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# THE LATEST EVENT IN THE CONFUSED HISTORY OF MUNICIPAL TORT LIABILITY

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## I. INTRODUCTION

For Florida governmental entities and plaintiffs' attorneys, one of the most significant proposals by the Florida Constitution Revision Commission is Proposal 197, which would replace article X, section 13 of the Florida Constitution[1] with a new article X, section 12, providing as follows:

> SECTION 12 . . . . *No sovereign immunity in contract or in tort.—The doctrine of sovereign immunity shall not be applicable in this state in contract or in tort for personal injury, wrongful death or property damage. Punitive damages shall not be recoverable against the state, counties, school districts, municipalities, special districts or any of their agencies.*[2]

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1. Article X, § 13 now provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

2. Fla. C.R.C., Rev. Fla. Const. art. X, § 12 (May 11, 1978). Proposal 197 superseded Proposal 98, which was passed December 9, 1977. The Local Government Committee had proposed a change in § 13 to ensure that any limit of sovereign immunity by the legislature would apply to all governmental entities. *See* Transcript of Fla. C.R.C. proceedings 117 (Dec. 9, 1977) (remarks of Commissioner Overton). Proposal 98 was amended significantly to provide: "The state and all of its political subdivisions shall be liable for all injuries and compensatory damages resulting from their wrongful acts. Provision shall be made by general law for such suits, providing full and complete recovery for all compensatory damages and losses." *See* 15 Fla. C.R.C. Jour. 239-40 (Dec. 9, 1977). Commissioner Douglass, author of the primary amendment, maintained that his amendment was intended to accomplish what the Local Government Committee wanted—to make everyone equal. Transcript of Fla. C.R.C. proceedings 118 (Dec. 9, 1977).

The issue resurfaced one month later with Proposal 197, which provided: "The doctrine of sovereign immunity shall not be applicable in this state." After extensive debate, Proposal 197 was adopted as introduced. 24 Fla. C.R.C. Jour. 351-52 (Jan. 26, 1978); *see* Transcript of Fla. C.R.C. proceedings 237-96 (Jan. 26, 1978).

The proposal was then amended twice before arriving in its final form. Commissioner Ben Overton considered the original proposal too "broad" and offered an amendment providing that "the doctrine of sovereign immunity shall not be applicable in this state in contract or in tort for personal injury, wrongful death or property damage. Punitive damages shall not be recoverable against the state or its political subdivisions." The amendment was adopted. 29 Fla. C.R.C. Jour. 553 (Mar. 9, 1978); 2 Transcript of Fla. C.R.C. proceedings 156, 159 (Mar. 9, 1978). The Committee on Style and Drafting offered a second amendment to enumerate the governmental entities to which the punitive damages provision applied. That amendment changed the last sentence to read: "Punitive damages shall not be recoverable against the state, counties, school districts, municipalities, special districts or any of their agencies." 30 Fla. C.R.C. Jour. 560 (Apr. 14, 1978); Transcript of Fla. C.R.C. proceedings 36-37 (Apr. 14, 1978).

The proposed new section would substantially abolish the doctrine of sovereign immunity in Florida.[3] It suggests a radical but relatively comprehensible change in the current state of the law of tort liability of the state and counties.[4] However, due to a confused history of legislative and judicial activity, the potential effect of the proposal on tort liability of municipalities is not so easily explained.

This article will examine the development of municipal tort liability in Florida and the status of that liability immediately prior to the Florida Constitution Revision Commission's work. In addition, the potential effect of the proposal on tort liability of municipalities will be explored.

## II. DEVELOPMENT OF MUNICIPAL TORT LIABILITY IN FLORIDA

The history of municipal tort liability in Florida may be described as "eventful." The Florida courts and legislature have created a substantial body of law which is both confusing and unpredictable in its application. The proposed revision by the Constitution Revision Commission must be examined in the perspective of relevant judicial and legislative precedents.

### *A. Judicial Treatment*

(1) *Pre*-Hargrove.

Prior to the Florida Supreme Court's 1957 decision in *Hargrove v. Town of Cocoa Beach*,[5] Florida municipalities were generally held to be immune from tort liability in the exercise of governmental, as opposed to proprietary or municipal, functions.[6] The denial of liability in tort for a municipality's exercise of a governmental function was based on the notion that governmental functions were exercised on behalf of the state for the benefit of the general public, whether residing within or without the corporate limits of the municipality.[7]

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3. *See* text accompanying notes 78-94 *infra*.

4. Florida courts have generally interpreted the language in article X, § 13 of the 1968 Florida Constitution as providing absolute sovereign immunity for the state and counties absent waiver by legislative enactment or constitutional amendment. *See* Circuit Ct. v. Department of Natural Resources, 339 So. 2d 1113 (Fla. 1976); Spangler v. Florida State Turnpike Auth., 106 So. 2d 421 (Fla. 1958); Hampton v. State Bd. of Educ., 105 So. 323 (Fla. 1925); Keggin v. Hillsborough County, 71 So. 372 (Fla. 1916); Buck v. McLean, 115 So. 2d 764 (Fla. 1st Dist. Ct. App. 1959).

5. 96 So. 2d 130 (Fla. 1957).

6. *See* Lewis v. City of Miami, 173 So. 150 (Fla. 1937); Smoak v. City of Tampa, 167 So. 528 (Fla. 1936); Chardkoff Junk Co. v. City of Tampa, 135 So. 457 (Fla. 1931); Loeb v. City of Jacksonville, 134 So. 205 (Fla. 1931).

7. *See* Smoak v. City of Tampa, 167 So. 528 (Fla. 1936).

When performing a governmental function as an arm of the state, a municipality shared the state's immunity from tort liability.[8]

In contrast, Florida municipalities did not share the state's immunity from tort liability in the exercise of proprietary functions, since, by judicial definition, these functions were performed for the specific benefit and advantage of the community embraced within a municipality's boundaries, and not on behalf of the state for the benefit of the public generally.[9] The judicial determination of whether a particular municipal function was to be denominated "governmental" or "proprietary" was made primarily on a case-by-case basis.[10]

(2) Hargrove.

In *Hargrove v. Town of Cocoa Beach*,[11] the town was sued for the alleged wrongful death of a prisoner who died of smoke suffocation while incarcerated in an unattended town jail. The trial court had dismissed the action on the ground that the town was immune from liability. In its decision, the Florida Supreme Court first traced the doctrine of sovereign immunity to its judicial origins and then recognized that "numerous strange and incongruous results" had been produced by drawing the distinction between governmental and proprietary functions in determining the extent to which municipalities enjoyed sovereign immunity.[12] Analogizing the modern city to a large business institution existing mainly for the benefit of the people within its municipal limits, the court concluded that "[t]o continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its

8. *See* Elrod v. City of Daytona Beach, 180 So. 378 (Fla. 1938); City of Miami v. Lewis, 104 So. 2d 70 (Fla. 3d Dist. Ct. App. 1958). In *Elrod*, the court stated that a municipality "in performing the governmental duties conferred on it by the Legislature should not be subjected to any greater liability than the Legislature." 180 So. at 381.

The sovereign immunity of the state is the evolutionary result of the proposition that "the King can do no wrong." *See* Note, *A Statutory Approach to Governmental Liability in Florida*, 18 U. FLA. L. REV. 653, 653-54 (1966).

9. *See* Chardkoff Junk Co. v. City of Tampa, 135 So. 457, 459 (Fla. 1931).

10. In City of Tampa v. Easton, 198 So. 753 (Fla. 1940), the court stated:

> What are governmental functions and what are corporate authority or duties of a municipality are not comprehensively defined in the law but are to be determined in each case upon a judicial interpretation and application of appropriate provisions or principles of law to the facts legally shown or admitted as may be provided by controlling substantive and procedural law.

*Id.* at 755. *See also* Barth v. City of Miami, 1 So. 2d 574 (Fla. 1941); City of Lakeland v. State *ex rel.* Harris, 197 So. 470 (Fla. 1940).

11. 96 So. 2d 130 (Fla. 1957).

12. *Id.* at 132-33.

virtue when it is degraded by the vice of injustice."[13]

Accordingly, the Florida Supreme Court in *Hargrove* expressly receded from its prior decisions that a municipality was immune from liability for the torts of its police officers.[14] Ignoring any distinction between governmental and proprietary functions, the court held that "when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done."[15] However, municipal immunity for the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions was specifically preserved.[16]

(3) *Post*-Hargrove.

In the decade following *Hargrove,* the Florida Supreme Court had several opportunities to apply and explain its decision in that case. In *City of Miami v. Simpson,*[17] for example, the issue was whether the *Hargrove* rule extended to intentional torts committed by municipal policemen in the course of their employment. In holding that a municipality may be liable for such torts, the court stated that the primary concern in *Hargrove* was not the nature of the wrong. Rather, the thrust of *Hargrove* was to eliminate the "nebulous" distinctions between governmental and proprietary functions and to determine liability based upon the doctrine of respondeat superior.[18] Thus, following *Hargrove* it appeared that municipal tort liability under the doctrine of respondeat superior would be established in Florida without immunity or limitation, except for those cases in which an employee's or agent's tortious act or omission occurred in the performance of a legislative, judicial, quasi-legislative or quasi-judicial function.[19]

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13. *Id.* at 133.

14. *Id. See generally* Price & Smith, *Municipal Tort Liability: A Continuing Enigma,* 6 U. FLA. L. REV. 330 (1953).

15. 96 So. 2d at 133-34. The court referred to the dissenting opinions in City of Miami v. Bethel, 65 So. 2d 34 (Fla. 1953) and Williams v. City of Green Cove Springs, 65 So. 2d 56 (Fla. 1953), "for a more thorough and lucid explanation of our justification for departure from the rule of municipal immunity." 96 So. 2d at 134.

16. 96 So. 2d at 133. As examples, the court cited Elrod v. City of Daytona Beach, 180 So. 378 (Fla. 1938) and Akin v. City of Miami, 65 So. 2d 54 (Fla. 1953).

17. 172 So. 2d 435 (Fla. 1965).

18. *Id.* at 436-37. In Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965), the court reiterated its decision in *Hargrove* but denied the recovery of punitive damages in tort against a municipality. The court stated, "Except as specifically limited, it [*Hargrove*] laid aside the governmental-proprietary dichotomy and recognized a right to compensation for a wrong done." *Id.* at 456.

19. *See* Evanoff v. City of St. Petersburg, 186 So. 2d 68 (Fla. 2d Dist. Ct. App. 1966); Shipp v. City of Miami, 172 So. 2d 618 (Fla. 3d Dist. Ct. App. 1963); Thompson v. City of

Unfortunately, this relatively clear, post-*Hargrove* picture of municipal tort liability was clouded by the decision in *Modlin v. City of Miami Beach.*[20] Miami Beach was sued for the alleged negligence of a city building inspector in approving the construction of a retail store mezzanine which subsequently collapsed, causing the death of a shopper. In its opinion, the Florida Supreme Court first determined that since enforcement of the city's building code was an executive function, the city was not immune from the plaintiff's claim under the rule of *Hargrove.*[21] But, the court reasoned that since the city could only be liable for the alleged negligence of the building inspector on the principle of respondeat superior, the city was entitled to assert any defense which was available to the building inspector.[22] The court then recognized the defense that the building inspector's duty to the plaintiff in inspecting the store mezzanine was no different than the duty he owed to the public generally. The court held that the plaintiff was precluded from recovery on the ground that a public officer is liable for injuries proximately caused by the negligent performance of his ministerial duties only when the injured person has a "special and direct interest" in the officer's proper performance of those duties.[23]

(4) *Recent cases.*

Since the *Modlin* decision, the cases relating to municipal tort liability may be characterized as an attempt by Florida appellate courts to reconcile the limiting effect of that decision with the broad scope of *Hargrove* and to apply the rules of both cases to specific factual situations.[24] The result has been a partial resurrection of the governmental-proprietary distinction purportedly abolished in *Hargrove.* For example, in *City of Tampa v. Davis,*[25] the Second District Court of Appeal recognized that *Modlin* had modified the

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Jacksonville, 130 So. 2d 105 (Fla. 1st Dist. Ct. App. 1961); Hewitt v. Venable, 109 So. 2d 185 (Fla. 3d Dist. Ct. App. 1959).

20. 201 So. 2d 70 (Fla. 1967).

21. *Id.* at 73. The court established definitions for "legislative," "judicial," and "executive" functions: legislative action is prospective and nondiscriminatory, prescribing a general rule for future operations; judicial and executive actions are retroactive and discriminatory, applying the general rule to specific situations; judicial action is distinguished from executive action by the presence of procedural safeguards of notice and hearing. The court further stated that, because of *Hargrove,* "tort liability of municipal corporations may now be equated with that of private corporations." *Id.*

22. *Id.* at 75.

23. *Id.* at 76.

24. *See* Seligman & Beals, *The Sovereignty of Florida Municipalities: In-Again, Out-Again, When-Again,* 50 FLA. B.J. 338 (1976).

25. 226 So. 2d 450 (Fla. 2d Dist. Ct. App. 1969).

scope of *Hargrove* by the introduction of the "special and direct interest" test into the law of municipal tort liability.[26] But the *Davis* court determined that since the building inspector in *Modlin* had been performing an executive or administrative duty in carrying out what was, prior to *Hargrove,* classified as a "governmental function," *Modlin* should be construed as requiring the application of the "special and direct interest" test only in those limited circumstances.[27] Similarly, in *Gordon v. City of West Palm Beach,*[28] the Fourth District Court of Appeal reviewed the law of municipal tort liability as developed in *Hargrove* and *Modlin,* stating that *Hargrove* had created a new area of municipal liability in the exercise of "governmental functions," while *Modlin* had not reduced the area of previously existing municipal liability in the exercise of "proprietary functions."[29] The *Gordon* court summarized the status of municipal tort liability in Florida as follows:

> (1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation;
> (2) as to those activities which fall in the category of governmental functions ". . . a municipality is liable in tort, under the doctrine of respondent [*sic*] superior, *only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.*"
> (3) as to those activities which fall in the category of judicial,

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26. *Id.* at 452-53.

27. *Id.* This interpretation of *Modlin* was combined with the *Davis* court's view that the "special direct interest" test contemplates either "privity or an arm's length relationship" in which a municipal employee or agent is dealing directly with the person injured. *Id.* at 452-53. The court stated:

> We conclude, therefore, that in the light of *Modlin,* a municipality is liable in tort, under the doctrine of respondeat superior, when its agent or employee commits a tort in the performance, or by the nonperformance, of an executive (or administrative) duty within the scope of a governmental function, *only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.*

*Id.* at 454.

Applying its conclusion to the facts of the case, the court held that the alleged negligence of the city had occurred in the performance of a governmental function, *i.e.,* controlling highway traffic. But the court denied relief since the plaintiff's injuries, received in a traffic accident where a stop sign collapsed and had not been replaced, did not arise out of any direct or special transaction between the plaintiff and the city's agents or employees. *Id.* at 452, 454-55.

28. 321 So. 2d 78 (Fla. 4th Dist. Ct. App. 1975), *writ discharged,* 349 So. 2d 160 (Fla. 1977).

29. *Id.* at 80.

> quasi judicial, legislative, and quasi legislative functions, a municipality remains immune.[30]

The court concluded its opinion by expressing discontent with the state of the law in the area of municipal tort liability where recovery depends on artificial distinctions between governmental and proprietary functions, but it deferred to the Florida Supreme Court for any substantive change in the law.[31]

But the Florida Supreme Court has eschewed all opportunities to clarify or reconcile *Hargrove* and *Modlin*,[32] although it stated as recently as 1976 that "existing precedent has led to some confusion over the viability of the [governmental-proprietary] distinction in the municipal area."[33]

### *B. Legislative Treatment*

(1) *Section 768.28.*

While the Florida courts were moving almost full circle in their utilization of the governmental-proprietary dichotomy to determine municipal tort liability, the Legislature enacted section 768.28 of the Florida Statutes.[34] This statute waived the sovereign immunity of the state and its agencies and subdivisions, including municipalities, to the extent provided therein.[35]

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30. *Id.* (citations omitted).

31. The court noted that the city could be liable for its alleged negligence in the design, construction, and maintenance of the street where the plaintiff's son was killed in a traffic accident, since road maintenance is a proprietary function, but that the city could not be held liable for negligence in failing to place traffic control devices at the location of the accident, since the installation and maintenance of traffic control devices is a governmental function and there had been no privity or direct relationship between the plaintiff's son and a city agent or employee. *Id.*; *see* Clifton v. City of Fort Pierce, 319 So. 2d 195 (Fla. 4th Dist. Ct. App. 1975); City of Tallahassee v. Elliot, 326 So. 2d 256 (Fla. 1st Dist. Ct. App. 1975). In *Elliot*, the First District Court of Appeal seemingly aligned itself with the Second and Fourth District Courts of Appeal in its view of *Hargrove* and *Modlin*, apparently discounting its earlier decision in Nobles v. City of Jacksonville, 316 So. 2d 565 (Fla. 1st Dist. Ct. App. 1975), *writ discharged*, 349 So. 2d 160 (Fla. 1977).

32. The court discharged writs of certiorari in Gordon v. City of West Palm Beach, 321 So. 2d 78 (Fla. 4th Dist. Ct. App. 1975), *writ discharged*, 349 So. 2d 160 (Fla. 1977), and Nobles v. City of Jacksonville, 316 So. 2d 565 (Fla. 1st Dist. Ct. App. 1975), *writ discharged*, 349 So. 2d 160 (Fla. 1977).

33. Circuit Ct. v. Department of Natural Resources, 339 So. 2d 1113, 1115 (Fla. 1976).

34. Ch. 73-313, 1973 Fla. Laws 711. In the following year, the legislature amended § 768.28 to require the state to pay judgments against state officers, employees, or agents which arise from some action within the scope of their employment, and to change the section's effective date. Ch. 74-235, 1974 Fla. Laws 663.

35. FLA. STAT. § 768.28(2) (1977) defines the terms "state agencies or subdivisions" to include "the executive departments, the legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities."

Section 768.28 provides in part:

> Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.[36]

The primary limitations on liability are monetary limits on the amount of judgments or claims which the state or its agencies or subdivisions may be required to pay.[37] These monetary limits are $50,000 for the claim or judgment of any one person and $100,000 for claims or judgments arising out of any one incident.[38] These limits would be supplanted, however, to the extent that the state or one of its agencies or subdivisions was protected by liability insurance. In that event recovery would be limited to the amount of the insurance coverage.[39] The excess of any judgment or judgments over these amounts "may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature."[40]

(2) *AGO 076-41.*

This partial waiver of sovereign immunity became effective for most agencies and subdivisions of the state, including municipali-

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36. *Id.* § 768.28(1). The measure was a limited waiver of sovereign immunity enacted under art. X, § 13 of the 1968 Florida Constitution. *See* note 1 *supra.*

37. FLA. STAT. § 768.28(5) (1977). Other limitations specified in the section are the prohibition of punitive damages and interest for the period prior to judgment, *id.*; claims against the state or one of its agencies or subdivisions must be presented in writing to the appropriate agency prior to bringing suit, *id.* § 768.28(6); civil actions must be commenced against the state or one of its agencies or subdivisions within four years after such claim accrues, *id.* § 768.28(11); and no action may be brought against the state or any of its agencies or subdivisions by a person injured as a result of a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience in which he unlawfully participates, *id.* § 768.28(12).

38. The limitation of $100,000 per incident originally referred only to claims or judgments paid by "the state," but chapter 77-86, 1977 Fla. Laws 161 [hereinafter cited as ch. 77-86], extended this limitation to "agencies and subdivisions" as well. *See* note 37 and accompanying text *supra.*

39. Ch. 73-313, 1973 Fla. Laws 711.

40. FLA. STAT. § 768.28(5) (1977). Presumably, "further act of the Legislature" means a "claims bill" authorizing or directing a state agency or subdivision to pay the excess amount of the judgment.

ties, on January 1, 1975.[41] The effect of the legislation on municipal tort liability became an issue shortly thereafter, culminating in Attorney General Opinion 076-41, issued on February 23, 1976.[42]

Attorney General Opinion 076-41 was a response to several questions posed by a city attorney relating to judgments in excess of the monetary limits on the waiver of sovereign immunity contained in section 768.28. The attorney general chose to respond by addressing the fundamental issue suggested by the inquiry: "What effect, if any, does the state's waiver of sovereign immunity from tort liability contained in s.768.28, F.S., have on the tort liability of municipalities?"[43] As a practical matter, it was necessary to address this basic issue since the inquiry, as posed, indicated that the city was considering some action to reduce or eliminate its insurance coverage and rely on the monetary limits of the statute.[44]

In his opinion, the attorney general quoted from *Modlin v. City of Miami Beach* for the proposition that Florida municipalities possess no aspect of the state's sovereign immunity, except in the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions.[45] Thus, since the statutory waiver of the sovereign immunity could logically operate only to the extent that municipalities shared that sovereign immunity, the attorney general opined that the waiver applied only to liability arising from the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions. Moreover, since the monetary limits on the waiver of sovereign immunity could operate only to the extent that the waiver itself operated, such limits, according to the attorney general, were relevant only when a claim or judgment against a municipality arose out of the exercise of those "immune functions." Because municipal activities attributable to those immune functions are ordinarily minimal, the attorney general concluded that section 768.28 did "not operate to limit in any substantive way the tort liability of municipalities under the doctrine of *respondeat superior*."[46]

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41. *Id.* § 768.30. The section became effective for executive departments of the state on July 1, 1974.

42. [1976] FLA. ATTY. GEN. ANN. REP. 70. Earlier, an opinion was written by Frederick Karl, later a Florida Supreme Court justice, to the Florida Association of Insurance Agents, in which he questioned whether future court decisions would uphold the validity of the application of § 768.28 to municipalities. *See* Karl, *Potential Impact of the Waiver of Sovereign Immunity on Local Government in Florida*, in A GUIDE TO THE MANAGEMENT OF LIABILITY RISK FOR THE FLORIDA PUBLIC INSTITUTION 52 (Florida Association of Insurance Agents ed. Oct. 1974) (available at the Florida Association of Insurance Agents, Tallahassee, Fla.).

43. [1976] FLA. ATTY. GEN. ANN. REP. 70.

44. *Id.*

45. 201 So. 2d 70, 73 (Fla. 1967).

46. [1976] FLA. ATTY. GEN. ANN. REP. at 71; *see* [1975] FLA. ATTY. GEN. ANN. REP. 193,

(3) *Chapter 77-86.*

In response to Attorney General Opinion 076-41, the Florida Legislature enacted chapter 77-86, Laws of Florida, to clarify the legislative intent with respect to application to municipalities of the limited waiver of the state's sovereign immunity contained in section 768.28. Thus, the preamble to chapter 77-86 specifies that the legislative intent in enacting section 768.28 was "to make the state, the counties, and the municipalities liable for tort claims in the same manner and to the same extent as a private individual under like circumstances . . . ."[47] The preamble further explains that "the Attorney General . . . failed to recognize the basis for the limitation of liability set forth in subsection (5) of section 768.28 . . . ."[48]

Chapter 77-86 amended section 768.28 in several important respects. First, it clearly established that all claims against municipalities are within the monetary limits of liability contained in section 768.28. This is accomplished by the addition of the following words to subsection (5) of section 768.28: "The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974."[49]

Assuming the constitutional validity of chapter 77-86,[50] Florida municipalities are now protected against judgments in tort that exceed $50,000 per person or $100,000 per incident, regardless of the nature of the municipal function giving rise to the tort action. Since municipalities in Florida, subsequent to the *Hargrove* decision, have been exposed to unlimited tort liability in the performance of all municipal functions not denominated legislative, judicial, quasi-

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which concluded that on the basis of Suwanee County Hosp. Corp. v. Golden, 56 So. 2d 911 (Fla. 1952), a special district hospital possessed no aspect of the sovereign immunity of the state upon which § 768.28 could operate to limit the claims of the hospital's paying patients.

47. Ch. 77-86, *supra* note 38. Similar language is found in FLA. STAT. § 768.28(1)(5) (1977). *See* note 48 *infra*. *See also* FLA. STAT. § 768.28(2) (1977), defining "state agencies and subdivisions" to include municipalities.

48. It appears that the preamble stands for the proposition that Attorney General Opinion 076-41 was erroneous in failing to recognize that the limited waiver of sovereign immunity in § 768.28 involved a two-step process. First, following the preamble's reasoning, the state and its subdivisions were declared to be subject to tort liability "if a private person, would be liable . . . in accordance with the general laws of this state . . ." FLA. STAT. § 768.28(1) (1977). Thus, the state and its subdivisions, including municipalities, had no sovereign immunity. The second step was to limit the extent of this potential liability. *See id.* § 768.28(5); note 38 *supra*.

49. Ch. 77-86, *supra* note 38, § 1 (codified at FLA. STAT. § 768.28(5) (1977)). Although this language may be the most important amendment to § 768.28, it is not referred to in the new statute's title.

50. *See* text accompanying notes 56-77 *infra*.

legislative, or quasi-judicial, this law has the significant effect of reducing the tort liability of municipalities. This result is clearly inconsistent with the approach taken in Attorney General Opinion 076-41,[51] which assumed that section 768.28 was intended to expand the tort liability of the state and its agencies and subdivisions, and negates the attorney general's conclusion that section 768.28 does not limit the tort liability of municipalities "in any substantive way."[52]

A second important amendment to section 768.28 made by chapter 77-86 was the repeal of subsection (10). Subsection (10) had provided that the monetary limits of liability contained in section 768.28 did not apply to the extent that an agency or subdivision had purchased liability insurance in excess of those limits. The repeal of subsection (10), therefore, established without exception the maximum allowable recovery against a municipality in a suit in tort at $50,000 per person and $100,000 per incident. Since most municipalities in Florida have maintained liability insurance in excess of those amounts,[53] chapter 77-86, again assuming its validity, would have the immediate and direct impact of reducing the amount of judgments actually recovered against municipalities.

Third, chapter 77-86 added subsection (13) to section 768.28, empowering the state and its agencies and subdivisions to be self-insured, to enter into risk management programs, or "to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, for any claim, judgment, and claims bill *which they may be liable to pay pursuant to this section.*"[54] Thus, a municipality is effectively precluded by chapter 77-86 from purchasing liability insurance coverage in excess of $50,000 per person or $100,000 per incident to protect it against judgments in tort. Apparently, the only liability insurance coverage which may now be obtained by a municipality in excess of those limits is that which

51. *See* note 48 *supra.*

52. [1976] FLA. ATTY. GEN. ANN. REP. at 71. *But see* notes 56-77 *infra* and accompanying text, questioning the constitutionality of ch. 77-86.

53. A recent survey of municipal liability insurance conducted by the Florida League of Cities revealed that in June, 1976, the most frequently reported limits of liability insurance were $100,000 per person and $300,000 per incident. Moreover, between 1970 and 1976, the cost of liability insurance increased about 39%. *See Liability Insurance for Florida Cities,* FLA. MUN. RECORD, Jan. 1977, at 2, 4. The article notes that the enactment in 1973 of § 768.28 had no impact on the amounts of insurance purchased by Florida municipalities because of uncertainty about whether the $50,000/$100,000 limitations of liability applied to municipalities. *See* Fort Lauderdale, Fla., City Commission Resolution 76-189 (June 1, 1976) (urging the legislature to clarify § 768.28 because of "ever increasing rates charged by insurance companies for all types of liability insurance").

54. Ch. 77-86, *supra* note 38, § 3 (emphasis added).

protects against the payment of claims bills awarded against the municipality by the Florida Legislature.

Finally, chapter 77-86 amended section 768.28 to correct an apparent drafting error in subsection (5). Although subsection (5) had expressly included state agencies and subdivisions, including municipalities, within the $50,000 limit of liability for the claims made by any one person, state agencies and subdivisions were not included within the $100,000 limit of liability for claims arising out of one incident.[55] Chapter 77-86 cured this omission.

### C. *The Constitutional Validity of Chapter 77-86*

The constitutional validity of a statute limiting the tort liability of particular persons and governmental entities, including municipalities, is not a new issue in Florida.[56] The issue stems primarily from consideration of the access-to-courts mandate of the Florida Constitution, which provides that: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[57] The varying judicial resolutions of the issue, based upon the guarantee of a remedy for every wrong and general notions of equal protection, may be illustrated by several Florida Supreme Court opinions. In *Williams v. City of Jacksonville*,[58] the court considered the validity of a municipal charter provision, enacted by special law, which limited tort actions against the city to cases involving "gross negligence," if notice of damage had been given to the city within a specified period of time. The court upheld the notice requirement as "a question of legislative policy," but it construed the charter provision so as to eliminate the requirement that a tort action against the city must involve gross negligence.[59] In support of this construction, the court cited its

55. *Id.* § 1.

56. For a detailed judicial treatment of statutory limitations on the liability of governmental entities in another state, see Brown v. Wichita State Univ., 547 P.2d 1015 (Kan. 1976). For a brief but excellent analysis of the subject with respect to municipalities in Florida prior to chapter 77-86, see Marsicano, *Waiver of Sovereign Immunity Act—Its Destiny*, FLA. MUN. RECORD, May 1975, at 2.

57. FLA. CONST. art. I, § 21. FLA. CONST. of 1885, art. I, § 4, from which this section was derived, provided: "All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

58. 160 So. 15 (Fla. 1935).

59. *Id.* at 21. "[T]he word 'gross,' preceding the word 'negligence' in the charter provision here involved, may be regarded as eliminated, so that the provision may in other respects be held valid, and not in conflict with Section 4 of our Declaration of Rights." *Id.*; *see* Ragans v. City of Jacksonville, 106 So. 2d 860 (Fla. 1st Dist. Ct. App. 1958), in which the court stated that "under the rationale of the Hargrove case, municipal tort liability cannot be validly restricted solely to suits for damages arising out of gross negligence." *Id.* at 862.

earlier decision in *Kaufman v. City of Tallahassee*[60] for the proposition that:

> it is always quite difficult, if not impossible, to give a satisfactory reason for holding a city immune from liability when through its own negligence or the carelessness or inefficiency of its agents and employees it violates a right of a citizen to his injury, especially when one considers [Section 4 of the Declaration of Rights, Florida Constitution, 1885].[61]

Since the plaintiff's injuries had not occurred as a clear result of the city's performance of a governmental function, however, the court declined to rule on whether the legislature could validly limit the liability of the city in the exercise of a governmental function.

In 1952, the court in *Suwannee County Hospital Corp. v. Golden*[62] considered the validity of a provision of a special law immunizing a public, nonprofit hospital corporation from liability for any negligence of its officers, agents, or employees. Concluding that the hospital corporation was engaged in a "proprietary function," the Florida Supreme Court invalidated the provision on the basis that it divested the hospital's paying patients of their constitutional right to redress for wrongs.[63]

Similarly, in *Woods v. City of Palatka,*[64] the court reviewed a municipal charter provision immunizing the city from liability for injuries due to defective streets, sidewalks, and other public grounds, and for the negligence of its officers and employees. In *Woods,* the plaintiff was injured by falling into a hole in a sidewalk. Concluding that the maintenance of sidewalks was a "proprietary function" and citing *Suwannee County Hospital,*[65] the *Woods* court stated that "the City of Palatka cannot constitutionally be exempt from liability for its negligence in the discharge of its duty to exer-

60. 94 So. 697 (Fla. 1922).
61. 160 So. at 20.
62. 56 So. 2d 911 (Fla. 1952).
63. *Id.* at 913. The court concluded:

> It is our view that one who enters a hospital of the type of appellant and pays for the professional services he receives is entitled to the same protection, and under our constitution, to the same redress for wrongs, that he would be entitled to had he had the same experience in a privately owned and operated hospital. . . .
>
> At least as to those who are paying patients like appellee, the hospital is operated in a proprietary capacity, and they may not be divested of constitutional rights by the attempted statutory immunization.

*Id.*
64. 63 So. 2d 636 (Fla. 1953).
65. 56 So. 2d 911 (Fla. 1952).

cise reasonable diligence in repairing defects in sidewalks . . . ."[66] Moreover, the court reasoned, since the charter provision had not imposed on abutting landowners civil liability for injuries due to defective sidewalks, the adoption of a contrary position would "leave the appellant without any remedy and would violate Section 4 of the Declaration of Rights of our . . . Constitution."[67]

Finally, in the 1973 landmark decision of *Kluger v. White*,[68] the Florida Supreme Court invalidated, by a four-to-three vote, section 627.738, Florida Statutes, which had in effect abolished the traditional right of action in tort for property damage resulting from an automobile accident. Section 627.738 provided that a person suffering such damage had to look to his own insurer unless he had chosen not to purchase property damage insurance and had suffered property damage in excess of $550. Reviewing the requirements of article I, section 21, of the Florida Constitution, the *Kluger* majority adopted the rule that

> where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. § 2.-01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[69]

On the basis of this rule, the court determined that the legislature had not demonstrated an "overpowering public necessity" for the abolition of the statutory and common law right to sue an automotive tortfeasor for property damage and that no alternative protection for the victim of an automobile accident had been provided.[70]

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66. 63 So. 2d at 637.

67. *Id.* at 637-38.

68. 281 So. 2d 1 (Fla. 1973).

69. *Id.* at 4. *See also* Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948), where the court upheld a general law abolishing the common law rights of action for alienation of affections, criminal conversation, seduction, and breach of contract to marry, on the ground that these forms of action had become instruments of extortion and blackmail.

70. 281 So. 2d at 5; *see* Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974), upholding the personal injury provisions of § 627.737, Florida Statutes, on the ground that the statute's requirement that the owner of a vehicle maintain "security," by insurance or otherwise, provided a reasonable alternative to the traditional action in tort for personal injuries, the injured party being assured of recovery from his own insurer.

Applying the rationale of the foregoing cases to chapter 77-86, it appears doubtful that tort actions which arise out of a municipality's exercise of a traditionally denominated "governmental function" are protected by article I, section 21, of the Florida Constitution. This conclusion is compelled by the Florida Supreme Court's early acknowledgement that municipalities were immune from liability at common law when exercising a governmental function[71] and by the court's apparent recognition that the legislature could reestablish the governmental-proprietary distinction purportedly abolished in *Hargrove v. Town of Cocoa Beach.*[72] Thus, the Florida Legislature apparently is not restrained by article I, section 21 from imposing monetary limits on the liability of municipalities, to the extent that the liability arises in the performance or exercise of a governmental function.

With respect to tort actions which arise out of a municipality's exercise of a "proprietary function," it appears that such actions are protected by article I, section 21, of the Florida Constitution. This conclusion is compelled by the absence of any judicial holding that municipalities are immune from liability at common law when performing proprietary functions[73] and by the Florida Supreme Court's clear rejection of legislative attempts to limit such liability.[74] Thus, at least to the extent that chapter 77-86 purports to limit the liability of municipalities in the exercise of proprietary functions, the limitations must apparently be measured against the two-fold test of *Kluger.*[75]

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71. *See* Lewis v. City of Miami, 173 So. 150 (Fla. 1937), in which the court stated that "[t]here was a time when all municipal functions were governmental and therefore municipal corporations were wholly free from responsibility for torts or civil wrongs, by the common law." *Id.* at 152.

72. 96 So. 2d 130 (Fla. 1957); *see* Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965), in which it is noted that "three sessions of the Legislature have now intervened [since *Hargrove*] and there has been no legislative restriction on the Hargrove rule." *Id.* at 456.

73. It would be difficult to find the rationale for constitutional protection of claims for proprietary functions within the four corners of the *Kluger* test since the narrow legal issue of liability of a municipality for proprietary functions had not been decided by July 4, 1776. *See* FLA. STAT. § 2.01 (1977). This is so because of the failure of the pre-1776 common law to articulate a governmental-proprietary distinction. *See* note 71 *supra.* But the supreme court has clearly held that such a cause of action is constitutionally protected. *See* notes 61-70 and accompanying text *supra.* The rationale for those decisions, in light of the *Kluger* test, would appear to be that a municipality, when acting in a proprietary capacity, closely resembles a private corporation and is liable for torts arising from their actions under common law. *See* Chardkoff Junk Co. v. City of Tampa, 135 So. 457, 459 (Fla. 1931).

74. *See* notes 60-69 and accompanying text *supra.*

75. As to a possible challenge to the operation and amount of the monetary limits contained in § 768.28, see State v. Silva, 478 P.2d 591 (Nev. 1970), in which the Nevada Supreme Court held that a $25,000 limit on the recovery of any claimant for tort liability of the state was not violative of the federal equal protection clause. Further, the Nevada court rejected

Applying the *Kluger* test to chapter 77-86, the only alternative method provided by the new law for a plaintiff to recover losses in excess of the monetary limits is by some further act of the legislature, *i.e.*, a claims bill. As to whether the Florida courts would consider the legislative process to be a reasonable alternative to an action in tort, suffice to say that there is no case adopting such a position.[76] Moreover, in light of the legislature's obvious intent in enacting chapter 77-86 to reduce the financial burden on municipalities resulting from unlimited exposure to tort liability, it would be anomalous indeed if the court found that the claims bill remedy is a "reasonable alternative" to actions in tort against municipalities. Such a finding would imply that the claims bill remedy presents a financial risk to municipalities equivalent to actions in tort.

As to the existence of an "overpowering public necessity" to limit the tort liability of municipalities in the exercise of proprietary functions, the legislature recited in the preamble to chapter 77-86 that municipalities "are experiencing difficulty obtaining liability insurance, and, if the insurance is available, the rates are exorbitant and often beyond the ability of the local taxpayers to afford . . . ." The judicial determination of whether this "difficulty" constitutes the overpowering public necessity required by *Kluger* will undoubtedly turn on the facts presented to the courts by proponents of chapter 77-86. If it can be shown that the fiscal viability of Florida municipalities is at stake and that no alternative means exist to deal with the problem, the courts may be persuaded to uphold chapter 77-86 against such a constitutional challenge.[77]

## III. THE POTENTIAL EFFECT OF PROPOSAL 197 ON MUNICIPAL TORT LIABILITY

Initially, it is obvious that the proposed article X, section 12 would abolish constitutionally the doctrine of sovereign immunity in Florida as a defense in actions against the state and local governments for personal injury, wrongful death, and property damage.[78]

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the plaintiff's argument that the state had waived the $25,000 limit by purchasing liability insurance in excess of that amount.

76. *But see* Circuit Ct. v. Department of Natural Resources, 339 So. 2d 1113, 1116 (Fla. 1976).

77. The fact that the claims bill remedy is provided for in chapter 77-86 may make a finding of public necessity more palatable to the courts. *See* ch. 77-86, *supra* note 38, § 1.

78. The doctrine of sovereign immunity is still viable in Florida. *See* Circuit Ct. v. Department of Natural Resources, 339 So. 2d 1113 (Fla. 1976). The type of torts included in the term "personal injury" is an issue which will probably be litigated if the revision commission's proposal is adopted. *See* BLACK'S LAW DICTIONARY 925 (rev. 4th ed. 1968) (personal injury).

However, aside from its potential impact on the monetary limits on municipal tort liability established by section 768.28, Florida Statutes, as amended by chapter 77-86, Laws of Florida, the Florida Constitution Revision Commission's proposal, if adopted, should have only a limited effect on municipal tort liability.

This limited effect stems from the Florida Supreme Court's previous determination in *Hargrove v. Town of Cocoa Beach* that municipalities do not share the sovereign immunity of the state except in the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions.[79] It is only these latter functions, therefore, upon which the proposed constitutional revision could operate to subject municipalities to new tort liability for personal injury, wrongful death, or property damage.[80] In the exercise of all other functions, *Hargrove* has already exposed municipalities to the compensatory consequences of their torts.[81]

The "special and direct interest" test promulgated in *Modlin v. City of Miami Beach*[82] should survive adoption of the proposal. This conclusion is supported by the origin of the "special and direct interest" test in the law relating to the duty element of the tort liability of public officials rather than in the doctrine of sovereign immunity,[83] and by the sparse judicial precedent on the subject.[84] Thus, even if the commission's proposal is adopted, a plaintiff may still be required to show that the municipal official involved owed the plaintiff a duty different than that owed the public generally, at least when the action arises out of the official's performance of a traditionally denominated "governmental function."

It appears doubtful that the monetary limits on municipal tort liability contained in section 768.28, as amended by chapter 77-86, will be sustained as presently constituted if the commission's pro-

79. 96 So. 2d 130 (Fla. 1957). *See also* Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965), discussed in note 18 *supra*, in which the Florida Supreme Court denied recovery of punitive damages from a municipality, thus further limiting the potential effect of the proposed revision on municipal tort liability.

80. *Cf.* 1976 FLA. OP. ATT'Y GEN. 076-41, discussed in text accompanying notes 41-46 *supra*. Of course, adoption of the proposed revision should not affect the defense of privilege based on consideration of the public interest. *See* Cobb's Auto Sales, Inc. v. Coleman, 353 So. 2d 922 (Fla. 4th Dist. Ct. App. 1978).

81. *Cf.* Darville v. Associated Indem. Corp., 323 So. 2d 441 (La. 1975), in which the Louisiana Supreme Court held that the defense of sovereign immunity could not be raised in a tort action involving a traffic accident that occurred prior to the 1974 constitutional abrogation of sovereign immunity since that court itself had abolished sovereign immunity in 1973.

82. 201 So. 2d 70 (Fla. 1967).

83. *See id.* at 75.

84. *See* Wesley v. State, 571 P.2d 1057 (Ariz. Ct. App. 1977); *cf.* Cheney v. Dade County, 353 So. 2d 623 (Fla. 3d Dist. Ct. App. 1977) (held that the "special and direct interest" test survived the limited waiver of sovereign immunity contained in § 768.28). *But see* Adams v. State, 555 P.2d 235 (Alaska 1976).

posal is adopted. First, it may be argued that section 768.28 was expressly enacted in the appropriate exercise of legislative discretion as a limited waiver of the state's sovereign immunity pursuant to article X, section 13 of the 1968 Florida Constitution[85] and that chapter 77-86, being an amendment to section 768.28, must be read within the context of the original statute's general purpose and scheme.[86] Accordingly, deletion of that 1968 constitutional provision by adoption of the proposed revision could be viewed as eliminating the constitutional basis and authority for enactment of section 768.28, as amended by chapter 77-86, thereby abrogating the monetary limits on municipal tort liability contained in the statute.[87] Judicial adoption of such an interpretation would necessarily depend on the position taken by the courts on the independence and severability of those monetary limits from the remainder of section 768.28.[88]

Second, besides removing the express constitutional basis for the enactment of section 768.28, the commission's proposal, if adopted, could also be viewed as positively prohibiting the imposition of all substantive limitations on actions in tort against municipalities. In *Vinnicombe v. State*, a California court held that a statute requiring a plaintiff suing the state to file an undertaking for the payment of costs incurred by the state did not violate a state constitutional provision granting a right to recover damages to private property resulting from public use.[89] The court stated that "in the case of a self-executing constitutional provision [granting a right to sue the state], while the Legislature can adopt reasonable procedural requirements for the enforcement of such constitutional right, it can do nothing which would unreasonably curtail or impair it."[90] If the commission's proposal were treated similarly, any statutory curtailment of damages recoverable against municipalities in tort actions, including the monetary limits on tort liability contained in section

85. *See* FLA. STAT. § 768.28(1) (1977). *See also* notes 1, 4 *supra*.

86. *See* 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 22.34-.35 (4th ed. 1972). *See also* Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So. 2d 522, 524 (Fla. 1973), for the proposition that legislative intent should be gathered from consideration of the statute as a whole.

87. *See* 1A C. SANDS, *supra* note 86, § 23.20; *cf.* United States v. Chambers, 291 U.S. 217 (1934), in which the Court held that to the extent the National Prohibition Act rested on the grant of authority to Congress by the eighteenth amendment, it immediately became inoperative on the repeal of the eighteenth amendment by the twenty-first amendment.

88. *See* High Ridge Management Corp. v. State, 354 So. 2d 377, 380 (Fla. 1977); Lasky v. State Farm Ins. Co., 296 So. 2d 9, 21 (Fla. 1974). *See generally* 1A C. SANDS, *supra* note 86, § 22.04.

89. 341 P.2d 705 (Cal. 1st Dist. Ct. App. 1959).

90. *Id.* at 706.

768.28, could be invalidated as unauthorized legislative acts, especially if the courts construe the revision as creating a previously nonexistent constitutional right to sue the state and local governments.[91]

Finally, any statutorily imposed monetary limits on the tort liability of municipalities must be sustainable under the access-to-courts mandate of the Florida Constitution.[92] Any legislative attempt to impose such limits, at least to the extent that they apply to traditionally denominated "proprietary functions," would be subject to challenge on this basis.

## IV. CONCLUSION

The Florida Constitution Revision Commission's proposed revision of the constitution's sovereign immunity provision is the latest event in Florida's long history of confusing and unpredictable judicial and legislative treatment of the subject of municipal tort liability. Moreover, the proposal, if adopted, would itself create new issues for the judiciary to resolve, particularly with respect to the continuing validity of section 768.28, Florida Statutes. Until these issues are resolved, municipal attorneys should advise their clients to take all reasonable measures to protect their financial resources from tort claims, and plaintiffs' attorneys should explore all avenues of redress for wrongs committed in the name of municipal government.

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91. The members of the Florida Constitution Revision Commission who were major proponents of Proposal 197 sought to preclude monetary limits on governmental tort liability, at least to the extent that such limits did not apply equally to nongovernmental tortfeasors. The following remarks were made during the commission proceedings. "Sovereign immunity ought to be abolished at every level of the state. The cap ought to be taken off and let it flow through." Transcript of Fla. C.R.C. proceedings 136 (Jan. 10, 1978) (remarks of Commissioner Spence). "And we are told that it would cost too much. Now, I find myself very much in agreement with Commissioner Annis who says that we should require no special breaks for cities, municipalities, or other units of government." Transcript of Fla. C.R.C. proceedings 272 (Jan. 26, 1978) (remarks of Commissioner D'Alemberte). "If I don't have a cap and, Commissioner Annis, you don't have a cap and Commissioner Moore and the rest of you, then by god the king shouldn't have a cap. I think it is that simple." 2 Transcript of Fla. C.R.C. proceedings 94 (Mar. 8, 1978) (remarks of Commissioner Polak).

92. The Florida Constitution Revision Commission did not recommend any change in article 1, § 21 of the constitution.