Claims against the government involve a whole boatload of scary legal principles designed to protect government coffers (not to mention government employees). It sort of makes sense: If any old plaintiff could sue the government for any old thing, we, the taxpayers, will pay the piper – both in the costs of litigation and the costs of a judgment in tort.

But – and to me it’s a very important but – the fact remains that a tortfeasor is a tortfeasor if someone acts negligently (or, even worse, deliberately or maliciously) and causes harm, our rule of law, developed over the centuries, requires the person or entity causing the harm to pay for it. We teach our children the same: if you mess something up, you clean it up; if you break someone’s toy, you replace it. It’s a code of personal responsibility translated to the larger community.

Why on earth should government employees, and their employer, escape that rule of law? The original reason, as discussed by one of our authors, Carla Minnard, is because “the king can do no wrong” and the sovereign is immune from liability. Really? Why?

As our own Supreme Court noted in Muskopf v. Corning Hospital District (1961) 55 Cal.2d 211, 214-215.) “From the beginning there has been misstatement, confusion, and retraction [about the rule of sovereign immunity]. At the earliest common law the doctrine of ‘sovereign immunity’ did not produce the harsh results it does today. It was a rule that allowed substantial relief. It began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called ‘one of the mysteries of legal evolution.’ (Borchard, Governmental Responsibility in Tort, 34 Yale L.J., 1, 4.)”

The Muskopf court had plenty more bad things to say about the doctrine, too. (E.g.: “The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.” “None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both statutory and judicial and the exceptions operate so illogically as to cause serious inequality.”)

In fact, the Muskopf court actually abandoned the common law rule of governmental immunity for all those reasons. But guess what? The Legislature stepped in and restored the doctrine (see State Dept. of State Hospitals v. Superior Court (2015) 61 Cal.4th 339, 348) and we’re no better off now than we were before 1961 when Muskopf was decided; maybe worse.

In any event, we hope that the articles in this edition of the Forum will help you navigate the treacherous waters of governmental immunity (that was a pun, based on recreational immunity, in case you missed it) so that you, and your clients will have the best chance possible of making the “king” pay the piper.

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