

Oklahoma Law Review

Volume 42 | Number 3

1-1-1989

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Recommended Citation

Tim Rhodes, *Torts: The Fault-Free Plaintiff and the Governmental Tortfeasor: Several Liability in Oklahoma under Fuller v. Odom*, 42 OKLA. L. REV. 513 (1989),
<https://digitalcommons.law.ou.edu/olr/vol42/iss3/7>

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Torts: The Fault-Free Plaintiff and the Governmental Tortfeasor: Several Liability in Oklahoma under *Fuller v. Odom*.

Introduction

The common law doctrines of joint and several liability and sovereign immunity, long used by Oklahoma courts to determine the relative culpability of joint tortfeasors and the liability of government tortfeasors, have lately been affected by statutory revision and by judicial statutory interpretation. The Oklahoma Supreme Court's decision in *Fuller v. Odom*¹ impacts on both of these important common law doctrines. This note will examine the impact of *Fuller* on joint and several liability and sovereign immunity in Oklahoma.

In Oklahoma, recent statutory changes outlined within the Governmental Tort Claims Act² have, in effect, created a new class of tortfeasor, the governmental tortfeasor.³ The liability of the government is now determined solely by the statute, exclusive of prior common law rules.⁴ Because the Governmental Tort Claims Act provides for several liability in tort for governmental entities, the statute has led to an Oklahoma Supreme Court decision in *Fuller v. Odom* which is markedly different from that which would have been rendered under prior case law.⁵

Sovereign Immunity in Oklahoma

The concept of governmental immunity from suit derives from centuries-old English common law.⁶ Its historical basis, "the King can do no wrong,"⁷ has today become more of a governmental policy of preventing depletion of public funds via payment of legal judgments than a belief in monarchical inviolability.⁸

The framers of the United States Constitution provided for preclusion from suits against states in the eleventh amendment.⁹ The amendment states that "[t]he 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."¹⁰ In Oklahoma, the doctrine of sovereign immunity had been

1. 741 P.2d 449 (Okla. 1987).

2. 51 OKLA. STAT. §§ 151-71 (1981 & Supp. 1984).

3. *Fuller*, 741 P.2d at 451 n.6.

4. *Id.* at 450.

5. *Id.* at 452.

6. 72 AM. JUR. 2D *States, Territories and Dependencies* § 99 (1974).

7. *Id.*

8. *Id.*

9. U.S. CONST. amend. XI.

10. *Id.*

embraced judicially¹¹ until the 1983 Oklahoma Supreme Court's decision in *Vanderpool v. State*.¹² In *Vanderpool*, the court abolished the concept of governmental immunity in Oklahoma.¹³

The *Vanderpool* decision abrogated the judicially created doctrine of governmental immunity.¹⁴ As a result, Oklahoma joined the courts and legislatures of a majority of states which had either substantially limited the doctrine of sovereign immunity, or done away with it altogether.¹⁵ However, the Oklahoma Supreme Court recognized the legislature's power to readopt the doctrine statutorily,¹⁶ which the legislature did in 1984.¹⁷

Prior to *Vanderpool*, the Oklahoma Supreme Court had recognized an exception to absolute state immunity from suit by drawing a distinction between state functions which were "proprietary," and thus subject to liability,¹⁸ and those which were "governmental," and thus immune from liability.¹⁹ The distinction was first recognized in municipal tort liability cases.²⁰ It was later extended to counties, the state and state agencies.²¹ Thus, the judicial determination of whether activities were "proprietary" or "governmental" was necessary to the maintenance of a suit against a governmental entity.²²

This distinction in Oklahoma courts was eroded when the Oklahoma Legislature enacted the Governmental Tort Liability Act in 1965 (the "1965 Act").²³ The 1965 Act stated that a municipality, whether acting in a proprietary or governmental capacity, could be held liable for the torts of its employees.²⁴ An Oklahoma Supreme Court ruling, however, held that the 1965 Act was inapplicable to municipal proprietary functions because the Act's title did not specifically "refer to proprietary functions."²⁵ A 1968 legislative amendment to the 1965 Act excluded a municipality's proprietary activities from tort liability.

11. *State ex rel. Williamson v. Superior Court*, 323 P.2d 979 (Okla. 1958); *Duncan v. State Highway Comm'n*, 311 P.2d 203 (Okla. 1957); *Mountcastle v. State*, 193 Okla. 506, 145 P.2d 392 (1943).

12. 672 P.2d 1153 (Okla. 1983).

13. *Vanderpool*, 672 P.2d at 1156. See also, Dillsaver, *An Overview of the Governmental Tort Claims Act*, 56 OKLA. B.J. 2938 (1985).

14. *Id.*

15. *Vanderpool*, 672 P.2d at 1156.

16. *Fuller*, 741 P.2d at 451.

17. 51 OKLA. STAT. § 152.1 (Supp. 1986).

18. *City of Oklahoma City v. Hill*, 6 Okla. 114, 50 P. 242 (1897).

19. Note, *Torts: Sovereign Immunity: The Changing Doctrine of the Immunity of the State in Tort in Oklahoma*, 25 OKLA. L. REV. 592 (1972).

20. Comment, *Sovereign Immunity For Tort Actions in Oklahoma: The Governmental Tort Claims Act*, 20 TULSA L.J. 561, 568 (1985).

21. *Id.*

22. *White v. City of Lawton*, 373 P.2d 25 (Okla. 1961); *Souligny v. Ponca City*, 272 P.2d 413 (Okla. 1954); *Oklahoma City v. Baldwin*, 113 Okla. 289, 272 P. 453 (1928).

23. Note, *Municipal Corporations: Municipal Immunity—A Changing Doctrine in Oklahoma*, 32 OKLA. L. REV. 890 (1979).

24. *Id.* at 892.

25. *Id.*

ty.²⁶ Therefore, the determination of whether activities were “proprietary” or “governmental” was still important, even under the 1965 Act.

In 1977, the legislature partially repealed the 1965 Act, including its title, and recodified remaining sections by enacting the Municipal Code.²⁷ The portions of the Municipal Code relating to municipal immunity, however, were in part repealed and recodified with the passage in 1978 of the Political Subdivision Tort Claims Act (the “1978 Act”).²⁸ The 1978 Act completely rejected “the governmental proprietary test by specifically providing that it applies to both governmental and proprietary functions.”²⁹

In response to the Oklahoma Supreme Court’s abolition of judicially created sovereign immunity in its 1983 *Vanderpool* decision,³⁰ the legislature readopted the doctrine in 1984 under its present name, the Governmental Tort Claims Act (the “Act”).³¹ This Act was referred to as the Political Subdivision Tort Claims Act by the Oklahoma Supreme Court in *Fuller*.³² The Act today is the exclusive means by which one may bring an action against the state or a political subdivision for its torts or those of their employees.³³

The legislature, under the Act, expressly adopted the doctrine of sovereign immunity for “[t]he state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions”³⁴ The drafters of the Act left little doubt, by the language of section 152.1(B), of their intent that the Act be construed as a broad embrace of governmental sovereign immunity with narrow provisions for waiver. The statute states in part, “The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.”³⁵

Whether the Act was applicable to the facts of *Fuller* was never contested by the litigants.³⁶ The case below was litigated on a straight negligence cause of action.³⁷ The only issue remaining open for determination was whether Oklahoma’s Act abrogated the “common law rule governing joint and several liability” in Oklahoma.³⁸

26. *Id.*

27. 11 OKLA. STAT. (1971 & Supp. 1977).

28. *See Note, infra* note 23, at 893 n.27.

29. *Id.* at 893.

30. *See Comment, supra* note 20, at 574.

31. 51 OKLA. STAT. § 151 (1981 & Supp. 1986) (historical note following text of statute).

32. *Fuller*, 741 P.2d at 450.

33. 51 OKLA. STAT. § 153 (Supp. 1986).

34. *Id.* at 152.1A.

35. *Id.*

36. Brief in Support of Defendant City of Tulsa’s Motion to Consolidate at 3, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987) (no reply by plaintiff to reference in motion to section 154E).

37. Petition at 2; Answer of Defendant City of Tulsa at p. 2-3, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987).

38. *Fuller*, 741 P.2d at 450.

Joint and Several Liability in Oklahoma

The history of joint and several tort liability in Oklahoma is similar to the development of the doctrine elsewhere.³⁹ At first, a joint tortfeasor was one who united in an act with another,⁴⁰ or acted in concert with another,⁴¹ to damage an innocent person. Under common law, joint tortfeasors were held jointly and severally liable,⁴² meaning the innocent plaintiff could sue one or more of the defendants separately, or all of them together.⁴³ The rationale for the rule was that each joint wrongdoer who pursued a common plan or design to commit a tortious act was equally culpable in the eyes of the law.⁴⁴

Because each participant who united with another in a wrongful act was deemed morally blameworthy to an equal degree,⁴⁵ Oklahoma courts allowed recovery of the entire amount of damages from any single joint tortfeasor,⁴⁶ so that an injured plaintiff might have a better opportunity for complete compensation.⁴⁷

The requirement of concerted action in a tortious activity was eventually relaxed in Oklahoma, making individuals responsible for concurring but independent acts, which produced a single injury, liable as joint tortfeasors.⁴⁸ This development mirrored the trend elsewhere in the country.⁴⁹ Because of semantical difficulties in defining these tortious actors as "joint tortfeasors," they are more accurately referred to as "concurrent tortfeasors." The term "joint tortfeasor" connotes action in concert, or action taken pursuant to a joint interest, and such requirements are immaterial in concurrent negligence.⁵⁰

The Oklahoma Constitution, however, provides tortfeasors with the defense of contributory negligence.⁵¹ Prior to 1973, contributory negligence operated as a complete bar to any recovery by a plaintiff in a negligence action.⁵² In 1973, the Oklahoma Legislature adopted the state's first comparative negligence statute.⁵³

39. W. PROSSER, PROSSER ON TORTS § 46 (5th ed. 1984).

40. *Preston v. Lewis*, 50 Okla. 754, 151 P. 485 (1915).

41. W. PROSSER, PROSSER ON TORTS § 46 (5th ed. 1984).

42. *Cain v. Quannah Light & Ice Co.*, 131 Okla. 25, 267 P. 641 (1928); *Selby v. Lindstrom*, 59 Okla. 227, 158 P. 1127 (1916).

43. BLACK'S LAW DICTIONARY 433 (5th ed. 1983).

44. *See* W. PROSSER, *supra* note 39.

45. *Id.*

46. *Adams v. Stanolind Oil & Gas Co.*, 187 Okla. 478, 103 P.2d 526 (1940); *Town of Sentinel v. Boggs*, 177 Okla. 623, 61 P.2d 654 (1936); *Prairie Oil & Gas Co. v. Laskey*, 173 Okla. 48, 46 P.2d 484 (1935).

47. *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980).

48. *Cities Service Oil Co. v. Merritt*, 332 P.2d 677 (Okla. 1958); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947 (Okla. 1957).

49. *See* W. PROSSER, *supra* note 39.

50. 57 AM. JUR. 2D *Negligence* § 186 (1971).

51. OKLA. CONST. art. XXIII, § 6.

52. *Hopson v. Triplett*, 380 F. Supp. 1169 (E.D. Okla. 1974); *Rader v. Fleming*, 429 P.2d 750 (Okla. 1967); *Barbe v. Barbe*, 378 P.2d 314 (Okla. 1962).

53. Note, *Comparative Negligence: The Role of the Absent Tortfeasor in Oklahoma*, 34 OKLA. L. REV. 815, 816 (1981).

In 1978, the Oklahoma Supreme Court addressed the issue in *Laubach v. Morgan* of whether a plaintiff's contributory negligence should be compared to that of each individual tortfeasor, or to the negligence of all tortfeasors aggregated.⁵⁴ After comparing the competing rationales of the comparative negligence statutes with decisions in other states, the court declared the comparative negligence statutes incomplete in scope and detail with regard to multiple parties.⁵⁵ Therefore, the court adopted the rule that a plaintiff's negligence should be compared to the combined negligence of all defendants.⁵⁶

The *Laubach* court also held that multiple tortfeasors should be severally liable in cases where the plaintiff was contributorily negligent. It also held that defendants would only be liable for the percentage of negligence attributed to them.⁵⁷ In *Laubach*, the court chose not to abrogate the existing rule against contribution between tortfeasors, one choice the court identified as a possible solution to the problem of determining how to apportion damages among multiple parties.⁵⁸ Instead, the court made a prospective mandate that juries would be responsible for apportioning the percentages of negligence between joint tortfeasors. Each joint tortfeasor would be liable for that percentage of the total damages assigned by the jury. Juries previously had been called upon to determine the percentage of responsibility between a single plaintiff and defendant.⁵⁹ Therefore, a jury also should be capable of determining the percentage of responsibility among defendants. The court rationalized its choice as the one most compatible with existing comparative negligence statutes and common law.⁶⁰ Neither state law nor case law allowed contribution among joint tortfeasors at the time the *Laubach* decision was reached.⁶¹ After *Laubach*, joint and several liability would apply to a plaintiff's contributory negligence, only if a jury was unable to apportion damages.⁶²

Amended to its present form in 1979,⁶³ the comparative negligence statute now allows for recovery by a plaintiff whose own negligence amounts to as much as fifty percent when compared to the combined negligence of all negligent actors. The statute provides that "[w]here such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of recovery shall be diminished in proportion to such person's contributory negligence."⁶⁴ Oklahoma is now one of forty-five states which has recognized some form of comparative negligence, either judicially or legislatively.⁶⁵

54. *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978).

55. *Id.* at 1073.

56. *Id.*

57. *Id.* at 1074.

58. *Id.*

59. *Id.*

60. *Id.* at 1075.

61. Roberts, *Contribution Among Joint Tortfeasors—Oklahoma Style*, 50 OKLA. B. J. 2193 (1979).

62. *Laubach*, 588 P.2d at 1074.

63. 23 OKLA. STAT. §§ 13, 14 (1981).

64. *Id.* at 14.

65. W. PROSSER, PROSSER ON TORTS § 67 (5th ed. 1984) (Alabama, Maryland, North Carolina, Tennessee and Virginia are the five remaining states).

Since the enactment of the state's comparative negligence statute, the Oklahoma Supreme Court has been called upon to apply the statute to cases involving either multiple defendants and a contributorily negligent plaintiff,⁶⁶ or multiple defendants sued by a fault-free plaintiff.⁶⁷ Under these decisions, contributory negligence on the part of plaintiffs will not bar their recovery, provided these plaintiffs' portions of negligence are determined to be not more than fifty percent.⁶⁸ However, such plaintiffs' damage awards will be reduced proportionally to the percentage of negligence attributable to them.⁶⁹ The plaintiffs' percentage of contributory negligence is calculated by a comparison to the aggregate negligence of all defendants.⁷⁰ Finally, because there is no way to compare single or multiple defendants' negligence where a plaintiff is fault free, the statutory comparative negligence provisions are inapplicable. In such cases, each defendant is jointly and severally liable for all harm done to the faultless plaintiff.⁷¹

Fuller v. Odom

Prior to *Fuller*⁷² the Oklahoma courts had never addressed the issue of a statutory mandate of several liability where a governmental cotortfeasor was held negligent toward a fault-free plaintiff. The decision-making process of the *Fuller* court was, therefore, one of both statutory construction and application.⁷³

In *Fuller*, Judy Fuller and her husband, Kenneth Boyce, filed separate suits against the City of Tulsa and one of its police officers for personal injuries received in an automobile accident. The accident involved a city police car driven by Officer Steven Odom, and a car driven by Boyce in which Fuller was a passenger. The court consolidated the two cases based on a motion by the City of Tulsa⁷⁴ and dismissed Officer Odom from the suit.⁷⁵

In a jury trial that concluded on January 8, 1986, the jury found the City of Tulsa fifty-one percent negligent and Boyce forty-nine percent negligent, and it awarded damages of \$10,000 to Boyce and \$35,000 to Fuller.⁷⁶ The trial judge entered judgment for Boyce in the reduced amount of \$5,100, pursuant to the provisions of the Act⁷⁷ which required reduction of an award

66. *Laubach*, 588 P.2d at 1074 (holding that each codefendant is severally liable only for the proportion of damages attributable to him).

67. *Anderson v. O'Donoghue*, 677 P.2d 648 (Okla. 1983) (tort-feasors jointly and severally liable); *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980).

68. OKLA. CONST. art. XXIII, § 6; 23 OKLA. STAT. § 13 (1981).

69. *Id.* at 14 (1987).

70. 23 OKLA. STAT. § 13 (1981).

71. *Boyles*, 619 P.2d at 613.

72. *Fuller*, 741 P.2d at 451.

73. *Id.*

74. Motion to Consolidate at 1, 2, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987).

75. Brief of Appellant at 1, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987).

76. *Fuller*, 741 P.2d at 450.

77. 51 OKLA. STAT. §§ 151-71 (1981 & Supp. 1986).

to a contributorily negligent plaintiff by the percentage of negligence attributed to the plaintiff.⁷⁸

Under Oklahoma common law prior to the Act, joint tortfeasors found to have harmed a fault-free plaintiff were all jointly and severally liable.⁷⁹ The trial judge, apparently influenced by the fact that Fuller was a fault-free plaintiff, did not reduce the award to her. The City of Tulsa appealed the entry of judgment.⁸⁰ The City contended that the “act is exclusive and governs the means by which Fuller can recover.”⁸¹ The City of Tulsa further argued that a political subdivision’s liability under the Act is several from that of any other person or entity.⁸² Therefore, Fuller’s award also should have been reduced to fifty-one percent of the full award: the amount of negligence corresponding to the city’s percentage of negligence.⁸³

On appeal, Fuller asserted that the Act was inapplicable where a fault-free plaintiff is injured by a governmental entity.⁸⁴ Prior to *Fuller*, the Oklahoma Supreme Court had not considered whether a political subdivision’s negligence liability is several from that of any other entity, even that of a fault-free plaintiff.

Justice Kauger, writing for a unanimous court, indicated that the intention of the court was to decide *Fuller* consonantly,⁸⁵ both with its 1983 landmark decision in *Vanderpool v. State*,⁸⁶ in which it renounced sovereign immunity in Oklahoma, and with the legislature’s 1984 readoption of the doctrine in the Governmental Tort Claims Act.⁸⁷ The court noted its *Vanderpool* decision did not preclude a legislative enactment embracing sovereign immunity.⁸⁸

In Oklahoma, actions against negligent tortfeasors normally proceed according to the state’s comparative negligence statutes.⁸⁹ However, courts have held those provisions inapplicable where a plaintiff is determined to be faultless.⁹⁰ Where a fault-free plaintiff successfully brings suit against multiple tortfeasors, comparative negligence does not apply and each tortfeasor is jointly and severally liable for all harm.⁹¹ The rationale for the rule is that an innocent plaintiff should be completely compensated for the injury incurred and that each of the wrongdoers should bear the burden of dividing the fault, not the innocent plaintiff.⁹²

78. *Id.* at 154F.

79. *Boyles v. Oklahoma Natural Gas*, 619 P.2d 613 (Okla. 1980).

80. *Fuller*, 741 P.2d at 451.

81. Brief of Appellant at 4, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987).

82. 51 OKLA. STAT. § 154F (Supp. 1986).

83. *Id.*

84. Brief of Appellee at 1, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987).

85. *Fuller*, 741 P.2d at 451.

86. *Vanderpool*, 672 P.2d at 1153.

87. 51 OKLA. STAT. § 152.1 (Supp. 1986) (effective October 1, 1985).

88. *Fuller*, 741 P.2d at 451.

89. *Id.*

90. *Boyles*, 619 P.2d at 613.

91. *Id.*

92. *Id.*

In addition, because the court had previously held that any limitations within the Act supercede general statutory law,⁹³ cases arising under the Act were to be determined by the provisions of the Act alone, without resort to other statutes.⁹⁴ Thus, the *Fuller* court determined it would not base its decision on a comparison between the Act and other state statutes. The court's decision was based on a comparison between the terms of the Act and the existing common law regarding joint and several liability.⁹⁵

The *Fuller* court was faced with a setting wherein one of the tortfeasors belonged to a separate class for which a separate rule had previously been devised.⁹⁶ The separate class included governmental tortfeasors.⁹⁷ The rule applicable to governmental tortfeasors derived exclusively from the Act. This included section 170 of the Act which mandated reliance on the Act alone to remedy the torts of a governmental entity.⁹⁸ Under the provisions of the Act, therefore, governmental tort liability would be several "from that of any other person or entity" in proportion to the government's percentage of negligence.⁹⁹ The statutory rule, however, conflicted with Oklahoma common law providing for joint and several liability.

The rule of judicial statutory interpretation in Oklahoma has long been that legislative intent should control judicial construction of a particular enactment.¹⁰⁰ The primary method for ascertaining legislative intent is to give the language of a statute its plain and obvious meaning.¹⁰¹ Further, courts should not "read into a statute exceptions not made by the Legislature."¹⁰²

Applying the "plain and obvious" meaning rule to the language of the Act, the *Fuller* court held that the statute was unambiguous.¹⁰³ The court held that because the Act contained no ambiguous language, judicial analysis of the Legislature's statutory intent was unnecessary where legislative intent "is clearly expressed."¹⁰⁴

Because the language of the Act was clear, the court stated its construction of the statute would not be to determine already clearly established legislative

93. *Hamilton v. Vaden*, 721 P.2d 412 (Okla. 1986); *Graves v. Rose*, 663 P.2d 733 (Okla. 1983).

94. *Hamilton*, 721 P.2d at 419 n.31; *Graves*, 663 P.2d at 735.

95. *Fuller*, 741 P.2d at 450.

96. *Black v. Ball Janitorial Serv. Inc.*, 730 P.2d 510 (Okla. 1986).

97. *Id.*

98. *Id.* 51 OKLA. STAT. § 170 (1981) provides: "This act is exclusive and supersedes all home rule charter provisions and special laws on the same subject heretofore, and all acts or parts of acts in conflict herewith are repealed." See also 51 OKLA. STAT. § 153B (Supp. 1989) ("the liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise").

99. 51 OKLA. STAT. § 154F (1981 & Supp. 1986).

100. *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 422 P.2d 840 (Okla. 1966); *City of Bristow v. Groom*, 194 Okla. 384, 151 P.2d 936 (1944).

101. *City of Bristow v. Groom*, 194 Okla. 384, 151 P.2d 936 (1944).

102. *Fuller*, 741 P.2d at 454.

103. *Id.* at 454 n.23.

104. *Id.* at 452. See also 25 OKLA. STAT. § 29 (1981).

intent.¹⁰⁵ The court would only decide what remedy was available to Fuller under the terms of the Act.¹⁰⁶ Fuller challenged the court's interpretation.¹⁰⁷

In her appeal to the Oklahoma Supreme Court, Fuller contended that the language of the statute was not sufficiently "clear and convincing" to abrogate the rule "that a negligent defendant's liability is both joint and several in situations involving negligence-free plaintiffs."¹⁰⁸ Fuller argued that the legislature's intent when enacting the statute was merely to limit a political subdivision's liability in cases of multiple negligent plaintiffs and defendants. This, she argued, was to prevent political subdivisions from bearing the burden of paying all the damages to a plaintiff under a "deep pocket" theory.¹⁰⁹ This reasoning did not persuade the court.¹¹⁰ Because it had determined the language of the Act to be clear and unambiguous,¹¹¹ and applicable to all plaintiffs,¹¹² the court was unable to accept Fuller's theory of statutory interpretation.¹¹³ Therefore, the court's holding was based on established judicial and legislative rules of statutory construction.¹¹⁴ Fuller's trial court award was reduced pursuant to the terms of the Act.

The Effect of Fuller v. Odom

The *Fuller* decision was judicial enforcement of legislative intent to alter previous common law rules of the joint and several liability of governmental entities.¹¹⁵ The *Fuller* ruling does not overrule existing rules of joint and several liability,¹¹⁶ but expressly declares that "the common law rule of joint and several liability continues in force outside the purview of the comparative negligence statute."¹¹⁷ A reasonable conclusion can be drawn that the court views the several liability section of the Act as an addition to the Oklahoma comparative negligence statutes. That is, the Act is a comparative negligence statute applicable in instances where a governmental entity is one of two or more tortfeasors. As the court stated, the Act embodies a special rule for a special class of tortfeasor.¹¹⁸

105. *Fuller*, 741 P.2d at 452.

106. *Id.*

107. Brief of Appellee at 3, *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987).

108. *Id.* at 6.

109. *Id.*

110. *Fuller*, 741 P.2d at 454. The court stated, "[w]e agree that the common law rule of joint and several liability continues in force outside the purview of the comparative negligence statute. We cannot agree, however, that the same rule applies to litigation arising under the Political Subdivision Tort Claims Act." *Id.*

111. *Fuller*, 741 P.2d at 452, 453.

112. *Id.* at 454.

113. *Id.*

114. *Fuller*, 741 P.2d at 454.

115. H.B. 1672, 41st Leg., 2d Reg. Sess. (1988); H.B. 1605, 41st Leg., 2d Reg. Sess. (1988).

116. *Fuller*, 741 P.2d at 452.

117. *Id.*

118. *Id.* at 451 n.6.

Aside from being a case of first impression on the government liability question,¹¹⁹ the *Fuller* decision had the added peculiarity of negligence attributed to a plaintiff's spouse.¹²⁰ There is no spousal immunity in tort in Oklahoma.¹²¹ Though she did not, Fuller was free to proceed against her husband, who was later held to be forty-nine percent negligent in causing the accident which injured her.¹²² Under Oklahoma law, Fuller's husband would have been jointly and severally liable to her had she obtained a judgment against him.¹²³

A more typical situation involving a governmental entity as a cotortfeasor would be one in which the plaintiff includes a claim against the non-governmental defendant. If the plaintiff is faultless, as Fuller was, then non-governmental tortfeasors would be subjected to joint and several liability,¹²⁴ while the governmental entity would be severally liable only.¹²⁵

One result of *Fuller* may be a re-examination by plaintiffs and their attorneys of the traditional "deep pockets" theory of suing multiple tortfeasors—suing one or more defendants with the greatest ability to remit in damages. Governmental entities may no longer be regarded as parties with "deep pockets," particularly where their negligence is estimated to be minimal. Because the government entity may not be viewed as a "deep pocket," plaintiff strategy in similar situations in the future may be to name more defendants in suits involving multiple tortfeasors, where one is a governmental entity. The nongovernmental tortfeasors would be subject to joint and several liability, making it possible for a plaintiff to seek complete satisfaction from any except the governmental tortfeasor.

Another possible result of *Fuller* may be an increase in contribution suits. This increase could easily occur if only one of many tortfeasors is sued and that tortfeasor pays more than a pro rata share of damages. After *Fuller*, an over-paying tortfeasor will likely seek contribution from a liable governmental entity. Although at common law there was no right of noncontractual contribution,¹²⁶ the right of contribution in tort has been permitted by statute in Oklahoma since 1978.¹²⁷

In a contribution action against a governmental entity, the first question to be resolved will be whether such an action is authorized at all under the language of the contribution statute. The statute states, "Where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them"¹²⁸

119. *Fuller*, 741 P.2d at 450.

120. *Id.* at 450.

121. *White v. White*, 618 P.2d 921 (Okla. 1980).

122. *Fuller*, 741 P.2d at 450.

123. See *supra* text accompanying notes 38-67.

124. *Id.*

125. *Fuller*, 741 P.2d at 450.

126. *Laubach*, 588 P.2d at 1074.

127. 12 OKLA. STAT. § 832 (Supp. 1978) (passed by the Legislature after the 1978 *Laubach* decision).

128. *Id.* at § 832A (emphasis added).

The question will be whether the term "person" in the statute includes governmental entities. The issue has not been decided in Oklahoma. However, when such a case arises, the contribution plaintiff will likely ask a trial court to construe the language of the contribution statute as including governmental entities.

If a court in such a case is persuaded that the plain and obvious meaning of "person" does not include governmental entities, then no right of contribution against governmental entities will be allowed. But, if the language of the statute is deemed to be ambiguous or unclear, then a court will determine the legislature's intent when it enacted the statute. How a court will respond to each party's arguments if such a case should arise is difficult to predict. The former choice is the one likely to be made and, if so, legislative amendment of the contribution statute will be necessary if a right of contribution against a governmental entity is to be allowed in Oklahoma.¹²⁹

Because the Act effectively creates a special class, the governmental tortfeasor, this special class will only be held liable for its proportion of fault. An unlikely effect of the *Fuller* decision will be to hinder settlement negotiations when governmental defendants estimate their negligence to be a low percentage of a plaintiff's claim. To assume the representatives of a governmental entity will take a "sue us, we're only slightly negligent and severally liable" attitude, is not a sound assumption to make. The risk of a jury's finding a higher percentage of governmental negligence than estimated is too great to preclude sincere settlement negotiations.¹³⁰

In the Tulsa City Attorney's Office the *Fuller* decision has not significantly affected its procedure of considering all facts and circumstances of each particular case. Where the City of Tulsa determines it might have some liability, it will still enter into settlement negotiations.¹³¹ What the *Fuller* decision has provided to the City of Tulsa is a valuable bargaining chip to be utilized during settlement. It has not created a policy of nonsettlement.¹³²

Conclusion

Most American jurisdictions utilizing some form of comparative negligence have retained the doctrine of joint and several liability among tortfeasors.¹³³ Some states have expressly abolished joint and several liability.¹³⁴

129. Because the Tort Claims Act and *Fuller* provide that such entities are severally liable only for the percentage of damages attributable to them, it should be unnecessary for a governmental entity to bring a contribution suit. Consequently, there should never be an overpayment by a governmental entity of a damage award.

130. Telephone interview with Martha Rupp Carter, City of Tulsa Assistant City Attorney (Aug. 11, 1988) (Ms. Carter was Tulsa's attorney in *Fuller*).

131. *Id.*

132. *Id.*

133. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* ¶ 16.4 (2d ed. 1986).

134. *Id.*

Oklahoma's comparative negligence statute is silent on the issue.¹³⁵ Judicial decisions have produced the rule that joint tortfeasors are jointly and severally liable to a faultless plaintiff¹³⁶ but only severally liable to a negligent plaintiff.¹³⁷

However, where one alleged wrongdoer is a governmental entity, the Act mandates several liability for the governmental tortfeasor, regardless of whether the plaintiff has contributed to the plaintiff's own injury.¹³⁸ The Oklahoma Supreme Court's decision in *Fuller* reiterated the statutory rule of several liability for governmental tortfeasors in Oklahoma, even against fault-free plaintiffs.

Tim Rhodes

135. 23 OKLA. STAT. §§ 12-14 (1981).

136. *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980).

137. *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978).

138. 51 OKLA. STAT. §§ 151-71 (1981 & Supp. 1986).