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THE "DISCRETIONARY-FUNCTION" EXCEPTION OF THE FEDERAL TORT CLAIMS ACT: SOME REFLECTIONS ON SOVEREIGN IMMUNITY

ROBERT C. VAUGHAN

INTRODUCTION

"Legal obligations that exist, but cannot be enforced, are ghosts that are seen in the law but that are elusive to the grasp."¹

Historically, the concept of sovereign immunity from suit has given rise to several such views of governmental liability, or lack of it, in tort. No matter what bases in theory have been assigned to these views, their pervasiveness is readily apparent in Anglo-American jurisprudence.

It was the intent of Congress in enacting the Federal Tort Claims Act of 1946² to breathe the life of enforceability into some of these "obligations" and thus remove a portion of the shroud of metaphysics and theory which have covered them for centuries.

The Federal Tort Claims Act waived sovereign immunity from suit for certain specified torts of federal employees. It provided for relief for damages to 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. . . ."³ Among the exceptions provided for in §2680

¹ Justice Holmes in *The Western Maid*, 257 U.S. 419, 433 (1922).

² 28 U.S.C. §§1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1952).

³ 28 U.S.C. §1346(b): ". . . 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."

Claims are assigned to the United States District Court for the district within which the plaintiff resides or within which the act or omission complained of took place. (§1402(b)).

Cases are to be tried without a jury. (§2404).

No ceiling is set upon the possible amount that may be claimed; but punitive damages are not allowed. (§2674).

Any judgment obtained is a complete bar to any action against the employee of the Government whose act or omission gave rise to the claim. (§§2672, 2676).

are claims arising from acts or omissions in the execution of statutes or regulations, and those which are based upon the exercise of a "discretionary function."⁴

Courts have shown by their interpretation and application of this section, especially that part excepting the "discretionary function," that some of the most elusive of Justice Holmes' "ghostly" legal obligations have been re-endowed with the phantasmal qualities that sometimes deny real injustice.

THE DECLINE OF SOVEREIGN IMMUNITY

What has been called "the almost explosive growth"⁵ in recent years of private tort law has been accompanied by a trend toward spreading the burden of losses so that injured parties will not be left without relief. The Federal Tort Claims Act and some recent state developments have presented commensurate opportunities for progress in the field of public tort liability. The prospectively devastating consequences of such legislation to the firmly entrenched theories of sovereign immunity are demonstrated by reference to any basic textbook on United States history. Whether such consequences have actually come about is another matter.

Writers have found the most perplexing problem to be one of ascertaining the reasons why such concepts as "sovereign immunity" and "the king can do no wrong" should have been adopted in the United States, under a system of government where there is no individual king-like sovereignty and where sovereignty is thought to flow from the people.⁶

⁴ 28 U.S.C. §2860 reads: "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."

⁵ Stason, *Governmental Tort Liability Symposium*, 29 N.Y.U.L.Rev. 1321, 1323 (1954).

⁶ The legal periodical literature in the field of governmental tort liability is voluminous, to say the least. Even before the passage of the Federal Tort Claims Act in 1946, it was a favorite topic of the legal authors, especially in regard to the philosophical bases of theories of sovereign immunity. By far the most thorough historical and philosophical treatment, and one which had a great influence in the movement for legis-

For the most part, our courts have given lip service to Borchard's view that the real basis of the statement that "the king can do no wrong" is that the king (or the executive-administrative branch as the exemplification of such sovereign power in the United States) is not privileged to do wrong.⁷ Thus, the "king" in Anglo-American law can commit some acts which are against the law, and for which the people might obtain redress. The question then becomes one of removing the procedural impediments to suit.⁸

But, underlying the reluctance of the courts to allow such traditional concepts to be circumvented, there is a reliance on the theory that the sovereign who has created the law is himself not a part of it.⁹ This Hobbesian view of law as coercion, in respect

lation, is found in a series of six articles by Professor Borchard, *Governmental Responsibility in Tort*, 34 Yale L.J. 1, 129, 229 and 36 Yale L.J. 1, 757, 1039 (1924-1927). Also see generally *Symposium on Governmental Tort Liability* 9 Law & Contemp. Prob. 179 (1942); Note, 25 N.Y.U.L.Rev. 872 (1950); Parker, *The King Does No Wrong—Liability for Misadministration* 5 Vand.L.Rev. 167 (1952); *Symposium on the Federal Tort Claims Act*, 7 Vand.L.Rev. 175 (1954); *Governmental Tort Liability Symposium*, 29 N.Y.U.L.Rev. 1321 (1954); James, *Inroads on Old Tort Concepts*, 14 NACCA L.J. 226 and 15 NACCA L.J. 281 (1954-1955). See also Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 Colum.L.Rev. 722 (1947); where the financial instability of the early American states is cited as a reason for our adoption of the English concepts of sovereign immunity and "the king can do no wrong."

⁷ Borchard, *supra*, note 6, 34 Yale L.J. at 2. *But cf.* Parker, *supra* note 6 (holding that the king's actions simply are not legal wrongs).

⁸ See Borchard, *supra*, note 6. The ability of Congress to pass a Court of Claims Act (1885), and of the states to grant limited liability in some instances other than tort claims, even in the 19th century, might be ascribed to this view. The Supreme Court has many times granted mandamus in cases where ministerial acts were contested, based on the test established in *Poindexter v. Greenhow*, 114 U.S. 270 (1884). As to the basis and use of private bills in Congress, see Gellhorn and Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L.Rev. 1325 (1954).

⁹ This has been referred to as the "secular" theory of sovereign immunity, as distinguished from the "sacred" theory of "the king can do no wrong". A third theory, that based on "expedience", would predicate sovereign immunity upon the necessity of preventing the hampering of government operations and the threat thereby to public welfare. Note, 25 N.Y.U.L.Rev. 872 (1950).

to the sovereign's position as being above the law, found one of its strongest advocates in Justice Holmes.¹⁰

As in other areas, the views of Holmes here seem to have been more influential than some in the majority would like to admit. And yet, for one who advocates a conceptual view of law as experience rather than as strict logic,¹¹ it is curious that Holmes should espouse a theory which, although nicely logical, is totally at odds with some of our most fundamental concepts of individual rights, and contrary to our experience in political freedom.¹²

To subscribe to the view that the state as the creator of the law is not able to commit a tort seems to endow the phrase "sovereign immunity" with a broader meaning than was first assumed. If the sovereign is considered *to be* the law, let alone *to be above* the law, it becomes apparent that what was professed to be a procedural impediment to suit for torts is more nearly a lack of *substantive liability*.

In this light the question becomes one of deciding whether the Federal Tort Claims Act, especially in regard to the "discretionary-function" exception, makes any substantive revisions in the theories of governmental tort liability, or whether, by removing the impediments to suit in some cases, it does not change many of the historical concepts of sovereign immunity.

THE DALEHITE CASE—THE GRAVEYARD REVISITED

The relatively few years since the passage of the Federal Tort Claims Act have seen a marked increase in the use of the "discretionary-function" exception as a defense by the Government. Prior to 1953, the various Federal courts wrestled mightily with the problem of where to draw the line between those acts which involve discretion and planning, and those which are merely on the operational level. The conclusion became inescapable that there is an unbroken scale along which acts of government employees

¹⁰ "A sovereign is exempt from suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

¹¹ Holmes, *The Common Law* (1881).

¹² See Borchard, *supra* note 6, especially 36 Yale L.J. at 17-41, 757-807.

could be differentiated only as a matter of degree insofar as "discretion" is concerned. In attempting to determine which was the proper test of "discretionary function," each court tended to over-emphasize one consideration to the exclusion of the others.¹³ On the whole, the surest trend to be inferred from the decisions prior to 1953 was that the "governmental-proprietary" distinction was not a part of the Federal Tort Claims Act and could not serve as a measure of the "discretionary function."¹⁴

In *Dalehite v. United States*,¹⁵ which was a test case for the more than 300 claims, representing over \$200,000,000, arising from the Texas City disaster of 1947, the Supreme Court in 1953 arrived at a result which implied a revival of the "governmental-proprietary" test and broadened the area of sovereign immunity.

The plaintiffs claimed negligence, substantially on the part of the entire body of Federal officials and employees involved in a program of production of the fertilizer material in which the original fire occurred and which exploded. This fertilizer had been produced and distributed at the instance, according to the specifications and under the control of the United States Government.

¹³ Note, 66 Harv. L.Rev. 488, 498 (1953). The note discusses some of the factors employed in judicial application of the Act: (1) the language of the statute under which the official acts; (2) the type of discretion; (3) the position of the employee; (4) possible repercussions of the activity; (5) "discretionary function as defined in other contexts; (6) the presence of a "governmental" function.

¹⁴ See Note, 5 Stan. L.Rev. 274, 282 (1951). And see *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951); *Cerri v. United States*, 80 F.Supp. 831, 833 (D.C.N.D.Cal. 1948). *But cf.* *Toledo v. United States*, 95 F.Supp. 838 (D. Puerto Rico 1951) (where it was said that "governmental function" is an additional test of and limitation on government liability under the Act)

Such difficulty in interpretation seems to stem from an unjustified extension to the national level of the judicial distinction between "governmental" and "proprietary" activities which has long been applied in the area of municipal corporations. But a municipal corporation is not generally regarded as possessing sovereignty; it is a creature of the state legislature. Therefore, the "discretionary-ministerial" test which was evolved in the municipal field to "substitute a rule of reasonableness" in the "proprietary" aspect of the "governmental-proprietary" distinction, would seem to have no relevance in considering federal and state liability. See Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 Law & Contemp. Prob. 181 (1942); Borchard, *supra* note 6, especially 34 Yale L.J. 129-143, 229-258; Petersen, *Governmental Responsibility for Torts in Minnesota*, 26 Minn. L.Rev. 293, 338 (1942).

¹⁵ 346 U. S. 15 (1953).

The Court applied the "discretionary-function" exception of §2680 (a) to deny recovery. In a four-to-three decision (two justices not participating) the Court held to be "discretionary" not only the high-level policy decision to use ammonium nitrate for fertilizer and to ship it abroad for agricultural rehabilitation after the war, but also the decisions (a) to refrain from further experimentation designed to discover the extent of its dangerously explosive character, and (b) to use a certain type of container, bag it at a certain temperature, and have it put out without any warning of possible dangers.¹⁶ The planning level was thus extended to cover all the decisions made by lower officials under the program, and to cloak them with sovereign immunity as being "discretionary" in nature.

Some observers have suggested that the real importance of *Dalehite* rested in its rejection of the plaintiffs claim that the Government was liable without fault as a manufacturer of an ultra-hazardous commodity.¹⁷ But more important in its possible implications and its inhibiting effects on the lower courts was the extension of the "discretionary-function" exception to a point where it appeared to embrace every act of a government employee other than the most rigorously routine. Almost all human conduct involves the use of some judgment and discretion. If the term "discretionary function" is to be construed to refer to any conscious decision, the Government would not incur liability for any act of negligence other than inadvertence.¹⁸

¹⁶ *Ibid* at 35-36. "... [discretion includes] ... more than the initiation of programs and activities ... Where there is room for policy judgment and decision there is discretion. It necessarily follows that the act of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."

¹⁷ Heuser, *Dalehite v. United States: A New Approach to the Federal Tort Claims Act?*, 7 Vand. L.Rev. 175 (1954).

Another factor in the case was the Court's rationalization that negligence of the Coast Guard in fighting a shipboard fire is not actionable because there is no analogous liability in general tort law. ("An alleged failure or carelessness of public firemen does not create actionable rights." 346 U.S. at 43.)

But cf. Note, 101 Penn. L.Rev. 420 (1953), where it is suggested that perhaps *Dalehite* was decided in larger reliance on the first clause of §2680(a) relating to an "authorized activity" by the "discretionary-function" exception. (Relying on H.R.Rep. No. 1287, 79th Congress, 1st Sess., 5-6 (1942).)

¹⁸ See Aron, *Federal Tort Claims Act: Some Comments and Questions for Practising Lawyers*, 33 A.B.A.J. 226,227 (1947), where are set down

Many people along the line in the Texas City case made decisions in the execution of the Government's program. The Court concluded that all the relevant decisions were on the "discretionary" level and precluded government liability. If we examine the language of the Act,¹⁹ we are forced to the conclusion that the Supreme Court failed in the application of "discretionary" tests in *Dalehite*. One need only to look at the case decisions and trends in manufacturers' liability today to see that the judgments made by the Government employees in carrying out the fertilizer program were the kind for which a private producer would be held liable, if they were negligently made.²⁰

The Court's decision in *Dalehite* casts some doubt on the adequacy and accuracy of its earlier summation, in the *Feres* case,²¹ of the effect of the Act in the area of governmental immunity.

certain comments of the Senate Committee reporting the bill: "With the expansion of government activities in recent years, it becomes increasingly important to grant private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles."

But, ". . . surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'the King can do no wrong' has not been uprooted, it has merely been amended to read, 'the King can do only little wrongs'." Justice Jackson, dissenting in *Dalehite*, 346 U. S. at 60.

As a result of *Dalehite*, it was suggested, not altogether facetiously, that a more accurate title for the Federal Tort Claims Act would be "The Federal Negligence Operation of Motor Vehicles Act". Gellhorn and Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L.Rev. 1325 (1954).

¹⁹ 28 U.S.C. §2674: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ."

The difficulty that arises under this provision stems from attempts to interpret the phrase, "under like circumstances". The Supreme Court, in *Feres v. United States*, 340 U.S. 135 (1950), interpreted "like circumstances" to mean "all the circumstances", and denied recovery for the death of a serviceman injured through the alleged negligence of his superior officers. The Court pointed out the "distinctly federal" character of the relationship existing between the wronged and the wrongdoer. 340 U.S. at 143-144.

²⁰ See James, *Inroads on Old Tort Concepts*, 15 NACCA L.J. 281, 293 (1955); Note, 25 Fordham L.Rev. 167 (1956) (where it is suggested that the amount of claims had much to do with the end result in *Dalehite*).

²¹ *Supra*, note 19 at 141. "It will be seen that . . . [the act] . . . is not the creation of new causes of action, but acceptance of liability under circumstances that would bring private liability into existence."

It appears that ramifications of the holding in the *Dalehite* case strike much deeper into the heart of the problem of sovereign immunity than mere considerations of "ministerial-discretionary" tests in the realm of the "governmental-proprietary" distinction. It becomes apparent that the broadening of the base of government liability in tort called for in the Federal Tort Claims Act was not as extensive as some had first thought. The "ghostly" legal obligations of Justice Holmes were drained of the life-blood seemingly introduced by Congress and returned to their ethereal state.

DEVELOPMENTS SINCE *DALEHITE*

Whatever progress had been previously noted in the lower Federal courts toward broadening the area of governmental liability under the Federal Tort Claims Act was halted abruptly, at least for a while, by the *Dalehite* decision. The courts tended to follow the lead of *Dalehite* in increasing the coverage afforded by the "discretionary-function" exception.²²

It remained for the Supreme Court itself to make the first notable departure from the trends implicit in the *Dalehite* case, by allowing recovery to the claimant in *Indian Towing Co. v. United States*.²³

The Court, in a five-to-four decision, held that where the United States undertakes to supply lighthouse service it must exercise reasonable care, and its failure to do so will subject it to liability under the Act; the operation of a lighthouse is an activity for which a private individual under similar circumstances could incur liability in tort within the meaning of the statute. It was felt that the failure of the subordinates to act and to give warning to others of a known dangerous condition was a breach of a duty owed to others.

Since the agents in charge of the manufacture and shipment of the fertilizer in the *Dalehite* case were under no less an obligation, the decision in the *Indian Towing Co.* case seemed to be a fairer interpretation of the extent of the "discretionary-function"

²² See *National Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir. 1954); *Goodwill Industries v. United States*, 218 F.2d 270 (5th Cir. 1954).

²³ 350 U. S. 61 (1955).

exception.²⁴ The Court here further departed from the approach taken by the Court in the *Feres* and *Dalehite* cases; it pointed out that Congress did not intend the Act to be self-defeating by adopting the specious distinction found in the “governmental vs. proprietary quagmire that has long plagued the law of municipal corporations.”²⁵

Cases since the *Indian Towing Co.* decision have followed its lead in refusing to apply the “governmental-proprietary” distinction and thereby further broaden the exception afforded by §2680(a).²⁶ In *Rayonier v. United States*,²⁷ the Supreme Court (Justices Reed and Clark dissenting) recently departed to an even greater extent from the rationale apparent in *Dalehite*. In *Rayonier*, negligence was charged to the United States Forest Service for failure to guard against or properly fight forest fires ignited on Government land in the State of Washington. Both the district court and the court of appeals relied upon *Dalehite* in dismissing the claims.²⁸

Justice Black’s majority opinion places liability on the United States if, as was alleged in the complaints, state law would enforce liability on private persons or corporations under similar circumstances. Rejected is the contention of the Government that the Tort Claims Act only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees. That private persons do not customarily carry on the negligently performed work is not to be the decisive factor.

Thus, the Court now finds that liability “. . . in the same manner and to the same extent as a private individual under like

²⁴ See Notes, 34 Texas L.Rev. 956 (1956), 25 Fordham L.Rev. 167 (1956) (“the duty to act is inconsistent with the choice of whether to act or not to act, possibly even at the executive level, and once that duty is found the “discretionary” exemption disappears”), 9 Vand. L. Rev. 882 (1956) (“the real test: not whether private persons actually engage in such activity, but whether they could conceivably do so”).

²⁵ 350 U.S. at 65.

²⁶ See *Pierce v. United States*, 142 F.Supp. 721 (D.C.E.D. Tenn. 1955); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Bulloch v. United States*, 145 F.Supp. 824 (D.C.D. Utah 1956). *But cf.* *Taylor v. United States*, 236 F.2d 649 (6th Cir. 1956); *Dugan v. United States*, 147 F.Supp. 674 (D.C. Dist. of Col. 1956).

²⁷ 352, U. S., 1.

²⁸ 225 F.2d 642 and 225 F.2d 650 (9th Cir. 1956).

circumstances . . .”²⁹ depends upon state law in each instance, rather than upon an extension of any sort of a “governmental-proprietary” distinction.

Changes in the personnel of the Court perhaps hastened this retrenchment from the broad exception imposed by *Dalehite*. However, that even this later Court was willing only to reject the uniquely-governmental test, and is not yet disposed to retreat from a widespread application of the “discretionary-function” exception, may be seen from dictum in *Soriano v. United States*,³⁰ a case arising in the Court of Claims, and decided by the same nine justices who participated in the *Rayonier* decision two weeks later. A change in personnel on the Court does not mean any substantial weakening of a philosophy so well-established as our concept of sovereign immunity.

In short, *Dalehite* has become tempered in its implications and largely discredited by the present Court, at least insofar as *Dalehite* broadened the exceptions under the Act to preclude liability for uniquely governmental activities. The “discretionary” problem remains.

CONCLUSION—IS THE “DECLINE” ASSURED?

At first glance, the case law on the “discretionary-function” exception under the Federal Tort Claims Act merely exemplifies the difficulty in deciding when any given exercise of judgment is simply an execution of another official’s decision, or is, in itself, a primary decision which is acted upon by others.

The problem presented, however, is not that simple. That it is more subtle and reaches deeper into our basic concepts of the state and its relationships with its subjects is illustrated by the tortuous and confused meanderings into the area of “governmental-proprietary” and “ministerial-discretionary” distinctions apparent in so many of the judicial utterances on the subject. It is submitted that changing the wording of §2680(a) and arriving at some sort

²⁹ 28 U.S.C. §2674.

³⁰ 352 U.S., 1 L.Ed.2d 306 at 311, 77 S.Ct. 269 at 273 (1957). Where it is stated: “And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. *United States v. Sherwood*, 312 U.S. 584, 590-591 (1941) and cases there cited.”

of a definition of the "discretionary function" is not going to solve the problem. What is needed is a thorough-going re-examination of the doctrine that "the King can do no wrong."³¹ For the fact remains that when the King really acts as a king, he still commits no wrong.³²

It is fairly easy to postulate that liability should not extend to the consequences of a legislative or executive decision of a political nature, and that the propriety of such decisions should not be subject to judicial review.³³ "It is not a tort for government to govern."³⁴ The important fact is that the extensions of this immunity are so pervasive in our concepts of sovereignty that even if there were no express exceptions in the statute, our courts would not hold the government liable for the consequences of many of these disputed non-political decisions, despite the provisions of §1346(b).³⁵

The solution to the problem will not be found by attempting to fit the language of §2680(a), in regard to "discretion," into previous patterns of precedent.³⁶ It rests rather in the realization that the courts of the United States have never expressly repudiated the doctrine of sovereign immunity. The legal anachronism of "the King can do no wrong," remains, as Professor Borchard pointed out over thirty years ago, to haunt us with the weight of a legal maxim.

It is a curious anomaly that, in a country which prides itself in having a government "by the consent of the governed," we should be bound by a doctrine that has its roots in Hobbesian theories of "law as coercion." In other areas, the judicial inability,

³¹ *Contra*, *Langford v. United States*, 101 U.S. 341, 343 (1884) ("neither in the United States or the states has the maxim that 'the King can do no wrong' had any reference to our government.")

³² Some observers prior to *Dalehite* were able to see the difficulties inherent in the "discretionary-function" exception of §2680(a). See Parker, *The King Does No Wrong—Liability for Misadministration*, 5 Vand.L.Rev. 167, 176 (1952) ". . . [the Act] . . . bows to the idea that both the King and his henchmen do no wrong."

³³ See James, *Inroads on Old Tort Concepts*, 15 NACCA L.J. 281, 290 (1955).

³⁴ Justice Jackson, dissenting in *Dalehite*, 346 U.S. at 57.

³⁵ See Note 3 *supra*.

³⁶ *But cf.* James, *supra*, Note 33 at 290; Notes, 66 Harv.L.Rev. 488, 495-496 (1953); 45 Ill.L.Rev. 791 (1951).

or rather unwillingness, to change a long-established doctrine is certainly not without outstanding exceptions in our modern judicial history. The fear of abandoning the doctrine of sovereign immunity may perhaps be attributed to the historical and constitutionally grounded aversion to judicial "legislation." Nevertheless, the judge made law of Holmes and others, accepting the philosophical theories of Hobbes and his contemporaries, is out of step with modern political thought and contemporary public opinion.³⁷

Whether we can go as far as the French system in rejecting the notion of sovereign immunity and make the State liable for all service-connected faults, holding the government liable for the consequences of non-feasance and late-feasance as well as mis-feasance, is extremely doubtful.³⁸ It has been felt that such a scientific and just system of responsibility cannot be established by judicial action in England and the United States, where the doctrine of stare decisis exists.³⁹

Whether the solution is thus assumed to be one where a constitutional amendment is necessary is also highly debatable. Suffice to say, legislative action which endeavors to solve the problem by removing the procedural impediments to suit, and then by the wording and obvious intent of its exceptions, recognizes that the concept of sovereign immunity is so ensconced in a position of honor in our traditions as to preclude substantive liability, serves only to perpetuate the anachronism decried by Borchard.

It is frequently maintained that although precedent has its place, society is entitled to progress. If the two claims conflict, either the courts or the legislature must, as the situation demands, accept the challenge and make a decision. The very nature of the origin and procreation of the theories advanced to justify "sovereign immunity" suggests that greater flexibility, at least on the appellate level, will result in the only complete and lasting solution. As Justice Cardozo once said, jurisprudence itself "will be the gainer in the

³⁷ See Schwartz, *Public Tort Liability in France*, 29 N.Y.U.L.Rev. 1432, 1439-1461 (1954).

³⁸ *Ibid.* See Schwartz, *supra*, note 37; Jacoby, *Federal Tort Claims Act and French Law of Governmental Liability*, 7 Vand.L.Rev. 246 (1954); Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 Law & Contemp. Prob. 181-213 (1942).

³⁹ Blachly and Oatman, *supra*, note 38 at 213.

long run by fanning the fires of mental insurrection instead of smothering them with platitudes.”⁴⁰

Lacking a definite rejection of the doctrine of sovereign immunity for the torts of inferior officers and employees, we will find that when cases like *Dalehite* occur (and occur again they will) the life seemingly imparted to these elusive legal obligations by such as the Federal Tort Claims Act is merely transitory. Absent a basic revision in our concepts of governmental liability, these obligations will revert to the “ghostly” status imputed to them by Holmes. They will remain as a mockery of progress in a modern democracy and, in fact, of the primary end of government: “the protection of the persons and property of men.”⁴¹

⁴⁰ Cardozo, *The Paradoxes of Legal Science* (1928), page 3.

⁴¹ Borchar, *supra*, note 6 at 34 Yale L.J. 2 (quoting Lord Macaulay).