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THE EMPLOYE DEFENSE ACT: WEARING DOWN SOVEREIGN IMMUNITY

INTRODUCTION

For many years, the judiciary and legislature of Kentucky have contemplated the complete abrogation of sovereign immunity. The doctrine that the state is immune from civil suit was first acknowledged by the Kentucky Court of Appeals in 1828. Since that time the doctrine has retained vitality in Kentucky even though the federal government and many other states have relinquished such immunity. The Kentucky Court has repeatedly refused to abrogate the doctrine; the Court's theory is that sovereign immunity is constitutionally based and that only the General Assembly may abolish immunity.

1 See generally Oberst & Lewis, Claims Against the State of Kentucky, 42 Ky. L.J. 65 (1953).
2 In Divine v. Harvie, 23 Ky. (7 T.B. Mon.) 439, 441 (1828), the Court stated that "[i]t seems to be conceded on all hands that the State can not be made a party defendant, and is not suable in her own courts." However, "[t]he Kentucky Court of Appeals has seldom bothered to consider the soundness of the doctrine, or even to cite precedent for it." Oberst, The Board of Claims Act of 1950, 39 Ky. L.J. 35 (1950). The Court has accepted it as "an elementary principle of the law . . . that the state cannot be sued without its consent . . . ." Zoeller v. State Bd. of Agriculture, 173 S.W. 1143, 1144 (Ky. 1915), quoted in Oberst, supra at 35.
5 See, e.g., Foley Constr. Co. v. Ward, 375 S.W.2d 392, 393 (Ky. 1963), in which the Court stated:
   The right of sovereign immunity in Kentucky has existed from the beginning of the Commonwealth. Article VIII, Section 4, 1792 Kentucky Constitution provides: "The legislature shall direct by law in what manner and what courts suits may be brought against the Commonwealth." With minor variations this principle has been embodied in each of the succeeding Constitutions. Article VI, Section 6, 1799 Kentucky Constitution; Article VIII, Section 6, 1850 Kentucky Constitution; Section 231, 1891 Kentucky Constitution.
6 See, e.g., Cullinan v. Jefferson County, 418 S.W.2d 407, 409 (Ky. 1967): [T]his court should not invade the constitutional authority of the General Assembly by holding that the doctrine of sovereign immunity does not bar a tort action . . . . [T]he members of the legislative branch . . . are elected . . . to reflect the feeling of the people and to enact laws to meet their needs.
under Section 231 of the Kentucky Constitution.\(^7\)

Strenuous arguments have been made, however, that sovereign immunity is not mandated by the constitution\(^8\) and that, in fact, the doctrine is unconstitutional under both the Kentucky\(^9\) and United States constitutions.\(^10\) Opponents of this immunity also argue that the doctrine stems solely from judicial holdings and can be judicially abrogated.\(^11\)

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\(^7\) When the people . . . want sovereign immunity waived . . ., their elected legislative representatives will be charged with this responsibility. It is doubtful that the average citizen of Kentucky is even aware that the doctrine of sovereign immunity exists until the state injures him, so it is unlikely that the citizens will seek legislative action. Whether the Court has overemphasized the language of § 231 with the intent of limiting the state's responsibility or whether "the Kentucky Constitution has from the beginning provided an escape valve for claims against the irresponsible state by making provision for legislation," Oberst, supra note 2, at 36, there is no relief from "the harshness of the effects on unfortunate persons so often wrought by the doctrine . . . ." 418 S.W.2d at 410 (Milliken, J., concurring).

\(^8\) "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." Ky. Const. § 231. Furthermore, "Kentucky Constitution Section 230 (which provides for restrictions on withdrawal of money from the State Treasury) complements Section 231." Foley Constr. Co. v. Ward, 375 S.W.2d 392, 393 (Ky. 1963).

\(^9\) A close reading of [§ 231] clearly shows that the Section does not say that suit may not be brought against the Commonwealth without the General Assembly's approval. The Section merely states that the General Assembly may determine the procedure for bringing a suit against the Commonwealth and that the General Assembly may determine in what court suit must be brought. It does not state that the Commonwealth can not be sued or that the General Assembly can determine if and when suit may be brought.


\(^11\) "Id. Counsel argued that Ky. Const. §§ 2, 4, 7, and 14 (Bill of Rights) in conjunction with § 54 (which provides that the legislature has no power to limit the amount of recovery for injuries leading to death or to personal or property injury) are meant to protect individual rights, not the rights of the state. To deny suit against the state "would be to deny claimants most of the rights granted to them by the Bill of Rights of the Kentucky Constitution." Id. at 5.

\(^7\) Id. at 7-18.

\(^10\) Id. at 4. It is also of some interest to note that in abrogating both charitable and municipal immunity, the Court recognized that those immunities were judicial in creation and thus could be judicially abrogated. In Mulliken v. Jewish Hosp. Ass'n, 348 S.W.2d 930, 932 (Ky. 1961), the Court acknowledged that although in Forrest v. Red Cross Hosp., 265 S.W.2d 80 (Ky. 1954) it had held that it was for the legislature to abolish charitable immunity, "[w]hen there is negligence the rule is liability." The Court thus judicially abrogated the immunity.

In Haney v. City of Lexington, 386 S.W.2d 738, 741 (Ky. 1964), the Court recognized that the "very machinery of the short biennial sessions of the General Assembly denies to it the time . . . to examine the various doctrines . . . of common law torts,"
Perhaps in the wake of such criticism, both the Court and the legislature have diminished the scope of the doctrine. Not only have Kentucky charities and municipalities lost immunity from suit but judicial interpretation of Section 13 of the Kentucky Constitution has resulted in a waiver of governmental immunity in eminent domain cases. The legislature also has provided for suit against public school districts once the district has purchased insurance; statutes of a similar nature control suits against counties. In breach of contract actions, the state has lost its defense of immunity by statute.

In 1946, the Kentucky legislature created the Board of Claims, which was analyzed as the potential end to immunity from liability for tortious conduct by the state. The language and took it upon itself "to correct an unjust rule which was judicially created."

The contention that the doctrine is not constitutionally based but rather judicially created, and thus subject to judicial abrogation, is strongly supported by reading the language above with that in State Park Comm. v. Wilder, 84 S.W.2d 38, 39 (Ky. 1935): "This immunity has come down to us as part of the fundamental common law and is only indirectly contained in the Constitution."


Haney v. City of Lexington, 386 S.W.2d 738, 739 (Ky. 1964). The Court, in ending municipal immunity, noted that "[t]here is probably no tenet in our law that has been more universally berated by courts and legal writers than the governmental immunity doctrine," citing 41 N.C.L. Rev. 290, 291 (1963), yet the Court reiterated that sovereign immunity still stands. See also Comment, Torts—Sovereign Immunity—Municipal Liability, 57 Ky. L.J. 763 (1969).

Ky. CONST. § 13, construed in State Park Comm. v. Wilder, 84 S.W.2d 38 (Ky. 1935), provides: "[N]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." See also Oberst, Claims Against the State of Kentucky—Reverse Eminent Domain, 42 Ky. L.J. 163 (1954).

Ky. REV. STAT. § 160.310 (1970) [hereinafter cited as KRS], construed in Taylor v. Knox County Bd. of Educ., 167 S.W.2d 700 (Ky. 1942) (once a board has purchased insurance, which is permissive under the statute, it cannot raise the defense of immunity).

KRS §§ 67.180, .185, .186 (1970) (liability limited to the extent of the policy amount).

"All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the commonwealth." KRS § 44.270 (Supp. 1976).

KRS §§ 176.290-.380 (1948) provided compensation for injuries sustained due to negligence in construction, reconstruction, maintenance, and policing of highways, with jurisdiction of the Board limited to $1000 in controversy. See generally Richardson, Kentucky Board of Claims, 35 Ky. L.J. 295 (1947).

"It is believed not unlikely that this Act will prove its worth to the point that some future session of the General Assembly will widen its scope to include all branches of the state government." Richardson, supra note 18, at 301.
in the statute was broadened in 1950\textsuperscript{20} from liability for negligence in highway claims to claims arising out of "negligence on the part of the commonwealth, any of its departments . . . or any of its . . . agents . . . while acting within the scope of their employment . . . .\textsuperscript{21} Unfortunately, however, several limitations have diluted this broad language. For example, the current statute places a $20,000 ceiling on damage awards\textsuperscript{22} and forbids any compensation for pain and suffering.\textsuperscript{23} Judicial construction has further limited the statute's scope as to which departments are within its coverage.\textsuperscript{24} In light of this narrow applicability, early optimism about the effect of the statute has dissolved—the Board of Claims\textsuperscript{25} has not provided a viable means of circumventing sovereign immunity.\textsuperscript{26}

The Court has not taken any further affirmative action towards abrogation. However, in the 1976 session, the General Assembly was presented with another opportunity to abrogate sovereign immunity entirely.\textsuperscript{27} Instead, it passed the Employee Defense Act,\textsuperscript{28} the effect and implications of which are still unclear.

I. THE EMPLOYEE DEFENSE ACT

In the 1976 session of the General Assembly, an act\textsuperscript{29} pro-

\begin{thebibliography}{9}
\item KRS §§ 44.070-.160 (1950) (current version at KRS §§ 44.070-.160 (Supp. 1976).
\item KRS § 44.070 (1)(1950) (amendment provided for a $5000 limitation on claims).
\item KRS § 44.070 (5) (Supp. 1976).
\item KRS § 44.070 (1).
\item See, e.g., Gnau v. Louisville & Jefferson County Metro. Sewer Dist., 346 S.W.2d 754, 755 (Ky. 1961), in which the Court held that while a sewer district is an agency of the state, since it is not "under the direction and control of the central State government," it is not within the statute. Of course, since the district is an agency of the state, it is protected from suit by sovereign immunity.
\item KRS §§ 44.070-.160 (1970).
\item The legislature had also provided for special laws to be enacted in order to compensate individuals injured by state employees. These were recognized as "a costly procedure, taking up much valuable time of legislators who have a very limited time to give to other and more weighty matters." Richardson, supra note 18, at 299. Subsequent to the creation of the Board of Claims, the Court, in a 4-3 decision, held that since the establishment of the Board of Claims was a general law, § 59 of the Kentucky Constitution prohibits further special legislation. Private resolutions, therefore, were held unconstitutional. Commonwealth v. McCoun, 313 S.W.2d 585 (Ky. 1958).
\item S. 304, 1976 Regular Session, Senate Journal 867-68 (1976) [hereinafter cited as S. 304].
\item KRS §§ 12.211-.215 (Supp. 1976).
\item S. 304, supra note 27.
\end{thebibliography}
viding for the express termination of the defense of sovereign immunity was proposed and received favorably. Recognizing "that in the interest of equity and justice, an individual damaged due to the negligence of an employee . . . of Kentucky . . . should not be expected or required to bear the resultant financial loss without just compensation," Senate Bill 304 provided that all departments and agencies of the state would be exposed to liability. At the legislature's discretion, the state would then have either purchased liability insurance or become a self-insurer. Section 2 of the bill, broadly interpreted, would have allowed compensation for pain and suffering, now excluded by the Board of Claims provisions. In fact,

30 S. 304, supra note 27, at § 2 provided that the defense of sovereign immunity be "abolished," yet retained all other defenses for the state. In effect, this would have made the state liable for negligent conduct just as any other individual or corporation would have been.

31 The Act was sponsored by 22 of the 38 senators. 1976 Regular Session, Senate Journal 436 (1976). The Committee on Judiciary-Statutes reported the Act for general consideration and recommended passage. Id. at 865.

32 S. 304, supra note 27, at § 1.

33 Id. The language allowed suit against "the commonwealth of Kentucky, its political subdivisions, departments or agencies." This was broader than the Board of Claims provision since it included political subdivisions. However, though the Act would have repealed various provisions relating to the Board of Claims, it was silent as to KRS §§ 67.180 and 67.185 (1970), which limit county liability to the policy amount of any insurance purchased by the county. Nor did it confront KRS § 160.310 (1970), which likewise limits liability for school bus accidents to the policy amount. See Taylor v. Knox County Bd. of Educ., 167 S.W.2d 700 (Ky. 1942).

34 S. 304, supra note 27, did not specify any guidelines as to the purchase of insurance or its effect. The Kentucky Court of Appeals had already construed purchase of insurance under KRS § 160.310 as a waiver of immunity up to the limits of the policy. Taylor v. Knox County Bd. of Educ., 167 S.W.2d 700 (Ky. 1942). Under S. 304, would the state then be able to limit its liability by the amount of insurance it purchases? Recalling that the Act expressly held the state liable as any private individual would be, it would seem that the intent of the Act would not be to allow such limitation.

35 Interview with Sandra M. Varellas, amicus curiae, Scheckles v. McClure, Civ. No. 87383 (Franklin Cir. Ct. 1976); co-counsel, Huffman v. Commonwealth, No. CA-690-MR (Ky. Ct. App. 1977); author, S. 304, supra note 27, in Lexington, Kentucky (March 4, 1977) [hereinafter cited as Interview with Varellas]. Ms. Varellas indicated that it would probably be less expensive for the state to be a self-insurer due to the surplusages in the state treasury and the saved expense of the state processing its own claims.

36 The state would "be liable for money damages for injury or loss of property or personal injury or death" under S. 304, supra note 27, at § 2. The Act also exposed the state to the same liability as that of a private individual. Thus, it could be argued that under S. 304 the state, like a private individual, would be liable for pain and
Senate Bill 304 also provided for abolition of the Board of Claims and imposed liability for negligence on the State of Kentucky equal to the liability of private citizens. Senate Bill 304, however, is not the law. It met with sudden defeat and in its place emerged the Employe Defense Act.

Under the Employe Defense Act (the Act) the Attorney General, at his discretion, may provide a defense for any employee subject to suit in actions arising as a result of any "act or omission made in the scope and course of his employment as an employe of the commonwealth and any of its agencies." The Act's language is not as broad as Senate Bill 304. First, it clearly retains sovereign immunity, whereas the express intent of Senate Bill 304 was to abolish it. Second, the Employe Defense Act limits liability to $50,000, whereas Senate Bill 304 had no such ceiling. Third, the Act does not automatically

suffering. See also note 39 infra for another argument as to why liability for pain and suffering is included under the Act.

The Act's language is similar to that in the Federal Torts Claims Act, 28 U.S.C. § 1346(b)(1970), which provides that the United States government shall be liable like a private person. That liability has been interpreted to encompass pain and suffering. See, e.g., Steeves v. United States, 294 F. Supp. 446 (D.S.C. 1968) and Newman v. United States, 248 F. Supp. 669 (D.D.C. 1965). The liability has also been held to be based on state tort law. E.g., Hoyt v. United States, 286 F.2d 356 (5th Cir. 1961).

KRS §§ 12.211-.215 was introduced in the House, went through committees, and was passed by a vote of 78 to 1. It was received in the Senate on March 16, 1976 and passed 38 to 0 on March 18, 1976. 12 Ky. Leg. Rec. 51, 86 (1976).

No other material is available on either bill.

KRS § 12.211 (Supp. 1976) states that the attorney general "may provide" a legal defense for an employee. KRS § 12.212 gives the Attorney General the right to refuse to defend an employee, based on determinations delineated in the statute. Subsection 2 allows the Attorney General to delegate that power of determination to the employee's agency or department.

expose the state to litigation, whereas Senate Bill 304 treated the state as a private individual who, as a defendant, must defend or lose by default. In fact, because the language of the Act is so vague, it could be construed to allow the state to escape all liability. Due to the indefiniteness of the language and the lack of discernible legislative intent, questions as to its construction, scope, and applicability are left unanswered.

II. The Act and Administrative Regulations

The Act authorizes the Governor to “provide by regulation through (1) the attorney general, (2) other employed counsel, (3) insurance which would cover the cost of defense, or (4) counsel from the employee's department. In response to this provision, the Governor has issued administrative regulations which comprehensively regulate methods of defense. Because these Regulations have been approved by the Administrative Regulation Review Subcommittee, the Attorney General has argued as an intervening defendant in Sheckles v. McClure that these regulations represent the legislative intent behind the Act.

Whether or not the Regulations are indicative of legislative intent, their effect is to narrow seriously the scope of the Act. For example, the Act provides that the Attorney General may defend a suit arising from actions by an employee “in the

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46 Though no decisions involving the application of the Act have been rendered, Sheckles v. McCure is now before the Franklin Circuit Court. It has been argued before that court that the Act should be limited to provide defenses only for executives of the central government and not for school and municipal employees. Memorandum for Intervening Defendant Attorney General, Sheckles v. McClure, Civ. No. 87383 (Franklin Cir. Ct. 1976)[hereinafter cited as Memo for Intervening Defendant].

47 S. 304, supra note 27, at § 2.

48 Memo for Intervening Defendant, supra note 46. The Attorney General argued that the Act applies to any suit solely at the Attorney General's discretion and that an “act or omission” within the Act applies only to “governmental decision making,” id. at 3, and not to ordinary negligence, id. at 5. He also argued that the meaning of “state employee” should be narrowly construed to include only central government employees.

49 See note 40 supra and accompanying text for a discussion of legislative actions on the Employee Defense Act.


51 10 Ky. ADMIN. REGS. 1:010 (1976) [hereinafter cited as KAR].

52 Id.

53 Civ. No. 87383 (Franklin Cir. Ct. 1976).

54 KAR, supra note 51.
scope and course of his employment as an employee of the commonwealth and any of its agencies."

Elsewhere in the Act, the language refers to the delegation of defense to counsel “assigned to or employed by the department, agency, board, commission, bureau or authority which employed the person requesting the defense.”

In the Regulations, “state agency” is defined as excluding “local units of state government such as school districts, counties, sewer districts or other municipalities.”

The Attorney General has argued that this definition reflects a legislative intent to limit the applicability of the statute solely to executives in the central government.

This argument gains further support in the Regulations. There the class of defendants is limited to those “sued in a civil action over acts or omissions of a discretionary nature.”

KRS § 12.213.
KAR, supra note 51, at § 1(4).
Memo for Intervening Defendant, supra note 46. Section 1 (4) of KAR, supra note 51, does define state agency to include any “department, administrative body, division or program cabinet” excluding local governmental units.

In Sheckles, plaintiff suffered a broken neck and resulting total paralysis while participating in a tumbling class at a Louisville junior high school where he was a student. He had engaged in the exercise at the direction of a teacher employed by the Louisville Board of Education. In a suit against the Board, the Jefferson Circuit Court granted summary judgment for defendants on the ground that the Board, as an agency of the state, was protected by sovereign immunity. The Court of Appeals affirmed.

Upon passage of the Employe Defense Act, plaintiff Sheckles brought suit again in Jefferson Circuit Court. The court found that the defendant-teacher was a state employee and was acting within the scope of his employment. Sheckles, pursuant to the Act, demanded payment from the Secretary for Finance and Administration. When the Secretary refused, the action was commenced in Franklin Circuit Court.

The Attorney General maintains that as a school board employee, the teacher was not within the scope of the Act. He further argues that “the purpose of the Act was to assist the Governor in enlisting competent executives for his administration and to provide a means by which an executive sued for some discretionary act may have a legal defense without expending his personal fortune.”

The difficulty with the Attorney General’s interpretation is that it has become generally accepted that an officer of a state is not liable for torts due to discretionary acts. See K. Davis, Administrative Law Text 485-87 (3d ed. 1972). An executive in such a suit would only have to move for a summary judgment and would thus have no need of the Act’s provision for payment of judgments.

KAR, supra note 51, at § 1(3).
Id. (emphasis added). The Attorney General argued that the defendant teacher had been negligent and that “[n]o governmental decision making was involved. The tort, therefore, was not an ‘act of omission’ under the purview of the Act.”
ever, the Act itself speaks only of an act or omission made in the scope or course of employment. While the Act does specifically exclude "discretionary acts or decisions pertaining to the design or construction of public highways, bridges, or buildings," there seems to be no explicit language in the Act that could be construed to exclude any other type of ordinary negligence. Furthermore, state employees involved in traffic accidents in a state vehicle are apparently not excluded as defendants by the Act even though the Regulations expressly remove such individuals from the class of defendants for whom the state will compensate the victims.

Opponents of the Attorney General's interpretation that the Regulations indicate legislative intent argue that if the definitions provided in the Regulations are meant to apply to the Act, there has been an unconstitutional delegation of legislative power. Legislative power is vested only in the General Assembly as mandated by the Kentucky Constitution. Provisions that require the separation of legislative, executive, and judicial functions into three departments do not allow one department to exercise the power of another. However, the

Intervening Defendant, supra note 46, at 3. Ordinary negligence would not be within the Act's scope.


Id.

The argument is that negligence should be excluded because "[t]he term 'act or omission' is a term of art which implies a voluntary, witting, act, as contrasted with carelessness and negligence." Memo for Intervening Defendant, supra note 46, at 4.

KAR, supra note 51, at § 5(4) states: "KRS 44.055 authorizes state agencies to purchase policies of insurance covering vehicles owned by the state. For this reason 'defendant', as defined in Section 1(3), does not include a person being sued for negligence in the operation of a state vehicle."

Memorandum of Amicus Curiae, Scheckles v. McClure, Civ. No. 87383 (Franklin Cir. Ct. 1976) [hereinafter cited as Memo of Amicus Curiae]. Attorney for amicus curiae, Sandra M. Varellas, argued that the definitions in the Regulations could not be intended to apply to the Act but would apply only to the Regulations themselves. The Regulations state: "Section 1. Definitions. When used in this regulation . . . ." Ms. Varellas argued that "the Governor was given no power by the General Assembly to adopt definitions to be used in interpreting the statute." Memo of Amicus Curiae, supra, at 16.

"The General Assembly did not attempt to give to the Governor the power to establish the coverage of the Act since the General Assembly is certainly aware that any such attempt would be an unconstitutional delegation of its legislative power." Memo of Amicus Curiae, supra note 65, at 16.

Ky. Const. § 29.

Id. § 27.

Id. § 28.
Court has recognized that "the legislature cannot deal with subordinate rules or cover the details of administration and execution in its regulatory enactments." Some flexibility in applying the constitutional requirements has been allowed to insure proper governmental functioning. Even though "[t]he principle that the Constitution does not prohibit some delegation of legislative power is well settled," there still remains a fine line between constitutional and unconstitutional delegation. "The legislature must declare the policy of the law and fix the principles which are to control in given cases; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply." The narrower class of defendants in the Regulations—may have developed as an attempt to meet legislative intent, but it can be argued that "[i]f the Legislature intend[ed] to confer upon administrative bodies" the authority to specify to whom the Act applies, "that intent should [have been] expressed in clear and unmistakeable terms." The Act expresses only an intent that the Governor "shall provide by regulation . . . for the defense of employes" by the methods enumerated by the legislature.

III. The Future of the Employment Defense Act

Until the courts have reached judgment on the application

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70 Bloemer v. Turner, 137 S.W.2d 387, 391 (Ky. 1939).
71 Hopkins v. Ford, 534 S.W.2d 792, 795 (Ky. 1976). While it is clear that some delegation is constitutionally acceptable, the Court indicated that "[i]t is all a matter of degree to be determined in the light of specific acts and circumstances." Id. Determining to what degree is no easy task. However, in Parks Co. v. Allphin, 295 S.W.2d 562, 565 (Ky. 1956), the Court indicated that although it would not determine if the Department of Revenue had the power to make regulations applicable to state tax law, the Court was "of [the] opinion that the Department had no power to add to or subtract from the standard set up by the statute itself."

If that rationale is applied to the Regulations here, the issue then becomes whether the Governor's Regulations subtract from the class of potential defendants under the Act so as to exceed constitutional authority.

72 Commonwealth v. Johnson, 166 S.W.2d 409, 412 (Ky. 1942). The General Assembly can delegate only that fact-finding power necessary for efficient administration of the law. The constitution prohibits legislative delegation of the power to determine or create laws. Henry v. Parrish, 211 S.W.2d 418, 421 (Ky. 1948).

73 See text accompanying notes 55-64 supra for a discussion of the narrower class of defendants contemplated by the Regulations.

74 Henry v. Parrish, 211 S.W.2d 418, 422 (Ky. 1948).
of the Employe Defense Act, many questions remain unanswered. Two issues which will have to be considered are how the Act will operate in conjunction with the Board of Claims, and whether the Act itself is constitutional.

A. The Act and the Board of Claims

In determining how the Employe Defense Act will operate in the presence of the Board of Claims, much will depend upon whether the courts decide that the definitions in the Regulations will control the class of defendants covered by the Act. The Board of Claims provisions have been interpreted to apply solely to "agencies which are under the direction and control of the central state government and are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury." This excludes agents of sewer districts and school districts. Even though neither are within the Board of Claims, both have been deemed arms of the state so that they are protected from civil suit by sovereign immunity. Should the definitions in the Regulations prevail as controlling the scope of the Act, sewer districts, boards of education, and other local governmental arms of the state would continue to escape liability for tortious conduct.

On the other hand, should the courts decide that the Regulation's definitions do not apply to the Act itself, then it would be more advantageous for a plaintiff to bring an action under the Act than before the Board of Claims. The Act would presumably include governmental agencies not necessarily a part

76 The Franklin Circuit Court should have the opportunity to decide this issue within the next few months. See text accompanying notes 50-75 supra for a discussion of the Attorney General's argument in Sheckles v. McClure, Civ. No. 87383 (Franklin Cir. Ct. 1976).
77 KRS § 44.070 (Supp. 1976).
80 See Wood v. Board of Educ., 412 S.W.2d 877 (Ky. 1967).
81 See note 24 supra and accompanying text for a discussion of limitations on the Board of Claims Act.
82 See KAR, supra note 51, at § 1(4).
83 It seems unlikely that one could bring an action both before the Board of Claims and under the Act. The Act allows suit against the individual employee, with defense and payment afforded by the state. An action against the state before the Board of Claims has been interpreted to bar another action against the employee. Op. KY. ATT'Y GEN. 61-994 (1961).
of the central government.4 Victims of negligent conduct by any state agent45 could then bring actions in courts of competent jurisdiction. Further, "all final judgments awarded . . . not exceeding fifty thousand dollars . . . [would] be paid . . : from the unappropriated general fund surplus in the state treasury."55 Recovery for pain and suffering, denied by the Board of Claims Statutes,57 would be allowed.

Furthermore, the Employe Defense Act would afford procedural advantages to the plaintiff. For example, the claimant who appeals from the Board of Claims is granted only "a limited appellate review"58 stemming from the statutory restrictions.59 Under the Act, however, the plaintiff would have general appellate review governed by the Rules of Civil Procedure60 and application of the general rules of evidence. The Board, on the other hand, has not been guided "by the well recognized rules of evidence."69 Finally, no longer would an injured party be bringing an action against a negligent party who is both defendant and judge.

B. The Issue of Constitutionality

In Sheckles v. McClure62 the Attorney General argued that the statute requiring judgments of up to $50,000 be paid out of the unappropriated general fund63 was unconstitutional under

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5 Of course, the plaintiff would still have to show that the employee fits within the Act, i.e., that the employee was acting within the scope of employment. The Attorney General has argued that if he decides not to defend an employee under KRS § 12.212, then the employee is not within any provisions of the Act. Memo for Intervening Defendant, supra note 46. In response to this argument, it has been submitted that if the Attorney General was correct, it "would amount to giving the Attorney General total fact-finding authority with respect to this Act . . . . This would allow the Act to be applied or not applied to a state employee at the mere whim of the Attorney General." Memo of Amicus Curiae, supra note 65, at 12.
7 KRS § 44.070(1) (1970).
9 KRS § 44.140 (1970).
10 Cf. Commonwealth v. Chinn, 350 S.W.2d 622 (Ky. 1961)(in which the Court held that before the Board of Claims, the state does not have to plead affirmatively the statute of limitations; instead, the claimant must prove that the statute has not run).
11 Bartlett v. Commonwealth, 418 S.W.2d 225, 227 (Ky. 1967).
12 Civ. No. 87383 (Franklin Cir. Ct. 1976).
Section 3 of the Kentucky Constitution. Section 3 provides: "All men, when they form a social compact, are equal; and no grants of exclusive, separate public emoluments of privileges shall be made to any man or set of men, except in consideration of public services." While state defense of an employee removes the employee's personal risk of litigation so as not to deter him from taking public office, it has been argued that for the Act then to require payment of the judgment by the state "goes too far" in that it creates a special privilege. However, the Court has held that Section 3 should not be "too strictly interpreted else public services and public welfare would suffer." Although the Board of Claims also provides for compensation to be paid out "of the general fund of the commonwealth," there appears to be no successful challenge to its constitutionality. But it seems clear that the thrust of both the Board of Claims provisions and the Employe Defense Act is to compensate the victims of negligent conduct by an employee of the state, not to create a privilege.

However, the Act may be subject to the more serious challenge of indefiniteness. Because no clear indication of legislative intent is available, the question of the Act's application under the Governor's Regulations will have to be resolved by the courts. In so doing, the courts must first recognize that the Act's passage was well within the General Assembly's power under Section 231 of the Kentucky Constitution. Further, in Gnau v. Louisville and Jefferson County, the Court held that if the General Assembly intended to withdraw the "existing common law immunity from suit" enjoyed by local governmental units (e.g., boards of education, sewer districts), "the language of the statute would . . . [have to] be more inclusive and more explicit" than that of the statutes establishing the

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81 Memo for Intervening Defendant, supra note 46.
82 Id.
83 Id. at 9.
84 Miller v. Robertson, 208 S.W.2d 977, 980 (Ky. 1948), cited in Memo of Amicus Curiae, supra note 65, at 12.
85 KRS § 44.100 (1970).
86 There are apparently no cases challenging the constitutionality of the Board on any basis.
87 346 S.W.2d 754 (Ky. 1961).
88 Id. at 755.
Board of Claims. It would seem that the language of the Employee Defense Act is more inclusive. As there appears to be a conflict between the provisions of the Act and those of the Regulations, the general rule of construing legislation in favor of constitutionality would seem to indicate that the language of the Act should control.

Because of the present restrictiveness of the Board of Claims, it could be inferred that the legislature intended to include all agencies of the state within the purview of the Act. "The Legislature clearly did not intend to duplicate the Board of Claims Act and did not merely intend to raise the limits of the Board of Claims, since that could have been easily accomplished by an amendment to the Board of Claims Act." Just as the Board of Claims and the Workmen's Compensation Board have been found constitutional, the Employee Defense Act should withstand constitutional attack.

CONCLUSION

In *Sheckles v. McClure*, the Attorney General argued that the Employee Defense Act should be limited to employees of the central government because the cost of defending and paying judgments for all state employees would be prohibitive. This concern over the commonwealth pocketbook is perhaps the major reason for the perpetuation of sovereign immunity in Kentucky. However, "[if] it is no answer to say that the government must see to its fiscal integrity. So must every private citizen be concerned for his own financial resources."

The General Assembly failed to abrogate sovereign immunity in its previous session, and it is doubtful that the doctrine will meet defeat in the next session. The legislature

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102 See notes 54-58 supra and accompanying text for an explanation of why the language of the Act suggests it is more inclusive.
103 See *Bloemer v. Turner*, 137 S.W.2d 387 (Ky. 1939).
104 Memo of Amicus Curiae, supra note 65, at 8.
105 See *Greene v. Caldwell*, 185 S.W. 129 (Ky. 1916).
106 Civ. No. 87383 (Franklin Cir. Ct. 1976).
107 See note 48 supra for an explanation of the Attorney General's argument as to the limitations of the Act.
108 Memo for Intervening Defendant, supra note 46, at 5-6.
110 Interview with Varellas, supra note 35.
seems content merely to wear down the state’s immunity through the Board of Claims and the Employe Defense Act, which provide only limited compensation. "[T]he legislature might expect the courts themselves to correct an unjust rule." The permissive language of Section 231 of the Kentucky Constitution does not vest the power of abrogation in the General Assembly. The Court too may provide justice. "The rule of governmental immunity for torts is an anachronism without rational basis, and has existed only by the force of inertia." It is time for the Court to act.

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111 The Board of Claims provides only $20,000 recovery. KRS § 44.070(5)(1970). The Employe Defense Act now provides up to $50,000. Id. KRS § 12.214(1)(Supp. 1976).

112 Haney v. City of Lexington, 386 S.W.2d 738, 741 (Ky. 1964).

113 See notes 8 and 11 supra and accompanying text for a discussion construing this section of the Constitution.