduct because they were not public officials executing discretionary duties. Second, the court held that even if the fire truck and ambulance drivers had been protected by a qualified immunity, the county would have been liable because it could not assert the immunity of its agent in a suit based on the agent's negligent conduct.

liability. Both these terms represent the principle "that, by reason of some relationship existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it." W. Prosser, supra note 3, § 69, at 458, quoted in James, 288 Md. at 332, 418 A.2d at 1182.

16. 288 Md. at 319, 418 A.2d at 1175. See infra notes 57-58 and accompanying text.
17. 288 Md. at 319, 418 A.2d at 1175.
18. Judge Digges, writing for the majority, was joined by five members of the court: Smith, Eldridge, Cole, Davidson, and Rodowsky. Only Chief Judge Murphy, who concurred in part and dissented in part, did not join the six-member majority.
19. In James, 288 Md. at 324, 418 A.2d at 1178, the court listed the following criteria for identifying a public official:

(i) The position was created by law and involves continuing and not occasional duties.
(ii) The holder performs an important public duty.
(iii) The position calls for the exercise of some portion of the sovereign power of the State.
(iv) The position has a definite term for which a commission is issued and a bond and an oath are required.

Quoting Duncan v. Koustenis, 260 Md. 90, 105, 271 A.2d 547, 550 (1970). While these factors are instructive in identifying characteristics of a public official, the court has recognized that they are not exhaustive. Indeed, the Duncan court acknowledged that in two limited circumstances a person would qualify as a public official despite failing to satisfy the above criteria. In particular, a public official also is one who exercises "a large portion of the sovereign power of government" or "who can be called on to exercise police powers as conservators of the peace" regardless of whether they satisfy the other criteria. 260 Md. at 106, 271 A.2d at 551 (emphasis in original).
20. 288 Md. at 328-29, 418 A.2d at 1180-81. For a discussion of what constitutes a discretionary duty, see infra text accompanying note 49.
21. 288 Md. at 331-32, 418 A.2d at 1182. Chief Judge Murphy disagreed with this holding because he claimed it controverted the unanimous decision in Bradshaw v. Prince George's County, 284 Md. 294, 396 A.2d 255 (1979), announced only one year earlier. James v. Prince George's County, 288 Md. at 338-40, 418 A.2d at 1185-87 (Murphy, C.J., concurring in part and dissenting in part). Chief Judge Murphy wrote the Bradshaw opinion.
II. HISTORICAL DEVELOPMENT OF GOVERNMENTAL IMMUNITY

The doctrine of sovereign immunity has its roots in the English common law principle that "the King can do no wrong" and thus cannot be held liable for his actions. The doctrine's acceptance in American jurisdictions, however, was not predicated upon this particular rationale. Instead, the states adopted sovereign immunity principally because of their legitimate overriding interest in protecting their treasuries from depletion by unpredictable tort claims.

In the early nineteenth century, the courts of most American jurisdictions adopted the common law doctrine of sovereign immunity; a majority of these courts later restricted or abolished it because of the hardship it imposed on tort victims. The Maryland Court of Appeals, however, consistently has maintained that the issues raised by the doctrine should be resolved by legislative, not judicial, action.

In fact, the Maryland legislature has paid close attention to this subject. In 1786, the Maryland General Assembly abolished the state's common law sovereign immunity. Nonetheless, a third of a century later, the legislature repealed the 1786 law, thereby reinstating the English common law principle. After being silent on this issue for over a century, the General Assembly in 1976 enacted a statute abrogating the state's immunity in contract, but not tort, actions.

22. The doctrine appears to date back as far as 1234. See 1 F. Pollack & F. Maitland, History of English Law 516 (2d ed. 1898) (citing cases holding that the King cannot be summoned by, or receive a command from, anyone).

23. In fact, the idea that the sovereign is unaccountable to its citizens is repugnant to a republican form of government. For this reason, application of sovereign immunity in the United States has been characterized as "one of the mysteries of legal evolution." Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 214, 359 P.2d 457, 459, 11 Cal. Rptr. 89, 91 (1961) (quoting Borchard, Government Liability in Tort, 34 Yale L.J. 1, 4 (1924)).

24. In Maryland, for example, the justifications include "fiscal considerations" and "administrative difficulties." Jekofsky v. State Rds. Comm'n, 264 Md. 471, 474, 287 A.2d 40, 42 (1972). See also W. Prosser, supra note 3, § 131, at 977-78.

25. See supra note 5.


27. 1786 Md. Laws ch. 53 provided in pertinent part that any citizen of this state, having any claim against this state for money, may commence and prosecute his action at law for the same against this state as defendant. The policy for this legislation was articulated in its preamble: "[I]t is reasonable that some mode should be adopted to afford such individuals [who have claims against the state] an opportunity of trying the justice of their claims at law."


29. During the 1974 Session, the General Assembly passed House Bill No. 5 which was
Although the Maryland legislature never has extended the state's immunity to Maryland's municipalities, the Maryland Court of Appeals has insulated the municipalities with a qualified common law immunity. This qualified immunity encompasses municipal functions that are governmental, as opposed to proprietary.20 The court has reasoned that "where . . . a municipality is engaged in the performance of a governmental function as an agent of the state, the same principle which protects the state from liability also protects the municipality."31

Under Maryland law government employees are also immune from tort liability if they are public officials who are performing discretionary duties when an accident occurs.32 Thus the victim of a municipal employee's negligence may have no tort remedy, for both the municipality and the individual tortfeasor may be immune.

Perhaps in response to this apparent injustice, the Maryland General Assembly has authorized chartered counties to waive their tort immunity up to $250,000 per individual, per occurrence.33 Although the Prince George's County Charter waived the county's immunity,34 in Bradshaw v. Prince George's County35 the court concluded that the waiver provision did not render the county liable for the negligence of its employees if the employees were personally immune.36 Just one year later, however, the James court effectively overruled Bradshaw,

designed to remove the sovereign immunity defense in ex contractu actions. However, the bill was vetoed by the Governor. The justifications offered for the veto were that the language was unclear, there were no means of establishing funds to satisfy judgments, certain defenses may not be allowed, and despite the words "ex contractu," the language of the bill might authorize some tort actions. Veto Message of May 31, 1974, 1974 Md. Laws 3087 (vetoing H.B. No. 5). The legislature, after a re-examination, passed a statute abrogating the State's immunity from suit in contract actions, but not tort actions. The Governor signed this statute into law. 1976 Md. Laws ch. 450.

30. Until the early twentieth century, Maryland courts held municipalities liable for conduct exercised within the municipalities' statutory or chartered authority because their duty of care was similar to that required of individuals and private corporations. Mayor of Baltimore v. Marriott, 9 Md. 160, 174 (1856); see, e.g., Mayor of Baltimore v. Bassett, 132 Md. 427, 430-31, 104 A. 39, 40 (1918); Taylor v. Mayor of Baltimore, 130 Md. 133, 147-48, 99 A. 900, 905 (1917). Since the 1920's, however, the courts have protected the municipalities from suit for "governmental," but not "proprietary," acts. See, e.g., Bradshaw v. Prince George's County, 284 Md. 294, 300, 396 A.2d 255, 259 (1979); Cox v. Anne Arundel County, 181 Md. 428, 431, 31 A.2d 179, 183 (1943); Mayor of Baltimore v. State, 173 Md. 267, 273, 195 A. 571, 574 (1937); Gold v. Mayor of Baltimore, 137 Md. 335, 340, 112 A. 588, 588-89 (1921). See RESTATEMENT (SECOND) OF TORTS § 895C comment b (1979).


32. James, 288 Md. at 323, 418 A.2d at 1178.


34. PRINCE GEORGE'S COUNTY, MD., CHARTER art. 10, § 1013 (1979); see supra note 13.


36. Id. at 302, 396 A.2d at 260.
holding that its former construction of the Prince George's waiver had been "too restrictive" and that the county would be liable for the torts of its employees, even if they were personally immune.\textsuperscript{37}

III. The \textit{Bradshaw} Decision

In \textit{Bradshaw}, two county police officers inspected a trash dumpster from which the plaintiff's son was hanging motionlessly. Detecting neither a heartbeat nor a pulse, the officers preliminarily concluded that the child might have been the victim of a crime. To preserve what they believed to be evidence of a crime, the police officers made no effort to remove or revive the child, who was declared dead upon arrival at the hospital.\textsuperscript{38} The mother brought suit against the county and the individual police officers, alleging that they negligently failed to administer proper care for the child when they arrived at the scene.\textsuperscript{39}

Writing for a unanimous court,\textsuperscript{40} Chief Judge Murphy held, first, that the police officers were entitled to a qualified personal immunity, and second, that the county charter did not waive the county's immunity when the alleged tortfeasors were themselves personally immune.\textsuperscript{41}

The threshold question for the court was to what extent the county intended to waive its tort immunity. Finding that the charter language was designed to render the county amenable to suit "in the same manner and to the same extent that any private person may be sued," the court noted that the doctrine of respondeat superior consequently would apply to the county, just as it would to a private employer.\textsuperscript{42} The court reasoned, however, that in this case the county might not be liable under respondeat superior, citing a series of decisions based on Maryland's intra-family immunity exception to the respondeat superior doctrine.\textsuperscript{43} Maryland's intra-family immunity exception permits an

\begin{itemize}
\item \textsuperscript{37} 288 Md. at 331-32, 418 A.2d at 1182.
\item \textsuperscript{38} 284 Md. at 296, 396 A.2d at 257.
\item \textsuperscript{39} \textit{Id}.
\item \textsuperscript{40} Chief Judge Murphy was joined by Judges Smith, Digges, Eldridge, Orth, and Cole. Only these six judges heard the case.
\item \textsuperscript{41} 284 Md. at 305, 396 A.2d at 262.
\item \textsuperscript{42} \textit{Id.} at 301, 396 A.2d at 259. Because the injury in \textit{Bradshaw} occurred in 1975, the court construed the language of the original charter:

\begin{quote}
The County may be sued in actions sounding in tort in the same manner and to the same extent that any private person may be sued. The County shall carry liability insurance with adequate limits to compensate for injury to persons or damage to property resulting from the negligence and other wrongdoings of its officers, agents, and employees. Nothing herein shall preclude the County from meeting the requirements of this section by a funded self-insurance program.
\end{quote}

\item \textsuperscript{43} 284 Md. at 301-02, 396 A.2d at 260.
\end{itemize}
employer to assert the immunity of his employee in a suit by a member of the employee's family. The Bradshaw court recognized an analogous exception, holding that the county could assert the public official immunity of its employees in suits based on allegations of their negligence. The court then concluded that the police officers were personally immune as public officials engaged in discretionary acts and the county therefore was not liable.

IV. THE JAMES DECISION

In deciding James, the court first considered whether the county would be liable under Bradshaw; i.e., whether the ambulance and fire truck drivers were personally immune. Although the court did not decide whether the drivers were public officials, it held that they were not performing discretionary acts when the accidents occurred and hence were not personally immune under Maryland law.

The court maintained that "an act falls within the discretionary function of a public official if the decision which involves an exercise of his personal judgment also includes, to more than a minor degree, the manner in which the police power of the state should be utilized." Applying this definition of a discretionary act to the facts in James, the court ruled that:

[The driving of an emergency vehicle such as an ambulance or fire truck requires, as does the driving of any automobile, that a number of decisions be made with regard to the manner of operation. Such decisions, however, involve to a minimal degree, if at all, the exercise of discretion with regard to the State's sovereignty.]

The court concluded that "the normal operation of a vehicle, including

45. The court apparently viewed its decision as an exercise in determining the intent of those who drafted the waiver provision in the county charter. See 284 Md. at 300-02, 396 A.2d at 259-60. Thus the court apparently assumed that the drafters intended the respondeat superior doctrine to govern these cases. It seems unlikely that the court imagined the drafters actually thought about the implications of Maryland's intra-family immunity exception. The court's opinion may more reasonably be explained as an attempt to apply Maryland's law in a manner that was consistent with the legislative intent to put the county in the position of a private individual.
46. 284 Md. at 305, 396 A.2d at 262.
47. 288 Md. at 322, 418 A.2d at 1177.
48. Id. at 325, 418 A.2d at 1179.
49. Id. at 327, 418 A.2d at 1180.
50. Id. at 327-28, 418 A.2d at 1180.
those on an emergency mission, is not ordinarily a discretionary act for which immunity will shield the driver from liability for negligence.\textsuperscript{51} Thus the driver, and hence the county, was not immune, even under Bradshaw.\textsuperscript{52}

The court went on to effectively overrule Bradshaw, deciding that its previous construction of the Prince George's County charter language was too restrictive\textsuperscript{53} and that, in any case, the doctrine of respondeat superior would make the county liable regardless of its employees' personal immunity.\textsuperscript{54} The court reiterated that the charter waiver rendered the county liable for conduct "which would be actionable if . . . done by a private person in a private setting."\textsuperscript{55} It said, however, that "a court should not, as we did in Bradshaw, treat Prince George's County as a private entity with public-official agents, but rather as a private entity utilizing private persons as its agents."\textsuperscript{56} Under this construction of the waiver provision, the personal immunity of the individual tortfeasor would be immaterial — for purposes of determining the county's liability, he would be treated as a private person, and the question of his public official immunity would not arise.

Further, the court said that even if the county's agents were not treated as private persons, the doctrine of respondeat superior should not permit the county to assert the immunity of its negligent employee.\textsuperscript{57} This understanding of respondeat superior, of course, contrasted with the court's apparent interpretation of that doctrine in Bradshaw.\textsuperscript{58}

The reasons offered by the James court for rejecting the Bradshaw

\textsuperscript{51} Id. at 328, 418 A.2d at 1180-81.
\textsuperscript{52} Id. at 328-29, 418 A.2d at 1181.
\textsuperscript{53} The court concluded:
that such a construction of [the charter's] language was too narrow in scope, and that the terminology chosen reflects a voluntary election by the people of the county to provide for liability on the part of their government notwithstanding the status or personal amenability to suit of the individual agent who commits the tort.
\textsuperscript{54} Id. at 329, 418 A.2d at 1181.
\textsuperscript{55} Id. at 331-32, 418 A.2d at 1182.
\textsuperscript{56} Id. at 330, 418 A.2d at 1181 (emphasis in original). The court expressly adopted this language from Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979) (en banc), cert. denied, 444 U.S. 1077 (1980).
\textsuperscript{57} 288 Md. at 331, 418 A.2d at 1182 (citing Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945)).
\textsuperscript{58} This portion of James suggested that the Bradshaw decision rested on the court's analysis of Maryland law regarding respondeat superior, not on the court's assumption that the drafters of the waiver had actually considered the implications of Maryland's intra-family immunity exception. 288 Md. at 332-33, 418 A.2d at 1182-83; see also supra note 45 and infra text accompanying notes 60-63.
view of respondeat superior are compelling. First, reliance on the intra-family immunity exception to respondeat superior is improvident because even this form of vicarious immunity confuses immunity from suit with lack of responsibility. Second, the intra-family immunity analogy is inappposite because the policy rationales underlying intra-family immunity are not comparable to the objectives of municipal immunity. The intra-family immunity doctrine is designed to preserve family harmony by forbidding suits between family members. That immunity was extended to the employer to protect the employee-family member. Otherwise, the employer could sue his employee for indemnification, thus circumventing the intra-family immunity and perhaps endangering the family relationship. In contrast, however, the purpose of municipal and public official immunities was not to preserve a special relationship between the tortfeasor and the tort victim, but to protect the government’s treasury and decisionmaking processes. Furthermore, the municipality cannot sue its personally immune agents for indemnification. There thus is no reason to impute the public official’s immunity to the municipality.

After re-evaluating the Bradshaw understanding of derivative liability, Judge Digges, writing for the majority, announced that he was modifying the holding in Bradshaw to arrive at the proper construction of the law. Judge Digges concluded that “the language waiving im-

59. See supra note 15.
60. See W. Prosser, supra note 3, § 122, at 869. Furthermore, the intra-family immunity doctrine itself has been stridently criticized. Professors Harper and James argue that the abrogation of the intra-family immunity principle “seems eminently desirable.” 2 F. Harper & F. James, supra note 2, § 8.10, at 645-46. Maryland courts are beginning to re-evaluate the propriety of the doctrine. See Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978); see also Recent Decision, Interspousal Immunity in Maryland, 41 Md. L. Rev. 181 (1981).
61. 288 Md. at 333, 418 A.2d at 1183.
62. Id.
63. Id.
64. Id.
65. Chief Judge Murphy dissented from the majority’s alternative holding, reasoning that Bradshaw’s limited interpretation of the charter was proper because, among other reasons, a statutory provision in derogation of the common law is to be strictly construed. 288 Md. at 399, 418 A.2d at 1186 (Murphy, C.J., concurring in part and dissenting in part). In Bradshaw, the Chief Judge had noted that a strict construction of the charter would interpret the waiver in a very limited fashion. 284 Md. at 302, 396 A.2d at 260. He believed, therefore, that the Bradshaw interpretation of the charter was correct; i.e., the municipality could invoke the immunity of its officials.

munity for tort liability set forth in the Prince George’s County Charter . . . makes the county liable for the negligent conduct of all of its employees occurring in the course of their employment, without regard to their status as public officials.”

In a footnote the court observed that “certain discretionary policymaking, planning or judgmental governmental functions . . . cannot be the subject of traditional tort liability and thus remain immune from scrutiny by judge or jury as to [their] wisdom.” The court did not fully explain what governmental operations would retain this immunity, but it did cite a number of cases suggesting that courts should not review broad governmental policy decisions for reasonableness. This limited immunity seems to be a function of the separation of powers doctrine. Such a limited immunity appears justified. As Justice Jackson observed, “[o]f course, it is not a tort for government to govern.”

V. THE PROBLEM THAT PERSISTS AFTER JAMES

By construing the county’s waiver in this fashion, the court ensured that tort victims will be compensated when they are injured through the negligence of Prince George’s County’s employees. But what about the victims of negligence by employees of other counties and municipalities? Such victims may be remediless unless the county or municipality has waived its immunity in tort. All Maryland counties and municipalities probably have the authority to waive their immunity as an incident of their power to provide for the general welfare.

66. 288 Md. at 336, 418 A.2d at 1184. The court presumably did not mean to suggest that the tortfeasor’s status as a public official or the discretionary nature of his or her functions are to be ignored. These factors are certainly probative as to the reasonableness of one’s conduct. This assessment, of course, would include the training of the tortfeasor, the nature of the act, and the customs of those in a similar position. Further, as is true generally in tort law, if the tortfeasor’s public position so requires, he or she may be held to a higher standard of care. See id. at 331 n.13, 418 A.2d at 1182 n.13.

67. 288 Md. at 336 n.15, 418 A.2d at 1184 n.15.


69. Apparently, the James court approved of the Florida court’s application of the separation of powers doctrine in this context. In Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), the court found that the separation of powers principle “will not permit the substitution of the decision by a judge or jury for the decision of a governmental body as to the reasonableness of planning activity conducted by that body.” Id. at 1018.

70. Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting), quoted in 288 Md. at 336 n.15, 418 A.2d at 1184 n.15.

71. Bradshaw v. Prince George’s County, 284 Md. at 297-99, 396 A.2d at 258-59.
However, Prince George's is the only county that has done so.\textsuperscript{72}

The court should abrogate municipal immunity altogether, because the immunity unfairly penalizes tort victims and because the court should not defer to the legislature in this context. Deference to the legislature regarding state immunity is rational because of the unique role the General Assembly has played in insulating the state from liability.\textsuperscript{73} Yet municipal immunity, unlike state sovereign immunity, was judicially created.\textsuperscript{74} Because municipal immunity has retained its common law status, the Maryland Court of Appeals may properly retract it without awaiting legislative action.

Furthermore, it is simply unfair to insulate municipalities from liability because holding them immune often will render a tort victim remediless. The victim of a municipal employee's negligence often will be unable to recover from the individual tortfeasor — the victim may be unable to identify the tortfeasor; the tortfeasor may be judgment proof; or he may be personally immune.\textsuperscript{75} In such cases the entire cost of the accident will fall on the victim if the municipality is immune. This injustice is unnecessary. It has been justified as a means of protecting the public fisc, but municipalities can protect themselves from liability through programs designed to foster safe conduct by their employees; perhaps through legislation setting limits on their liability;\textsuperscript{76}

Chartered counties are empowered only to the extent that the General Assembly expressly, or by necessary implication, delegates such authority. \textit{Id.} Although the Express Powers Act specifically provided for a charter county's waiver of its sovereign immunity in tort actions, MD. ANN. CODE art. 25A, § 5(C) (1973 & Cum. Supp. 1980), that act did not become effective until July 1, 1976. However, article 25A, § 5(S) of the Maryland Code provides that chartered counties may enact "such ordinances as may be deemed expedient in maintaining the peace, good government, health, and welfare of the county." \textit{Id.} § 5(S). Thus, the \textit{Bradshaw} court concluded that by necessary implication, the waiver provision in the county charter prior to its amendment to conform to the Express Powers Act was a proper exercise of the county's authority. 284 Md. at 297-99, 396 A.2d at 258-59.


\textsuperscript{72} PRINCE GEORGE'S COUNTY, MD., CHARTER art. 10, § 1013 (1979), quoted at note 13 supra.

\textsuperscript{73} See \textit{supra} notes 27-29 and accompanying text.

\textsuperscript{74} See \textit{supra} note 30.


\textsuperscript{76} Assuming the court did abrogate the municipal immunity, probably neither the counties nor the municipalities would have the authority to limit their liability without the General Assembly's authorization, because limiting tort liability is not an express power and probably not an implied power delegated to counties and municipalities. MD. ANN. CODE arts. 23A, 25, and 25A (1973 & Cum. Supp. 1980). Just as the Maryland General Assembly limited the chartered counties' liability under the Express Powers Act, \textit{id.} art. 25A. § 5(C),
and at any rate, through insurance. The cost of accidents, i.e., the cost of insurance, can thus be spread among all taxpayers, not borne exclusively by the accident victims, who seldom will be insured adequately or at all against injury caused by others' negligence. It seems particularly appropriate to spread this cost in this fashion, because all taxpayers enjoy the benefits of municipal activity and hence arguably ought to share the incidental risks of that activity. Finally, as Professor Borchard argued, governmental immunity is inconsistent with a fundamental principle of American democracy — that government should be responsible to the governed. 77

VI. CONCLUSION

The James court sensibly construed the Prince George's County Charter. Unfortunately it did not take the next step, abrogating entirely the common law municipal immunity. The Court of Appeals is protecting municipalities, which are in a good position to protect themselves, instead of the tort victim, who is not. At the next opportunity, the court should abolish Maryland's common law municipal immunity.

presumably the legislature would also authorize all counties and municipalities to limit their liability if the court totally abolished the common law doctrine of municipal immunity.

77. See Borchard, supra note 26 at 4.