

Summer 1971

The Tort Liability of the State of Indiana: Perkins v. State

Edward F. McCrea

Indiana University School of Law

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [State and Local Government Law Commons](#), and the [Torts Commons](#)

Recommended Citation

McCrea, Edward F. (1971) "The Tort Liability of the State of Indiana: Perkins v. State," *Indiana Law Journal*: Vol. 46 : Iss. 4 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol46/iss4/7>

This Special Feature is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

RECENT DEVELOPMENTS

THE TORT LIABILITY OF THE STATE OF INDIANA: PERKINS v. STATE

In *Perkins v. State*¹ the Indiana Supreme Court held that the doctrine of sovereign immunity² did not bar plaintiffs' damage action against the state for illness allegedly caused by a contaminated lake in a state park. Although the court held that the state is not immune for non-governmental functions,³ it refused to eliminate the doctrine entirely.⁴

1. —Ind.—, 251 N.E.2d 30 (1969) [Hereinafter cited as *Perkins*.]

2. The doctrine of sovereign immunity, simply stated, is that a government cannot be sued without its consent. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 996 (3d ed. 1964) states:

While these [immunities of governments] may or may not have had their roots in Roman law, the origin of the idea underlying them in the common law seems to have been the theory, allied with the divine right of Kings, that "the king can do no wrong," together with the feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued as of right in his own courts.

3. For cases upholding the doctrine of sovereign immunity, see *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459 (1945); *Bracht v. Conservation Comm'n.*, 118 Ind. App. 77, 76 N.E.2d 848 (1947); *Busby v. Indiana Bd. of Agr.*, 85 Ind. App. 572, 154 N.E. 883 (1927); *City of Indianapolis v. Indianapolis Water Co.*, 185 Ind. 227, 113 N.E. 369 (1916); *State v. Mutual Life Ins. Co.*, 175 Ind. 59, 93 N.E. 213 (1910); *May v. State*, 133 Ind. 567, 33 N.E. 352 (1893); *Pittsburgh, C., C. & St. L. Ry. v. Iddings*, 28 Ind. App. 504, 62 N.E. 112 (1901); *State v. Young*, 238 Ind. 452, 151 N.E.2d 697 (1958); *State v. Patten*, 209 Ind. 482, 199 N.E. 577 (1936); *Hogston v. Bell*, 185 Ind. 536, 112 N.E. 883 (1916); *State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N.E. 379 (1886); *State ex rel. Woodward v. Smith*, 85 Ind. App. 56, 152 N.E. 836 (1926); *State ex rel. Fry v. Superior Court*, 205 Ind. 355, 186 N.E. 310 (1933); *State ex rel. Hord v. Board of Comm'rs.*, 101 Ind. 69 (1884). The appellate court decision in *Perkins*, reversed by the supreme court, approved the following language from the case of *Bracht v. Conservation Comm'n.*, 118 Ind. App. 77, 83, 76 N.E.2d 848, 850 (1947):

Appellant has presented a very forceful argument and one in which there may be merit; however, the reasons urged by the appellant are proper ones to be presented to the legislature in behalf of legislation allowing tort actions to be brought against state agencies and departments, but they cannot be considered by the courts in view of the law as written in Section 24, Article 4 of the Indiana Constitution. . . .

—Ind. App.—, 244 N.E.2d 667, 669 (1969) (emphasis in original).

4. Experience demonstrates that distinguishing governmental from proprietary functions does not establish sufficient guidelines. Complaining about the "legalistic" distinctions produced by the governmental-proprietary rule, Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 442 (1941). [hereinafter referred to as *Tort Liability*], summarized:

After an enormous amount of litigation on what is a proprietary function or a governmental function, these may now be classified within broad limits: activities of fire prevention, police, education, and general government are governmental; municipal railways, airports, gas, water, and light systems are

Before the *Perkins* decision, article IV, § 24 of the Constitution of Indiana was interpreted as preventing nonconsensual suits against the state.⁵ To date the legislature has passed only two acts significantly affecting state sovereign immunity;⁶ one involves contract claims,⁷ and

proprietary; activities involving streets, sidewalks, playgrounds, bridges, viaducts, and sewers are governmental in some jurisdictions and proprietary in others. Criteria for determination of these classes of functions are neither certain nor carefully followed by the courts.

If the act benefits the public in general, it is a governmental function; if it serves the private interests of the municipal corporation, it is a proprietary function. This distinction has allowed courts to evade the harsh effects of total immunity, but borderline cases have made the distinction a troublesome tool to use. To assist in this definitional dilemma, courts often apply the test that pecuniary profit to the government renders the function proprietary. The theory is that when the government makes a profit from its activity, it is competing with free enterprise and performing a function which could be accomplished by private persons or corporations, and that in these situations, the government should be held responsible to the same extent that a private corporation would be. In contrast to this, the judicial rationale for immunity in the performance of governmental functions is that when a city or town is acting in such capacity, it is but an arm of the sovereign state and is therefore not liable. For the view that the city shares in the sovereignty of the state only when performing governmental functions, see Note, *Governmental Tort Liability in Indiana*, 23 IND. L.J. 468, 476 (1948). See also, Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 131 (1924) [hereinafter cited as *Governmental Liability*] and *infra* note 37.

5. IND. CONST. art IV, § 24, states:

Suits against the state.—Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.

6. Of less importance are three acts passed in 1933 which allow suits against the state in limited situations. IND. ANN. STAT. § 2-229 (Burns Repl. 1946) allows an individual to make the state of Indiana a party defendant to an action to foreclose a mortgage or to quiet title to real estate. IND. ANN. STAT. § 64-2614(a) (Burns Repl. 1961) allows actions against the state to recover improperly paid taxes (interpreted by the United States Supreme Court, in *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459 (1945), as not allowing a suit in federal court). IND. ANN. STAT. § 27-120 (Burns Repl. 1960), the Indiana "Drainage Statute," was first interpreted as giving the state's consent to be sued [*see State v. Roberts*, 226 Ind. 106, 76 N.E.2d 832 (1948) and *Myers v. Sell*, 226 Ind. 608, 81 N.E.2d 846 (1948)], but later the court held consent was required in addition to the "Drainage Statute" [*see State v. Pulaski Circuit Court*, 231 Ind. 245, 108 N.E.2d 185 (1952)]. In 1945, the legislature passed a municipal liability act, IND. ANN. STAT. § 47-2030a (Burns Repl. 1965), waiving immunity where the city negligently operates a police or fire department vehicle. Finally, IND. ANN. STAT. § 3-1711 (Burns Repl. 1968) allows a person having interest in any land taken for "public use" to bring suit for the value of such land.

7. IND. ANN. STAT. § 3-3401 (Burns Repl. 1968). However, this Act was held inapplicable to tort actions. *Michigan Cent. R.R. v. State*, 85 Ind. App. 557, 155 N.E. 50 (1927); *State v. Mutual Life Ins. Co.*, 175 Ind. 59, 93 N.E. 213 (1910). In 1959, the Indiana legislature passed S. B. 63, which provided for the prosecution of tort claims against the state without restriction as to the type of function involved. The Governor, however, vetoed this piece of legislation. S.B. 63, Ind. Gen. Ass'y. 91st Reg. Sess., vol. I (1959), reads:

Any person, firm or corporation may prosecute a claim in tort arising after the effective date of this act, against any unit of government of the State of Indiana. Such claim shall be prosecuted in the circuit or superior court either

the other enabled state or municipal corporations to purchase liability insurance.⁸

Although the courts initially had difficulty reconciling the purchase of insurance with a disclaimer of liability, they retained governmental immunity by holding that insurance did not constitute a waiver of it.⁹ In 1960, the Indiana Supreme Court reversed the earlier insurance cases in *Flowers v. Board of Commissioners*.¹⁰ In finding the county liable for the negligent operation of a skating rink, the court held that sovereign immunity is not a defense where insurance has been purchased.¹¹ After *Flowers*, both cities and counties were held liable for their proprietary functions, and any unit of government which purchased insurance for governmental functions "might" be held as having waived its immunity.¹²

In *Brinkman v. City of Indianapolis*¹³ and *Klepinger v. Board of Commissioners*,¹⁴ the Indiana Appellate Court abrogated immunity for cities and counties, thereby solving the problem of distinguishing between proprietary and governmental functions and making unnecessary the somewhat strained interpretation of the 1941 Insurance Act announced in *Flowers*. The *Brinkman* case involved an allegation of wrongful death

of the county of the residence of the claimant or of the county where the claim arose.

The language of the Federal Tort Claims Act, 28 U.S.C. § 2674 (1964), the New York Court of Claims Act, N.Y. Ct. Cl. Act § 8 (McKinney 1963); and Hawaii's State Tort Liability Act, HAWAII REV. LAWS § 662-2 (1968), is very similar to that of S.B. 63. Two states, Utah [UTAH CODE ANN. §§ 63-30-1 to -34 (1965)] and California [CAL. GOV'T. CODE § 835 (West 1966)] enacted tort claims acts which list the specific instances when the state shall be liable.

8. IND. ANN. STAT. § 39-1819 (Burns Repl. 1952).

9. In *Hummer v. School City*, 124 Ind. App. 30, 112 N.E.2d 891 (1953), the plaintiff contended that the school city waived its immunity by purchasing liability insurance under the 1941 Insurance Act. The court rejected this argument, holding that the Act did not provide for insuring the governmental unit, but only its officers and employees. See Note, *The Decline of Sovereign Immunity in Indiana*, 36 IND. L.J. 223 (1961) [hereinafter cited as *Decline*].

10. 240 Ind. 668, 168 N.E.2d 224 (1960) [hereinafter cited as *Flowers*].

11. *Id.* at 227. A review of the *Flowers* decision concluded that it appeared clear that the state would be liable, to the extent of any insurance coverage, for non-governmental torts and that the language of *Flowers* indicated that the state might be liable for governmental functions if insurance had been procured pursuant to the statute. See *Decline*, *supra* note 9, at 235.

12. See *Decline*, *supra* note 9, at 235-36:

If the state is not to be held in any case where liability insurance is not procured, the law is placing an unjust premium on the absence of insurance. A unit of government could escape all liability and save the insurance costs by merely not purchasing insurance. . . . One additional problem . . . [is that] . . . [t]he state or municipality could purchase ridiculously low policies and insulate themselves against liability for a greater amount under the provision.

13. 141 Ind. App. 662, 231 N.E.2d 1967), *transfer denied* Aug. 7, 1968 [hereinafter cited as *Brinkman*].

14. 143 Ind. App. 155, 239 N.E.2d 160 (1968), *transfer denied* Nov. 4, 1968 [hereinafter cited as *Klepinger*].

negligently caused by an Indianapolis police officer while on duty. Adopting the proprietary-governmental distinction, the plaintiff contended that the officer was engaged in a proprietary function at the time of the deceased's arrest, and, therefore, the city should not be shielded by immunity. Faced with Indiana precedent which labeled police activities as governmental,¹⁵ the appellate court eliminated the distinction, thus ending all *municipal* immunity.¹⁶

In *Klepinger*, the plaintiff's injury was allegedly caused by the negligent maintenance of a county bridge, which, under Indiana precedent,¹⁷ was a proprietary function. The appellate court could have held the county liable because of the proprietary nature of the function. However, the court went further by stating that since *Brinkman* the governmental-proprietary distinction, as it applied to counties, should be ignored.¹⁸

Consequently, the *Perkins* court was confronted with a trend toward the total elimination of governmental immunity in Indiana. Nevertheless, the *Perkins* court limited its holding to proprietary functions.¹⁹

15. *Morris v. Switzerland County*, 131 Ind. 285, 31 N.E. 77 (1892); *Smith v. City of Gary*, 93 Ind. App. 675, 178 N.E. 572 (1931); *City of Lafayette v. Timberlake*, 88 Ind. 330 (1882); *Vaughtman v. Town of Waterloo*, 14 Ind. App. 649, 43 N.E. 476 (1895).

16. The court said, 141 Ind. App. at 665, 231 N.E.2d at 171-72:

The governmental-proprietary rule, however, often produces legalistic distinctions that are only remotely related to the fundamental considerations of municipal tort responsibility. . . . [A]fter careful consideration we are of the opinion that the doctrine of sovereign immunity has no proper place in the administration of a municipal corporation.

17. *City of Kokomo v. Loy*, 185 Ind. 18, 112 N.E. 994 (1916); *Aiken v. City of Columbus*, 167 Ind. 139, 78 N.E. 657 (1906).

18. The court said in *Klepinger*:

We are of the opinion that that the decision and reasoning of the *Brinkman* case should be applied to the counties of Indiana and, therefore, hold that the doctrine of governmental immunity as it applies to the counties of Indiana is hereby abrogated and that counties may now be held liable for the torts of its [sic] officers, agents or employees. . . . It is further our opinion that in determining the tort liability of a county or a city, our courts can now ignore the governmental-proprietary distinction and render judgments and assess damages without regard to the policy limits of any insurance carried by the city or county.

143 Ind. App. at 201, 239 N.E.2d at 173.

19. After noting that tort immunity for charities and for hospitals has been "whittled down by an enlightened judiciary," —Ind. at —, 251 N.E.2d at 33, the *Perkins* court approvingly refers to several legal scholars who have criticized the doctrine of sovereign immunity. Among the articles cited by the court is the work of Professor Edwin Borchard, the leading critic of sovereign immunity. See *Governmental Liability*, *supra* note 4.

Professor Borchard sharply criticizes the distinction between proprietary and governmental functions:

In few, if any, branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases, and terminology, with

The court considered *Brinkman* and *Klepinger* as having held municipalities liable at least for their proprietary functions.²⁰ This reading appears perplexingly restrictive unless the court reached the unlikely conclusion that the police officer's conduct in *Brinkman* was a proprietary function. Another remote possibility for the restrictive reading may be a result of the fact that the *Brinkman* court did not expressly determine that the officer's conduct was governmental.²¹ Yet, both possibilities conflict with the express language in *Brinkman* and *Klepinger* to the effect that city and county activities, either proprietary or governmental, were subject to tort liability.²²

The statement in *Perkins* that all governmental units must be treated alike adds to the confusion of the holding.²³ If the court is going to treat all units of government alike, it must either abrogate immunity for all

the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy. This is notably the case in the effort to apply the supposedly settled rule that the municipal corporation is not liable for torts committed by its agents in the performance of governmental, political or public functions, whereas it is liable when the tort is committed in the performance of corporate, private or ministerial functions.

Id. at 129.

While it is true that he discusses the distinction as it relates to municipalities and not the state government, Borchard makes it clear that all levels of government should be treated the same:

. . . with the deflation of the conception of sovereignty and the realization that all political group organizations, from the smallest to the largest, are merely means adopted by the people to enable them to perform certain public services, that there is no sound reason either for differentiating their responsibility according to size or form or organization or to grant them immunity for the torts of their agents and employees.

Id. at 45.

20. The court stated:

The courts of this state have long held that a municipality, an instrument of the state government, is liable at least for its proprietary acts where someone has been tortiously injured. . . . These governmental agencies [counties and municipalities] are in reality a part of the state government. They are supported by taxes and they have been made liable for their tortious acts in the area of proprietary businesses operated by those governmental agencies.

—*Ind.* at —, 251 N.E.2d at 34.

At first impression this statement appears to emphasize cases decided prior to *Brinkman* and *Klepinger*, namely: *City of Indianapolis v. Butzke*, 217 Ind. 203, 26 N.E.2d 754 (1940), *rehearing denied*, 217 Ind. 214, 27 N.E.2d 350 (1940); *City of Evansville v. Blue*, 212 Ind. 130, 8 N.E.2d 224 (1937); *City of Kokomo v. Loy*, 185 Ind. 18, 112 N.E. 994 (1916).

21. See note 15 *supra* & text accompanying.

22. See notes 16 & 18 *supra*.

23. The court said, —*Ind.* at —, 251 N.E.2d at 34-35:

If the cities, towns and lesser agencies of the state are liable under a principle of law, consistently then the state, as we have previously said, should be liable for its acts under like circumstances. . . . It is of little concern to the injured party whether the injury was caused by a city, county or state. We feel, to be consistent, the common law principle should be applicable to all governmental units alike.

state functions or revive the proprietary-governmental distinction for cities and counties. If in fact the latter was what the court sought to do, then the subtle rejection of the language found in *Brinkman* and *Klepinger* appears to be an unnecessary method of accomplishing the task.²⁴ If the *Perkins* court intended for *Brinkman* and *Klepinger* to remain unaltered, the result is inconsistent with its earlier statement, since all units of government are not being treated equally.

Many of the policies concerning immunity for governmental functions were not adequately dealt with in the *Perkins* opinion. The most persistent argument supporting sovereign immunity is that to allow all tort claims may deplete the treasury to a point where the proper performance of governmental duties will be impaired.²⁵ Such a financial fear may be partially justified, especially if the courts were to adopt a wholesale abrogation of immunity. Although liability insurance is available to spread the cost of state tort liability,²⁶ coverage may not always be available for all state functions, such as highway design, construction, maintenance and repair where the exposure to risks is extensive and difficult to predict. Even if the risk could be estimated, the premium

24. The court in *Perkins*, said: "There may be some logical reason why a government should not be liable for its governmental actions and functions." —Ind. at—, 251 N.E.2d at 35 [emphasis added]. By saying "a government" instead of "a state government," the *Perkins* court left open the possibility that it had reservations about the total abrogation of immunity made by the appellate court for cities and counties in *Brinkman* and in *Klepinger*. In *Gross Income Tax Div. v. City of Goshen*, —Ind.—, 252 N.E.2d 259, 264 (1970), the appellate court cites the *Perkins* result as aiding in the court's determination that the sale by the City of Goshen of an electric generating and distribution system constitutes a proprietary function, thereby making the income from the sale taxable. However, the appellate court did not solve the issue of whether or not *Perkins* revived the proprietary-governmental distinction for lower levels of government.

25. See Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181, 195 (1942). LAW & CONTEMPORARY PROBLEMS devoted its entire Spring issue in 1942 (vol. IX, No. 2) to the question of sovereign immunity. See also *Tort Liability*, *supra* note 4, at 461. This financial fear has been offered as explaining why the United States, after winning its independence, incorporated into its legal structure the doctrine of sovereign immunity, which was so closely identified with England.

The argument is that the states were afraid of mass attempts to collect the heavy debt created by the Revolution. See *Governmental Liability*, *supra* note 4, at 130, for a discussion of why, at the time of Independence, there was no comfortable place for sovereign immunity in American political theory, even though the United States incorporated all English common law into its legal structure. In Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947), the authors state: "Its [the immunity rule's] survival in this country after the Revolutionary War is attributable, in all likelihood, to the financial instability of the infant American states rather than to the stability of the doctrine's theoretical foundations."

26. The *Perkins* court made this argument, —Ind. at—, 251 N.E. 2d at 35: "Insurance has ameliorated the effects of such liability to private individuals and can do so for the state."

cost might be prohibitive. Special funds could be established to cover liability, but unless the abolition of immunity is coupled with certain limitations and exceptions, the economic threat would still remain. The most straightforward method of dealing with this contention would be a legislative solution.²⁷

Supplementing the financial fear is the concern that once sovereign immunity is abolished, the courts will find themselves besieged with fraudulent claims. Studies of suits filed against the state of New York and the city of Boston conclude that there is nothing to justify either the financial or the fraudulent claim fears.²⁸ However, in the absence of a Tort Claims Act limiting the state's liability and establishing procedural mechanisms, this result might not follow.²⁹ Both of the policy arguments for immunity thus far discussed demonstrate a need for a legislative solution to the problem.³⁰

The fundamental reason against sovereign immunity is that the law

27. A legislative solution can also provide various "low cost" features. Among these are settlement procedures, low administrative costs, limitations upon lawyer's fees, and exclusion of pain and suffering from recoverable damages.

28. For the study made of Boston, see *Tort Liability*, *supra* note 4, at 450. For the New York study see Leflar & Kartrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363 (1954).

29. In *Campbell v. State*, *transcript filed*, No. 1270 A253, Ind. App. Ct., Dec. 10, 1970, the Attorney-General, in Brief for Appellee at 23, used the following argument against complete abrogation of immunity:

The California experience, alluded to by *Klepinger*, is often referred to by parties advocating the destruction of sovereign immunity. The abrogation attempted by *Muskopf v. Corning Hospital District* (1961), 55 Cal.2d 211, 11 Cal. Repr. 89, 359 Pac.2d 457 was complete as to nearly all existing governmental immunities but the aftermath of that decision should be of interest to all advocates herein. What followed *Muskopf* in California was an onslaught of tort claims against the state, many frivolous and unfounded, but all seeking compensation and requiring the state's funds to combat them. Moratorium legislation was the result.

30. An additional policy argument for state immunity was formulated by the Indiana Supreme Court in *Shoemaker v. Board of Comm'rs*:

The theory upon which the state cannot be sued is, that the law-making power will do full and ample justice to all the citizens of the state.

36 Ind. 175, 186 (1871). One-hundred years ago when governmental activities were extremely limited and liabilities from motor vehicles were non-existent, such an idyllic statement was understandable. Hopefully, the state does have as its purpose "full and ample justice to all the citizens," but the failure of the legislative, executive and judicial branches to abrogate governmental immunity betrays such hope. Professor Bocharad succinctly states this argument as follows:

The supposition that the government will do no injustice, were it truly a postulate of our government, would long since have resulted in the waiver of all sovereign immunity and the voluntary submission to the adjudication of pecuniary claims. The supposition that the government does not desire to perpetrate injustice is perhaps the strongest motive behind the present movement for the abandonment of the English maxims on which immunity primarily rests.

Governmental Liability, *supra* note 4, at 805.

of torts requires liability to follow negligence.³¹ Private tort liability encourages persons to act with reasonable care, and it could be argued that disallowing governmental immunity would discourage tortious conduct by state employees.³²

The social policy of cost spreading is also universally invoked by critics of the immunity principle.³³ The *Perkins* court implicitly accepted this policy by asking the rhetorical question why an individual should bear the loss and injury resulting from a negligent act of the government.³⁴

Confronted with the criticism of sovereign immunity, the holdings in *Brinkman* and *Klepinger* and the logic that all governmental units should be treated alike, the *Perkins* court still chose to retain sovereign immunity for governmental functions of the state. The court explains its narrow result by raising the possibility of some logical reason for immunity. Possibly the only logical reason remaining is fear that total elimination of immunity might create chaos.³⁵

The practical explanation of *Perkins* is that the court believed the

31. See Talley, *Torts—Judicial Abrogation of the the Doctrine of Municipal Immunity to Tort Liability*, 41 *N.C.L. Rev.* 290, 291 (1963). Critics of the doctrine argue that the denial of a remedy for a wrong violates due process of law, and they add that the failure to give redress for wrongs is one more undesirable example of the divergence of legal obligations from moral obligations. See, Schumate, *Tort Claims Against the State*, 9 *LAW & CONTEMP. PROB.* 242, 247 (1942).

32. A counter-argument is that high-ranking state officials will feel undue restraints upon their normal activities unless legislative exemptions to liability are enacted for their "discretionary" functions.

33. See generally *Governmental Liability*, *supra* note 4. Critics of the doctrine cannot forget that in the leading English case holding a county immune from tort liability, *Russell v. The Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788), the court based its decision upon the philosophy that ". . . [i]t is better that an individual should sustain an injury than that the public should suffer an inconvenience." *Id.* at 362 (Ashhurst, J.). (Ashhurst, J.).

Municipal immunity is historically traced to this case in which Lord Chief Justice Kenyon refused to allow the "experiment" of bringing an action against the county itself to succeed. *Id.* But as was pointed out by Fuller & Casner (*see Tort Liability, supra* note 4), this case was not based upon sovereign immunity, but the doctrine was later attached to *Russell* as a rationalization for its result.

34. —*Id.* at —, 251 N.E.2d at 33.

35. "Chaos" may not be an exaggeration. Since the *Perkins* decision, approximately 85 cases have been filed against the state, and the rate is steadily increasing. The state cannot settle these claims; the state cannot hire local counsel to assist in the defense; the state has no procedural mechanism equipped to handle a heavy case load; and perhaps most significant, in the face of millions of dollars worth of suits pending and several large judgments, the state has no money appropriated with which to pay these judgments so that successful plaintiffs may not be able to get execution of their judgments in view of the restriction in art. IV, § 24 of the constitution that "no special act making compensation to any person claiming damages against the state shall ever be passed." Interview with Thomas C. Mills, Deputy Attorney General of Indiana, in Indianapolis, April 16, 1971.

legislature was better equipped than the judiciary to establish guidelines for the prosecution of claims against the state.³⁶ Had the court abandoned the distinction between governmental and proprietary functions, it would have had either to define the scope and nature of the state's new liability or merely present the state with an unqualified tort liability.³⁷

Perkins managed simultaneously to continue and reverse the trend of striking down governmental immunity. On the one hand, the court ruled that the state need no longer consent to be sued for torts arising out of its proprietary functions. On the other hand, the court refused to agree that no sound reason for retaining governmental immunity exists and revived the distinction between governmental and proprietary functions. The *Perkins* court may have raised the possibility of the existence of a reason for immunity to conceal its feelings that the state's new tort liability must be developed by the legislature. If the court believes that governmental immunity should be abolished, it could force the desired legislative action by eliminating the proprietary-governmental distinction.

EDWARD F. MCCREA

36. For example, the legislature could provide answers to the following questions: (1) will prompt notice to the state be required as is required to cities; (2) should a special court of claims be established; (3) who will have authority for bringing about settlements of claims against the state; (4) are limitations upon attorney's fees advisable; (5) what will the upper limits of recovery be, if any; (6) would liability insurance have certain required provisions; (7) will the right to jury trial be denied; and (8) will a judgment against the government bar an action against the employee? Possible solutions to these questions emerge from the tort claims acts of the federal government and four states which have abrogated sovereign immunity. See note 7 *supra*.

37. The Indiana Appellate Court, in *Campbell v. State of Indiana*, —Ind. App. —, 269 N.E. 2d 765, May 27, 1971, held that the maintenance and repair of public highways by the state is a governmental function, and with reference to the *Perkins* opinion, stated:

We do not here choose to speculate upon what reasons if any may exist for the continued application or misapplication of the traditional governmental-proprietary distinction. Nor do we deem it within our appellate prerogative to judicially abolish sovereign immunity in its entirety. We feel compelled to recognize and honor the aforementioned governmental-proprietary distinction without editorial comment upon its logic or efficacy.

Id. at 767.

The Court, recognizing the desirability of additional guidelines, adopted the definition of "governmental functions" developed by the Utah courts in *Cobia v. Roy City*, 12 Utah 2d 375, 366 P. 2d 986, 988 (1961):

The most general test of governmental function relates to the nature of the activity. It must be something done or furnished for the general public good, that is, of a "public or governmental character," such as the maintenance and operation of public schools, hospitals, public charities, public parks or recreational facilities. In addition to the above mentioned general test these supplemental ones are also applied: (a) whether there is special pecuniary benefit or profit to the city and (b) whether the activity is of such a nature as to be in real competition with free enterprise.