Ross v Consumers Power Co

Suing the State

420 Mich 567 (1984)

In a series of cases in the late 1970s and early 1980s, the Michigan Supreme Court rewrote the complicated law of governmental immunity. For most of American history, federal, state, and local governments could not be sued in their own courts without their consent. In the twentieth century, legislatures began to extend the right to sue more generally, the Michigan legislature doing so in the Governmental Tort Liability Act (GTLA) of 1964. What followed, however, were two decades of legal confusion. The Supreme Court then stepped in with a sweeping reassertion of governmental immunity, which the legislature subsequently accepted and codified by amendments to the GTLA. Few cases better illustrate the confident and effective lawmaking power of the state's high court.

Sovereign or governmental immunity has always been a problem in political and legal theory. How could the power that had established the courts, itself be sued in them? On the other hand, if the government was immune from suit, what was to prevent it from abusing its powers and harming the people it was established to protect? The issue raised the theoretical problems of ultimate political power (sovereignty) that had been at the heart of the American Revolution and Civil War. For the most part, American governments had adopted a policy of nearly complete governmental immunity from suit. The principle was often said to derive from the English rule that "The King can do no wrong" and its corollary, "The King can authorize no wrong." It is more likely that these maxims expressed the ancient and medieval idea that the King and his agents *ought* to do no wrong—that they were not above the law. In the early modern period in which the Tudors and Stuarts bid for unlimited power, it came to be rendered as the King and his agents were *incapable* of doing wrong, and it was this idea that came to be adopted by the American states and federal government.[1]

Burned Man Reported 'Fair'

A young man who received severe electrical burns Tuesday in a construction site accident is in fair condition in St. Joseph Mercy Hospital, Ann Arbor.

Michael S. Ross, 19, of 304 Harwood, received the burns at a sewer installation site on Cunningham Road in Blackman Township.

Ross was burned extensively on the face, arms, legs and abdomen when a crane-borne metal support he was guiding into place, touched a high tension wire.

He was given emergency treatment at Mercy Hospital and transferred to St. Joseph Mercy.

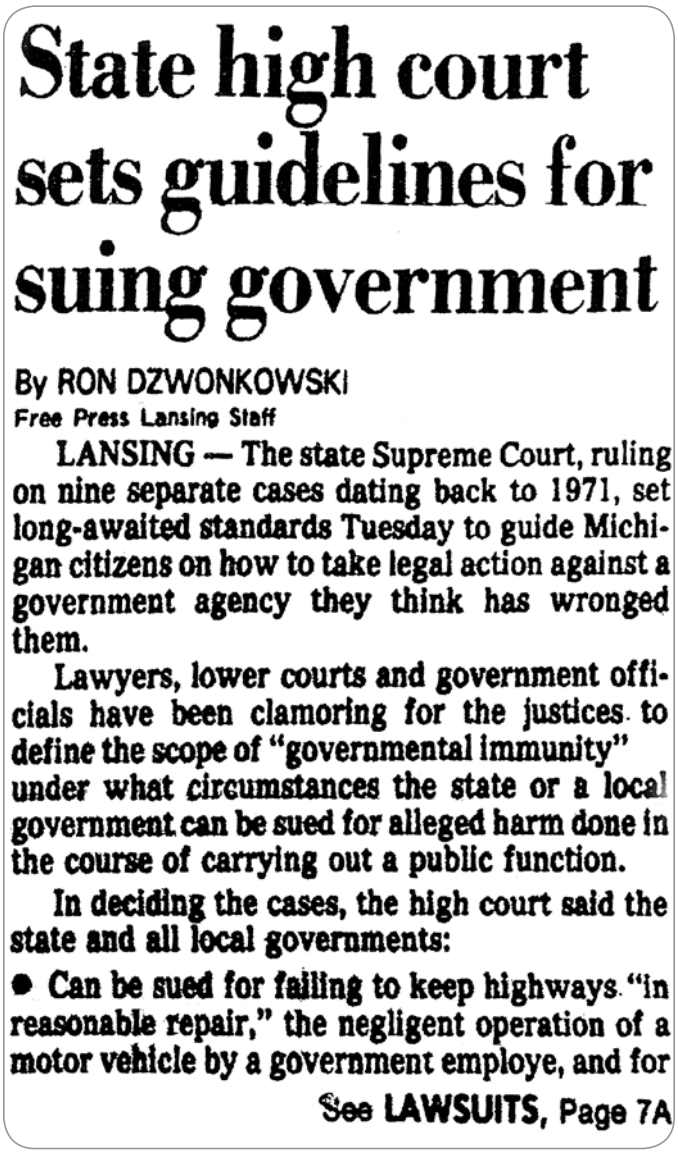
Headline from the August 25, 1971, edition of the *Jackson Citizen Patriot.*

Indeed, the jealousy with which early American colonial and revolutionary era governments guarded their sovereign immunity led to the First Amendment to the U.S. Constitution after the Bill of Rights. Article III of the Constitution allowed federal courts to hear suits "between a state and citizens of another state…and between a state, or the citizens thereof, and foreign states, citizens or subjects." When this provision led to states being sued in federal courts, the Eleventh Amendment, which states that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," was adopted in 1795. States could still be sued in federal court on *appeal* (i.e., so long as the suit was not initially "commenced or prosecuted" against them, but was begun by the State against a citizen), and state *officers* could be sued. In 1884, in *Poindexter v Greenhow*,[2] the United States Supreme Court held that state officers were immune from suit in cases in which the real party in interest was the State; it had earlier held in *Gibbons v United States*[3] that the federal government could not be sued without its consent.[4] Though Congress established a Court of Claims where citizens could sue for breach of contract, American governments did not eagerly invite suits. As Justice Oliver Wendell Holmes, Jr. put it in 1907, near the height of the doctrine of sovereign immunity, "A sovereign is exempt from suit…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."[5]

The states were equally unwilling to extend liability in their own courts. Some western states adopted broader liability for municipal corporations than eastern states, but state courts proved to be even more attached to governmental immunity than state legislatures. Thus, the Michigan Supreme Court, in an 1861 opinion by Justice Cooley, relaxed the common-law standard of governmental immunity, but in 1870 the Court reversed this decision and held that immunity could not be reduced without a statutory change.[6] Michigan courts also held that state officers could not be sued if the real party being sued was the State.[7]

In the twentieth century, as government began to undertake ever more activities, the need for some sort of protection against government harm of private citizens became pressing. It seemed rather ironic that the less democratic governments of continental Europe admitted more government liability than England and America. In the 1920s, California and Wisconsin began to waive sovereign immunity and allow suits in some cases. In 1939, Michigan enacted a court of claims act for similar cases. During World War II, the legislature completely waived its immunity, but repealed the act two years later.[8] The federal government enacted the Federal Tort Claims Act in 1946. The major movement allowing state liability began in the 1960s, as state courts began to qualify the principle of sovereign immunity. The Michigan Supreme Court abolished the common-law doctrine in 1961 (*Williams v City of Detroit,* 36 Mich 231 (1961)), and the legislature responded with a Governmental Tort Liability Act in 1964, which allowed the government to be sued in cases in which it was not carrying out a "governmental function."[9] The Act also provided for government liability in cases involving motor vehicles, the maintenance of public highways and buildings, and when the government was involved in "proprietary" or for-profit activity. However, the legislature did not define many of these common-law terms, and so it remained for courts to determine, for example, what a "governmental function" was. The courts experimented with several definitions, such as analyzing whether the activity was for the "common good of all," or part of "the essence of governing." This produced two decades of, as the Supreme Court put it, "confused, often irreconcilable" lower-court decisions that were "of little practical guidance to the bench and bar."[10] The Michigan Supreme Court, which had been evenly divided on the extent of governmental immunity in the early 1980s, was moving toward a standard of narrower government immunity, and finally stepped in and reviewed eight lower-court cases in an effort to clarify the law.[11]



State high court sets guidelines for suing government

By RON DZWONKOWSKI
Free Press Lansing Staff

LANSING — The state Supreme Court, ruling on nine separate cases dating back to 1971, set long-awaited standards Tuesday to guide Michigan citizens on how to take legal action against a government agency they think has wronged them.

Lawyers, lower courts and government officials have been clamoring for the justices to define the scope of "governmental immunity" under what circumstances the state or a local government can be sued for alleged harm done in the course of carrying out a public function.

In deciding the cases, the high court said the state and all local governments:

- Can be sued for failing to keep highways "in reasonable repair," the negligent operation of a motor vehicle by a government employe, and for

See LAWSUITS, Page 7A

Headline from the January 23, 1985, issue of the *Detroit Free Press.*
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In partisan terms, the evenly divided Court of the 1970s, with the Independent Justice Levin in the middle, now had a Democratic majority. Republicans Coleman and Fitzgerald, as well as Democratic Justice Moody, had been replaced by two Democrats, Patricia J. Boyle and Michael F. Cavanagh, and Republican James F. Brickley. The Court consolidated the appeals in eight different cases and announced a broad standard of governmental immunity. Five justices issued a per curiam opinion. Justice Levin dissented in part, and Justice T. G. Kavanagh did not participate.

Ross v Consumers Power Co was the leading case, the details of which show the complications of sovereign-immunity litigation. Michael Ross had sued the Consumers Power Company for injuries he sustained while working on a drain-construction project. He had suffered electrical burns when some of his equipment ran into the power company's lines. The power company then sued the drainage district, claiming that it had been negligent in failing to notify the company of the work being done near its power lines. So the real issue in *Ross* was whether Consumers Power could sue the drainage district, or whether the drainage district, as a public entity, was immune from suit. The circuit court held that the district was immune; the Michigan Court of Appeals held that it was liable; the Michigan Supreme Court reversed and held that the district was immune. Having led the movement to limit government immunity in the 1960s, the Court now

reversed course and "essentially reiterated absolute governmental immunity," based on its interpretation of legislative intent.[12]

After reviewing the history of sovereign immunity, and the tangle of case law that followed the Governmental Tort Liability Act, the Court observed that its earlier attempts to define "governmental function" all "require the judiciary to make value judgments" and were unavoidably "subjective." "The legislature's refusal to abolish completely sovereign and governmental immunity, despite this Court's recent attempts to do so," the Court declared, "evidences a clear legislative judgment that public and private tortfeasors should be treated differently." The Court now defined "governmental function" broadly, as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. When a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity is proprietary in nature or falls within one of the other statutory exceptions to the governmental immunity act." Defining immunity broadly, the Court subsequently defined these exceptions narrowly. It did note that government officials could still be liable, for "the immunity extended to individuals is far less than that afforded governmental agencies."[13]

The companion cases involved a variety of government agencies and officials: a delinquent-care facility, a mental hospital, a high school, police officers, and the Department of Natural Resources. In every case, the Court held the government immune. In doing so, it upheld the Court of Appeals in six cases, and the circuit courts in seven.[14] Justice Levin dissented in part; he and Justice Kavanagh had been the members of the Court moving toward narrower standards of governmental immunity in the preceding years, and he noted that in this case "the Court casts the net of governmental immunity too far."[15]

The Court's return to a broad standard of governmental immunity, whether more just or not, at least had the benefit of clarity. The Court, a contemporary observer noted, "has drawn a bright line rule. It has given the lower courts a black and white distinction in deciding issues of governmental immunity."[16] As a recent commentator notes, "No one is well served when a case, good or bad, must be evaluated in a cloud of total uncertainty. Plaintiffs' counsel are spared the expense of fruitless case preparation when there is a clear immunity defense. Defense counsel can advise clients with more confidence regarding their risks when the challenged conduct is known to be actionable."[17] Indeed, the Court had the ancient principle that law ought to be stable, orderly, and predictable on its side. John Locke had stated that a legitimate, constitutional government could only rule by "established standing laws, promulgated and known to the people, and not by extemporary decrees."[18] James Madison, too, warned in the *Federalist Papers* that overly mutable laws—the "repealing, explaining, and amending laws, which fill and disgrace our voluminous codes," as he put it—posed a threat to republican government.[19] The Michigan legislature agreed, and adopted the *Ross* standard by statute shortly after the decision by amendments to the GTLA. But another commentator called the case an "amazing display of judicial *chutzpah,*" an activist piece of judicial legislation that turned a government-liability statute into a government-immunity one. "However," he admitted, "because the pro-government definition created by the Court coincided with the pro-government bias of those who controlled the legislature at the time, the act was amended to incorporate *Ross'* definition of governmental function."[20]

The State was hardly scot-free, though. However difficult it might be to sue Michigan *in its own courts,* the State remained liable to suit in federal courts. In the aftermath of the civil rights movement, federal courts extended a wide right to sue states under the Civil Rights Act of 1866 (section 1983 of the United States Code). The Act provided that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State… subjects…any citizen…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In the 1970s the act "became an all-purpose instrument for pursuing grievances against state and local governments that went far beyond the sphere of civil rights as traditionally understood." Suits under section 1983 rose from several hundred in the 1960s to several thousand in the 1980s. Combined with other procedural changes that widened access to the courts, states still faced a degree of civil liability that was high by historical standards.[21]

FOOTNOTES

1. Weller, *Sovereign immunity in Michigan: Sources and outline,* 6 TM Cooley L R 218 (1989); Borchard, *Governmental liability in tort,* 34 Yale L J 2 (1924).
2. *Poindexter v Greenhow,* 114 US 270; 5 S Ct 903; 29 L Ed 185 (1884).
3. *Gibbons v United States,* 75 US 269; 19 L Ed 453 (1968).
4. Borchard, *Governmental liability, supra* at 17; Hirsch, *Law and Economics: An Introductory Analysis,* 2d ed (Boston: Harcourt, 1988), p 239.
5. *Kawananakoa v Polyblank,* 205 US 349; 353; 27 S Ct 526; 51 L Ed 834 (1907).
6. Borchard, *Governmental liability, supra* at 9; *Detroit v Corey,* 9 Mich 165 (1861); *Detroit v Blackeby,* 21 Mich 84 (1870); JES, *Note,* 8 How L J 62 (1962).
7. Weller, *Sovereign immunity, supra* at 231.
8. 1943 PA 237, § 24; repealed by 1945 PA 87, § 2.
9. Borchard, *Governmental liability, supra* at 1–9; JES, *Note, supra* at 62; Weller, *Sovereign Immunity, supra* at 234; Hirsch, *Law and Economics, supra* at 239; Baylor, *Governmental Immunity in Michigan,* 2d ed (Ann Arbor: Institute of Continuing Legal Education, 2006), p 2.1.
10. *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984).
11. Collins, *Governmental immunity from tort liability in Michigan,* 28 Wayne L R 1764 (1982).
12. Russ, *Governmental immunity after* Ross v Consumers Power Co, 32 Wayne L R 1475 (1986); *Ross v Consumers Power Co, supra* at 598.
13. *Ross v Consumers Power Co, supra* at 617–618, 620, 636.
14. *Id.* at 636–661; Baylor, *Governmental immunity, supra* at 2.11.
15. *Ross v Consumers Power, supra* at 684; Collins, *Governmental immunity, supra* at 1764.
16. Russ, *Governmental immunity, supra* at 1496.
17. Baylor, *Governmental immunity, supra* at 2.2. As the report of an 1806 conspiracy trial put it, "It is better that the law be known and certain, than that it be right." Commons, et al., ed, *A Documentary History of American Industrial Society* (New York: Russell & Russell, 1958), vol III: 59.
18. Locke, *Second Treatise of Government,* Peardon, ed (Indianapolis: Bobbs-Merrill, 1952), p 73.
19. No. 62, *The Federalist Papers,* Rossiter, ed (New York: Mentor, 1961), p 379.
20. Braden, *(Mis) Construing the Governmental Immunity Act: Using* Ross v Consumers Power, 84 Mich B J 45 (2005).
21. Kelly, Harbison, & Belz, *The American Constitution: Its Origin and Development,* 7th ed (New York: Norton, 1991), p 703.