Sovereign Immunity: Principles and Application in Medical Malpractice

Michael Suk MD, JD, MPH, FACS

Published online: 14 March 2012
© The Association of Bone and Joint Surgeons® 2012

Abstract

Background Tort law seeks accountability when parties engage in negligent conduct, and aims to compensate the victims of such conduct. An exception to this general rule governing medical negligence is the doctrine of sovereign immunity. Historically, individuals acting under the authority of the government or other sovereign entity had almost complete protection against tort liability.

Questions/purposes This article addressed the following: (1) the development of sovereign immunity in law, (2) the lasting impact of the Federal Tort Claims Act on sovereign immunity, and (3) the contemporary application of sovereign immunity to medical malpractice, using case examples from Virginia and Florida.

Methods I performed an Internet search to identify sources that addressed the concept of sovereign immunity, followed by a focused search for relevant articles in PubMed and LexisNexis, literature databases for medical and legal professionals, respectively.

Results Historically, sovereign liability conferred absolute immunity from lawsuits in favor of the sovereign (ie, the government). Practical considerations in our democratic system have contributed to an evolution of this doctrine.

Conclusions Understanding sovereign immunity and its contemporary application are of value for any physician interested in the debate concerning medical malpractice in the United States. Under certain circumstances, physicians working as employees of the federal or state government may be protected against individual liability if the government is substituted as the defendant.

Introduction

The legal basis for accountability in medical practice is rooted in negligence law. Negligence law is comprised of four elements: duty, breach, causation, and harm. In other words, it imposes a duty on individuals and organizations to meet standards of due care as established by peer practice. If a failure to meet such standards results in harm to another party, those individuals or organizations responsible can be sued and may be found liable for damages in a court of law. Medical malpractice is a unique subset of negligence or tort law whose regulation is both a fertile and active battleground between physicians, attorneys, and lawmakers. Traditionally, in medical malpractice cases involving negligent acts or omissions, the physician is individually liable for damages. However, a powerful shield to physician liability can manifest if the government is substituted as defendant when a physician is acting within the scope of federal or state employment.

Sovereign immunity is a legal doctrine that protects a sovereign body (ie, the federal or state government and their respective agencies) from being held liable for civil wrongs (torts) committed by its departments, agencies, or employees, unless consent to be sued is expressly granted by the sovereign body itself. This blanket protection from liability is clearly advantageous for the sovereign, but

The author certifies that he or a member of his immediate family, has no commercial associations (eg, consultancies, stock ownership, equity interest, patent/licensing arrangements, etc) that might pose a conflict of interest in connection with the submitted article.

All ICMJE Conflict of Interest Forms for authors and *Clinical Orthopaedics and Related Research* editors and board members are on file with the publication and can be viewed on request.

M. Suk (✉)

Department of Orthopaedic Surgery, Geisinger Health System,
MC 21-30, 100 N Academy Ave, Danville, PA 17822, USA
e-mail: msuk@geisinger.edu

leaves the injured party with little or no remedy for the harm suffered. The concept of sovereign immunity creates certain exceptions to medical malpractice liabilities that are important for clinicians to understand. Accordingly, this review had the following purposes: (1) discuss the development of the sovereign immunity doctrine in law (2) examine the lasting impact of the Federal Tort Claims Act on sovereign immunity, and (3) examine the contemporary application of sovereign immunity to medical malpractice. Specific examples examined include the unique circumstances applied to military personnel on foreign soil covered under the Medical Malpractice Immunity Act, the legal interpretive test established by the state of Virginia, and finally the policy-based approach in the state of Florida that applies to physicians working in teaching hospitals and medical schools.

Search Strategy and Criteria

I searched the topic of “sovereign immunity” in a general Internet query, using the Google search engine. Legislative acts and legal cases thus identified were further investigated using the PubMed and LexisNexis databases used by medical and legal professionals, respectively, to learn about the selected examples cited in this article. Inclusion criteria for such relied principally upon relevance to the topic of how sovereign immunity modulates medical malpractice law, and the lessons that may be of interest and value to practicing clinicians.

The Doctrine of Sovereign Immunity

In the context of this legal framework, broad bars to legal liability for negligent acts are often called immunities. At the level of the state and federal governments, this immunity is usually referred to as sovereign immunity and is associated with the idea that the “King can do no wrong” [10]. The doctrine of sovereign immunity holds that the government cannot be sued or held legally responsible for its actions or the actions of its branches, departments, agencies, and employees [4]. Today, cases of negligent acts by physicians employed by the federal or state governments are sometimes covered under this doctrine and provide broad protections against individual liability; however, its application is both complex and often misunderstood.

The general principle of sovereign immunity was carried over to the United States, even without a “sovereign.” The reason for this was partly the belief that actions of the executive branch should not be subject to regular judicial

review as a result of individual tort litigation [12]. The modern rationale focuses on the inappropriateness of holding government to the same standards of due care applicable to private parties. As a general rule, actions taken by the government are immune from suit, except if the government consents to litigation.

Physicians working as an employee of the federal or state government often cite sovereign immunity as the basis for the claim that they cannot be sued. As a general rule, this is an inaccurate assertion. In fact, government employment status and its attendant liability protection is more appropriately defined as “defendant substitution,” whereby the government waives sovereign immunity and consents to be sued in lieu of the individual physician. The genesis of this legal rubric lies in the Federal Tort Claims Act [18].

The Federal Tort Claims Act

The broad application of sovereign immunity did not historically preclude individuals from suing the government for acts resulting in harm. Early cases of tort litigation against the United States show that success in obtaining damage awards was both extremely challenging and granted only under very limited circumstances: (1) if the individual could demonstrate that the government committed a taking of property compensable under the Constitution, or (2) if the individual had the political connections and wherewithal to maneuver a private bill through Congress [10]. Owing to the burdensome nature of this process, Congress enacted the Federal Tort Claims Act in 1946. Under the Federal Tort Claims Act, the government allows itself to be sued for the acts of its departments, agencies, and employees to the same extent as a private individual for inappropriate acts under negligence law [3].

In the broad view, when the government’s conduct is at the planning level, it is protected by the immunity. However, during its execution (ie, the operational level) the government is not immune and its actions must be carried out with “reasonable care.” Reasonable care is a concept of tort law and refers to conduct that a reasonable person in the defendant’s shoes would have engaged in under similar circumstances. Affirmative, specific acts of negligence are often clearly operational, so that the government can be held liable for the negligent operation of automobiles [15], airport control towers [13], lighthouses [7], and the negligent performance of medical care [16].

For example, if the government makes an administrative decision that wrongly denies a patient admission to a hospital (planning level), and the patient is harmed because of a failure to provide the standard of care once he is admitted (operational level), immunity is applied for the

first act [11], but not the second [16], under the modern interpretation of sovereign immunity.

The Federal Tort Claims Act specifically gives plaintiffs the option of suing the government in addition to, or in lieu of, the federal employee under the laws of the state in which the negligent act occurred [18]. However, while the plaintiff has the option of suing the United States in addition to the employee, he may only recover damages from one defendant [6]. For practical reasons, many plaintiffs elect to sue only the government over the employee because recovery of monetary damages is far more certain. However, with that decision, plaintiffs give up certain remedies. For example, under the Federal Tort Claims Act, punitive damage awards against the government are expressly disallowed [15]. Moreover, the Federal Tort Claims Act imposes a 2 year statute of limitations, which, in some instances, may be shorter than under many state laws [17]. Finally, in medical malpractice cases, a jury trial is often preferred, particularly if the injury has the potential to elicit sympathy. Under the Federal Tort Claims Act, jury trials are not allowed [9].

Medical Malpractice Immunity Act

As originally enacted, the Federal Tort Claims Act gave a general consent for defendant substitution with specific exceptions. Particular to medical malpractice, one of the exclusions under the Act applied to the ability to sue the federal government for negligent acts by US medical personnel serving on a military base on foreign soil [2]. Under this exclusion, the federal government maintained its complete sovereign immunity, leaving only the individual practitioner to act as a defendant. Military physicians serving overseas found themselves individually liable for the consequence of medical malpractice. Owing to the phenomenon of a dramatic increase in malpractice suits during the early 1970s, Congress sought to remedy the situation with the enactment of the Medical Malpractice Immunity Act [1].

The purpose of the Medical Malpractice Immunity Act is to protect federal medical personnel “from any personal liability arising out of the performance of their official medical duties” [14] by substituting the federal government as defendant. The Medical Malpractice Immunity Act protects medical personnel in most instances by removing the claimant’s option to sue the physician individually. From a public policy standpoint, such protections provide a substantial incentive for physicians to serve overseas in areas of the greatest military need, providing care with the understanding that, in the case of medical negligence, the federal government would allow itself to be sued in lieu of the individual.

US State Sovereign Immunity

Based on the idea that the king could do no wrong, the sovereign immunity doctrine of the modern state is much like that of the federal government (ie, the state and its agencies must consent to be sued). In doing so, the government offers itself as a substitute for the individual defendant. With rare exception, the great majority of states in the United States have now consented to at least some liability for torts committed by government employees.

The method by which states expose themselves to liability varies. Several states have established administrative agencies to hear and determine claims against the state. In most instances, nearly complete relief seems possible, subject only to the dollar limit that may be imposed on the state’s liability. Other states have agreed to be sued in limited cases, typically where the state or its agency has procured liability insurance that will pay any judgment.

The majority of states, however, have abrogated sovereign immunity in a substantial or general way [15]. Overall, the liability of these states is as broad as, or broader than, the liability of the federal government under the Federal Tort Claims Act. Physician liability exposure in these states is limited as a result. And while the specter of individual lawsuit exists, physician fears are often assuaged in the knowledge that plaintiffs are compelled to choose one defendant over the other, and often choose governments over individuals. Specific examples of state legislative efforts in this area of law follow.

The Virginia Test

To examine the application of the sovereign immunity doctrine to medical malpractice, the case of *James v Jane* is instructive [8]. At issue was whether or not a full-time employed physician employed by the Commonwealth of Virginia was entitled to a sovereign immunity defense when sued for medical malpractice (ie, the physician as direct agent of the commonwealth could do no wrong and, therefore, could not be sued). In this case, the commonwealth did not consent to be substituted as the defendant, thereby exposing the individual physicians to major liability concerns. The defendants argued that as full time employees of the commonwealth, their actions were in the interests of public policy and, therefore, they should be immune from lawsuit.

In adjudicating this case, the Supreme Court of Virginia examined four factors: (1) the relationship between the doctor’s functions and the state’s important governmental objectives, (2) the extent of the state’s interest and involvement in the doctor’s function, (3) the degree of control and direction exercised by the state over the doctor, and (4) the doctor’s use of judgment and discretion [8].

In this landmark ruling, the Commonwealth of Virginia said that the physician's primary function was to provide good medical care, which was distinct from the state's objective of providing a good medical school institution, thereby weakening the sovereign immunity defense. Furthermore, the nexus between the state's general interest in good quality care and involvement in the specific physician's delivery of that care through control and direction did not coincide sufficiently to warrant an immunity defense. Finally, the court noted that physicians had substantial discretion and the ability to use their own judgment in their delivery of medical care, making them individually liable for their negligent actions.

The *James v James* ruling set forth certain legal principles that have served as a precedent in later cases dealing with similar issues. The lesson here is that the legal application of immunity is driven by the proximity to which the government employee has to the overall objectives of the state and the degree to which the government has control over an employee's actions. Other than an agreement for defendant substitution as provided for in statutes similar to the Federal Tort Claims Act, where a sovereign immunity defense fails, the individual is responsible for attendant damages.

The Florida Approach

An examination of the Florida approach further illustrates these principles. The State of Florida and its counties, municipalities, and other political subdivisions have waived sovereign immunity in favor of defendant substitution [5]. In cases of torts committed by physicians employed by the government, Florida's waiver of sovereign immunity allows plaintiffs to recover damages from the state government. However, the state places caps on payment of a judgment or claim up to a maximum of \$200,000 per person, or \$300,000 per incident [5].

Similarly, Florida law further allows independent contractors to enjoy the benefits of the low limits on damages and it is specifically designed to allow those providing medical services to the indigent at county hospitals to be considered agents of the immune entity [5]. Specifically, Florida statute § 768.28(10)(f) provides that health care practitioners who are affiliated with a Florida not-for-profit college or university that owns or operates an accredited medical school and have contractually agreed to act as agents at a teaching hospital to provide health care services are considered agents of the teaching hospital for purposes of the statute. The teaching hospital must be owned or operated by the state, a county, a municipality, a public health trust, a special taxing district, or any other governmental entity with health care responsibilities. The health

care providers must act within the scope of, and pursuant to, the contract in order to be considered agents of the teaching hospital. Conceptually, the Florida approach to modernizing sovereign immunity mirrors that of Virginia in the *James v Jane* ruling.

Discussion

Tort law seeks accountability from parties engaged in negligent conduct and is intended to provide compensation to victims of such conduct. Historically, however, individuals acting under the authority of the government or other sovereign entity have had almost complete protection against tort liability claims. This exception has been known as the doctrine of sovereign immunity. The goal of this article was to identify (1) the history and development of sovereign immunity, (2) the lasting impact of the Federal Tort Claims Act, and (3) its contemporary application to medical malpractice in the United States. I identified and examined specific state legal cases and legislative acts.

This review was limited in that it was not a comprehensive examination of the doctrine of sovereign immunity outside of its specific application to medical malpractice jurisprudence. Also, I selected the judicial cases cited here in light of their direct contribution to our understanding of sovereign immunity. Third, many states other than Florida and Virginia have enacted specific statutes relevant to the concept of sovereign immunity, and these statutes have been the subject of litigation at the state level. Rather than provide a comprehensive legal review, my goal was to select the best examples that could illustrate the sovereign immunity doctrine and its effects on practicing clinicians.

Sovereign immunity is a practical, historical doctrine designed to enable the sovereign (ie, the king or government) to do its work without the fear of limitless litigation related to disputes arising from acts of governance. Applied in its pure form, it confers absolute immunity from legal liability upon the sovereign, leaving injured parties without any recourse or compensation. The modern application of sovereign immunity reflects an attenuation of the rigid historical concept. Today, as a broad bar to legal liability for negligent acts, sovereign immunity most commonly protects governmental planning actions or policy-making actions to avoid endless judicial speculation and second-guessing of the actions of the executive or legislative branches of government. However, when the government carries out its policies on an operational level using individuals acting on behalf of the government, then sovereign immunity can operate undesirably by subjecting the individual employee acting on behalf of the government to legal liability, and leaving the individual as the only source from whom damages may be collected.

Recognizing these considerations, the Federal Tort Claims Act was enacted in part to provide protection for individuals acting on behalf of the government in lawsuits involving negligent acts. The Federal Tort Claims Act provides a general consent by the government to be named in a lawsuit and provides a mechanism by which the government may be substituted for the individual defendant. This defendant substitution allows an individual defendant relief from becoming the sole source for damages arising out of lawsuits directed at the government. The majority of states in the United States have enacted similar statutes that provide a general consent to be sued as a sovereign entity and follow procedural mechanisms that are modeled after the Federal Tort Claims Act.

In the context of medical malpractice under negligence law, sovereign immunity and the related concept of defendant substitution can provide important protections against individual liability for physicians working on behalf of a state or federal government. Specifically, medical personnel working overseas on behalf of the government, those working in teaching hospitals, or institutions affiliated with, or owned by, the government may have relatively more protections against medical negligence lawsuits than private clinicians. However, such immunity is not impregnable, as the case law from Virginia illustrates. Rather than conferring blanket immunity upon employee physicians and always permitting substitution of the state as the defendant, Virginia law requires an examination of the relationship between the physician and the state by considering several factors, including the doctor's functions versus governmental objectives, the extent of state involvement in the doctor's function and the amount of control exercised by the state over the doctor, and the doctor's use of judgment and discretion. Rather than assume that government-related employment may mitigate legal liability in a medical negligence action, physicians should be aware that liability in such cases turns on a factual inquiry, as illustrated by the landmark *James v. Jane* case in Virginia.

The practice of medicine is a complex endeavor, and the Florida approach is another instructive example in understanding how modern sovereign immunity affects medical malpractice negligence law. While Florida has chosen, for policy reasons, to allow its local governments to be substituted as defendants in medical negligence lawsuits, thereby allowing plaintiffs to recover damages from the state government, the state has also imposed monetary caps on such damages. Florida law protects physicians who contract to provide services at indigent hospitals, medical schools, colleges and universities, and teaching hospitals.

If Florida physicians are acting in the scope of their contractual duties at a facility owned or operated by the government, then sovereign immunity can shield them against medical negligence lawsuits.

In summary, a historical legal doctrine designed to protect the sovereign and allow effective governance has undergone considerable evolution in our democratic society. In the medical negligence setting, sovereign immunity can operate to protect the clinician, provided there is a credible nexus between physician activity and substantial government interest, and if certain requirements pertaining to government ownership or interest, as well as the nature of physician activity are shown. Federal reform led to the evolution of the sovereign immunity doctrine in 1946; since then, many states have adopted statutes designed to facilitate medical care, teaching, volunteer service, staffing of indigent hospitals, and medical service overseas, including during times of military operation. For clinicians desiring more precise information on this subject, an examination of their respective state laws concerning sovereign immunity to medical providers will be instructive.

Acknowledgments I thank B. Sonny Bal, MD JD MBA for organizing the symposium and for his encouragement and editing in writing this article. Also, I gratefully acknowledge the contribution of Steve Friedman, Senior Editor at the University of Missouri, Department of Orthopaedic Surgery.

References

1. Defense of Certain Suits Arising out of Medical Malpractice, 10 USC §1089 (1988).
2. Exceptions, 28 USC §2680a-n (1982).
3. Federal Tort Claims Act, 28 USCA §2674 (1982).
4. *Feres v. United States*, 340 US 135, 139 (1950).
5. Fla Stat Ann § 768.28 (West 1997 & Supp. 1998).
6. *Henderson v. Blumink*, 511 F2d 399, 403-404 (DC Cir 1974).
7. *Indian Towing Co. v. United States*, 350 US 61, 76 S Ct 122 (1955).
8. *James v. Jane*, 221 Va. 43, 282 SE2d 864 (1981).
9. Jury Trial in Actions Against United States, 28 USC §2402 (1982).
10. Keeton WP, Dobbs DB, Keeton RE, Owen DG. *Prosser and Keeton on the Law of Torts* 5th ed. St. Paul, MN; West; 1984.
11. *Morton v. United States*, 2287 F2d 431 (DC Cir 1955).
12. *Osborn v. Bank of the United States*, 22 US 738, 6 LEd 204 (1824).
13. *Ross v. United States*, 640 F2d 511 (5th Cir 1981).
14. S. Rep. No. 1264, 94th Cong, 2nd Sess 4 (1976) 4440-4459.
15. *Sullivan v. United States*, 129 F Supp 713 (ND Ill. 1955).
16. *Supchack v. United States*, 365 F2d 844 (3rd Cir 1966).
17. Time for Commencing Action Against United States, 28 USC §2401b (1982).
18. United States as Defendant, 28 USC §1346b (1982).