Florida State University Law Review

Volume 12 | Issue 2 Article 7

Summer 1984

Sovereign Immunity -- Revisited but Still Not Refined

Susan C. McDonald

Follow this and additional works at: http://ir.law.fsu.edu/lr

 Part of the Legislation Commons, and the State and Local Government Law Commons

Recommended Citation

Susan C. McDonald, *Sovereign Immunity -- Revisited but Still Not Refined*, 12 Fla. St. U. L. Rev. 401 (2017) .
http://ir.law.fsu.edu/lr/vol12/iss2/7

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

SOVEREIGN IMMUNITY—REVISITED BUT STILL NOT REFINED*

SUSAN C. MCDONALD

I. INTRODUCTION

In 1973 the Florida legislature, in accordance with the authority granted to it under the Florida Constitution,[1] waived the sovereign immunity of the state and its agencies and subdivisions for tort liability.[2] On its face, the waiver appeared to be nearly absolute and promised to quell the confusion surrounding this area of the law.[3] However, the Florida Supreme Court has construed the waiver in section 768.28, Florida Statutes, to contain an implicit exception for certain governmental acts.[4] This judicial interpretation has not only eliminated causes of action for many potential claimants, it has left the present state of the law in confusion.

In 1979, in *Commercial Carrier Corp. v. Indian River County*, the Florida Supreme Court adopted a "planning-operational" approach to sovereign immunity: governmental acts which were planning functions were excepted from liability, while operational functions were subject to liability.[5] This approach proved to be ambiguous, and in 1982 the supreme court attempted to provide clarification in the *Neilson* trilogy of cases.[6] However, lower court decisions following *Neilson* have reflected the failure of the su-

---

* This comment supplements the Florida State University Law Review Note, *Sovereign Immunity Trilogy*—Commercial Carrier *Revisited but Not Refined*, 10 FLA. ST. U.L. REV. 702 (1983).

1. FLA. CONST. art. X, § 13 reads: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

2. Ch. 73-313, 1973 Fla. Laws 711 (codified as amended at FLA. STAT. § 768.28 (1983)).

3. *Id.* The pertinent part of the statute reads:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. 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.

4. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979).

5. *Id.*

6. Department of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982); Ingham v. Department of Transp., 419 So. 2d 1081 (Fla. 1982); City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982).

preme court's attempt. Confusion prevails, and opinions in every district court emphasize and demonstrate the immediate need for direction both from the supreme court and the legislature.[7] Since the trilogy, at least five questions of great public importance have been certified to the supreme court, with no response thus far.[8] In addition, the latest supreme court pronouncement in *Department of Transportation v. Webb*[9] serves only to further obscure the issues.

In order to identify and analyze the cause of the confusion which the courts are experiencing, it is necessary to examine the recent history of sovereign immunity. In addition, it will be seen that by modifying certain tests which have been applied unsuccessfully by the supreme court, these problems may be greatly alleviated.

II. SOVEREIGN IMMUNITY FROM *Modlin* THROUGH *Neilson*

A. *The Evolvement of* Commercial Carrier

Prior to the enactment of section 768.28, Florida Statutes, the torts of state employees were not actionable under the common law doctrine of sovereign immunity,[10] while municipalities enjoyed only limited immunity.[11] The statute, however, appears to draw no distinction between the two; the immunity of both seems to be clearly waived.[12] Even so, it is still helpful to understand the analysis which was followed by courts in claims of municipal sovereign immunity prior to the enactment of the statute. This common law analysis influenced the courts' subsequent analysis of state sovereign immunity after the statute became effective in 1975.

From 1967 to 1979, the courts primarily analyzed claims against

---

7. *See* Bryan v. Department of Bus. Reg., 438 So. 2d 415, 420 (Fla. 1st DCA 1983); Everton v. Willard, 426 So. 2d 996, 999 (Fla. 2d DCA 1983); Broward County v. Payne, 437 So. 2d 719, 721 (Fla. 4th DCA 1983); Palmer v. City of Daytona Beach, 443 So. 2d 371, 372 (Fla. 5th DCA 1983); Trianon Park Condo. Ass'n v. City of Hialeah, 423 So. 2d 911, 914 (Fla. 3d DCA 1982).

8. *Payne*, 437 So. 2d at 720; Carter v. City of Stuart, 433 So. 2d 669, 670 (Fla. 4th DCA 1983); Manors of Inverrary XII Condo. Ass'n v. Atreco-Florida, Inc., 438 So. 2d 490, 492 (Fla. 4th DCA 1983); *Palmer*, 443 So. 2d at 372; *Trianon Park*, 423 So. 2d at 914-15.

9. 438 So. 2d 780 (Fla. 1983).

10. State *ex rel.* Davis v. Love, 126 So. 374, 377 (Fla. 1930); McWhorter v. Pensacola & A. R. Co., 5 So. 129, 131 (Fla. 1888). *See, e.g.*, Valdez v. State Road Dept., 189 So. 2d 823 (Fla. 2d DCA 1966); Pereira v. State Road Dept., 178 So. 2d 626 (Fla. 1st DCA 1965).

11. Gordon v. City of West Palm Beach, 321 So. 2d 78, 80 (Fla. 4th DCA 1975). *See also* Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

12. FLA. STAT. § 768.28(2) (1983).

municipalities by applying the *Modlin* doctrine.[13] *Modlin v. City of Miami Beach* involved a wrongful death action by a citizen alleging that a city building inspector was negligent.[14] The supreme court upheld the lower court's recognition of sovereign immunity and averred that inasmuch as the inspector owed no greater duty to the deceased than to the general public, the city was not liable.[15] Thus, the "general-duty/special-duty" dichotomy was born.[16] Unless a special duty was owed by the municipality to a particular plaintiff, a cause of action would not lie.[17] Application of the doctrine was difficult.[18] Courts became entangled in the determination of the type of duty when, as one district court complained, it seemed "far more realistic and workable . . . [to] question whether the governmental entity's act or failure to act proximately caused the harm claimed."[19]

In 1975, a district court in *Gordon v. City of West Palm Beach* further obscured the issue of municipal sovereign immunity by applying a "functional" test.[20] In *Gordon,* the court determined that a municipality would remain immune if its activities were judicial, legislative, or otherwise governmental (with minor exceptions), but not if its functions were proprietary.[21] In other words, when a municipality is acting as a private corporation, for example, as a public utility, it must bear the tort liability of a private corporation.

Surprisingly, courts continued to apply the *Gordon* and *Modlin* tests to determine the liability of governmental authorities after the 1973 enactment of section 768.28.[22] After the Third District Court of Appeal twice declined to recognize either the implication or application of the statute, the supreme court felt compelled to

---

13. *Modlin,* 201 So. 2d at 75.

14. *Id.* at 72.

15. *Id.* at 76.

16. Klein & Chalker, *Developments in Florida's Doctrine of Sovereign Immunity,* 35 U. MIAMI L. REV. 999, 1001 (1981).

17. Seligman & Beals, *The Sovereignty of Florida Municipalities, In-Again, Out-Again, When-Again,* 50 FLA. B.J. 338, 339 (1976).

18. *Id.*

19. *Gordon,* 321 So. 2d at 81.

20. *Id.* at 80.

21. *Id.*

22. Commercial Carrier Corp. v. Indian River County, 342 So. 2d 1047 (Fla. 3d DCA 1977) (district court asserted it was unnecessary to discuss the implications of FLA. STAT. § 768.28 on sovereign immunity); Cheney v. Dade County, 353 So. 2d 623 (Fla. 3d DCA 1977) (court reasoned that FLA. STAT. § 768.28 "was not intended to create a cause of action where none existed at common law prior to its enactment," *Commercial Carrier,* 371 So. 2d at 1014, paraphrasing the *Cheney* holding).

act.[23] In 1979, *Commercial Carrier Corp. v. Indian River County* and *Cheney v. Dade County*, consolidated on writ of certiorari, provided a forum for the court to conclusively address the scope of the waiver of sovereign immunity in the statute.[24]

Commercial Carrier Corporation and its insurer were defendants in a wrongful death action as a result of a collision at an unmarked county intersection.[25] The defendants filed a third party complaint against the county and the Florida Department of Transportation, seeking indemnity and contribution because of the county's alleged negligence in failing to maintain the stop sign and the Department's failure to properly mark the intersection.[26] The trial court dismissed the third party complaint in part (1) because section 768.28 had not waived state immunity from claims for indemnity and contribution, and (2) for failure to state a cause of action.[27] The district court affirmed, citing *Gordon* as authority.[28]

In the companion case, Cheney and his liability insurer were also defendants in an action for damages resulting from an intersection collision. Cheney filed a third party complaint against the county, claiming that the negligent maintenance of the traffic light at the intersection was the sole cause of the accident.[29] Again, the trial court dismissed the third party complaint for failure to state a cause of action because, among other reasons, sovereign immunity barred recovery.[30] The district court affirmed, using the *Modlin* doctrine as authority.[31]

The supreme court then proceeded to discard the *Modlin* doctrine, declaring that it contained "circuitous reasoning" which could remain dispositive only if the common law doctrine of sovereign immunity retained its vitality.[32] While the court acknowledged that *Gordon* properly reflected the state of the law of municipal sovereign immunity at the time of the enactment of the statute,[33] it determined that the legislative intent was not to codify

23. *Commercial Carrier*, 371 So. 2d at 1015.
24. *Id.* at 1012.
25. *Id.* at 1013.
26. *Id.*
27. *Id.*
28. *Commercial Carrier*, 342 So. 2d at 1049.
29. *Commercial Carrier*, 371 So. 2d at 1013.
30. *Cheney*, 353 So. 2d at 624.
31. *Id.* at 626.
32. *Commercial Carrier*, 371 So. 2d at 1015.
33. *Id.*

these court-made rules of sovereign immunity.[34] Thus, the court declined to extend *Gordon*'s "governmental/proprietary" function test, although the concept of immunity for certain governmental acts did survive.[35]

Justice Sundberg, writing for the majority in *Commercial Carrier*, "distinguished between that part of the sovereign immunity doctrine involving negligent tortious conduct waived by section 768.28 . . . and that part of the sovereign immunity doctrine identified at times as official or governmental immunity not waived by the statute."[36] The court was adamant that "even absent an express exception . . . for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability,"[37] under the premise "that it cannot be tortious conduct for a government to govern."[38] The court reasoned that this interpretation would also serve the added function of safeguarding the separation of powers, ensuring that a basic policy decision of a governmental body would not be replaced by that of a judge or jury through judicial second-guessing.[39]

The court eschewed the temptation to use semantic labels to identify immune functions, applying instead the discretionary function approach of the federal courts and certain other states.[40] The United State Supreme Court had first addressed the immunity of discretionary governmental functions in *Dalehite v. United States*,[41] a case involving a claim under the Federal Tort Claims Act.[42] There the Court construed the express exception to the Act's waiver of sovereign immunity to protect from review "the discre-

---

34. *Id.* at 1016.

35. *Id.* at 1020.

36. Department of Transp. v. Neilson, 419 So. 2d 1071, 1075 (Fla. 1982) (discussing *Commercial Carrier*).

37. *Commercial Carrier*, 371 So. 2d at 1020.

38. *Neilson*, 419 So. 2d at 1075 (discussing *Commercial Carrier*).

39. *Commercial Carrier*, 371 So. 2d at 1018.

40. *Id.* at 1020-22.

41. 346 U.S. 15, 32-36 (1953).

42. 28 U.S.C. §§ 1346(b), 2671-80 (1982), which is substantially similar to the statute interpreted by the Court in *Dalehite*. Section 2680 reads in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.

tion of the executive or administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law."[43] At the same time, the Court readily acknowledged federal liability for other common law torts for which a private person would be liable.[44] Unfortunately, the Court declined to define precisely where discretion ended.[45] The planning-operational analysis was the result of attempts to explicate this imprecise doctrine.[46] Thus, "planning functions" encompassed basic executive policy decisions which were immune from liability, whereas "operational functions," those that implemented policy, were not immune.[47]

In deciding *Commercial Carrier,* the Florida Supreme Court looked to its sister courts in California and Washington for guidance in application of the planning-operational analysis. The California Supreme Court created the planning-operational distinction in *Johnson v. State*[48] to define the limits of immunity for discretionary governmental acts:

> We recognize that this interpretation of the term "discretionary" presents some difficulties. . . . Our proposed distinction, sometimes described as that between the "planning" and "operational" levels of decision-making . . . , however, offers some basic guideposts, although it certainly presents no panacea. Admittedly, our interpretation will necessitate delicate decisions. . . . Despite these potential drawbacks, however, our approach possesses the dispositive virtue of concentrating on the reasons for granting immunity to the governmental entity. It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision.[49]

The Supreme Court of Washington suggested a case-by-case method of analysis. In *Evangelical United Brethren Church v. State,*[50] the court proposed a preliminary test to be used in determining the character of governmental actions:

---

43. *Dalehite,* 346 U.S. at 34.
44. *Id.*
45. *Id.* at 35.
46. *Commercial Carrier,* 371 So. 2d at 1021 (discussing *Dalehite*).
47. *Id.*
48. 73 Cal. Rptr. 240 (1968).
49. *Id.* at 248-49 (citation and footnote omitted).
50. 407 P.2d 440 (Wash. 1965).

> Whatever the suitable characterization or label might be, it would appear that any determination of a line of demarcation between truly discretionary and other executive and administrative processes, so far as susceptibility to potential sovereign tort liability be concerned, would necessitate a posing of at least the following four preliminary questions: (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.[51]

In *Commercial Carrier* the Florida Supreme Court adopted the California planning-operational distinction and suggested utilization of the Washington preliminary test on a case-by-case approach.[52] Applying these analyses, the court found that the failure to maintain an installed traffic signal was an operational activity and, therefore, not immune from liability.[53] Accordingly, the decisions of the district court were quashed, and the cases remanded with directions for the trial court to reinstate the third party complaints against the state and counties.[54]

B. The Neilson *Trilogy*

Subsequent application of *Commercial Carrier* by the lower courts reflected the confusion generated by the planning-operational distinction instead of the clarity which the supreme court

51. *Id.* at 445.
52. *Commercial Carrier*, 371 So. 2d at 1022.
53. *Id.*
54. *Id.* at 1023.

had sought.[55] In 1982, in an attempt to resolve conflicts between lower court holdings and clarify the planning function exception to the sovereign immunity waiver, the supreme court handed down three similar cases on the same day. *Department of Transportation v. Neilson*[56] and a consolidated action (*City of St. Petersburg v. Mathews* and *City of St. Petersburg v. Collom*)[57] came to the court from the Second District. The third case, *Ingham v. Department of Transportation*,[58] was appealed from the First District Court of Appeal.

The *Neilson* claim arose from an automobile collision at a poorly marked intersection.[59] The resulting suit against the city, county, and Department of Transportation alleged negligence in the design and construction of the roadway, failure to install adequate traffic control signals, negligent design, construction, and maintenance of traffic control devices, and failure to warn motorists of a hazardous condition.[60] The supreme court determined that the failure to upgrade and reconstruct the intersection and install additional traffic control devices were planning functions protected by the court-created exception to section 768.28.[61] However, the court did find that the failure to warn of the known dangerous condition at the intersection was actionable as a negligent omission at the operational level.[62]

City of St. Petersburg v. Collom and *City of St. Petersburg v. Mathews* were consolidated wrongful death actions.[63] *Collom* resulted from the drowning of the plaintiff's wife and daughter when they fell into a storm sewer drainage ditch during a rainstorm and were sucked into the sewer pipe.[64] Collom alleged the city's failure to screen off the pipe's opening and failure to warn of the hazardous condition proximately caused the deaths.[65]

In *Mathews*, the city was sued in a wrongful death action by the

---

55. *See* Ingham v. State Dept. of Transp., 399 So. 2d 1028 (Fla. 1st DCA 1981); Neilson v. City of Tampa, 400 So. 2d 799 (Fla. 2d DCA 1981); Mathews v. City of St. Petersburg, 400 So. 2d 841 (Fla. 2d DCA 1981); Ellmer v. City of St. Petersburg, 378 So. 2d 825 (Fla. 2d DCA 1979).

56. 419 So. 2d 1071 (Fla. 1982).

57. 419 So. 2d 1082 (Fla. 1982).

58. 419 So. 2d 1081 (Fla. 1982).

59. *Neilson*, 419 So. 2d at 1073.

60. *Id.* at 1074.

61. *Id.* at 1078.

62. *Id.*

63. *Collom*, 419 So. 2d at 1082.

64. *Id.* at 1084.

65. *Id.*

parents of a child who drowned after falling into a drainage creek in a public park.[66] They alleged the proximate cause of death was the city's failure to install a protective barrier around the ditch and negligence resulting from creation of an attractive nuisance.[67] In both cases the supreme court agreed that the following could properly be classified as operational and, therefore, nonimmune functions: (1) the proper construction, installation, and design of an overall improvement plan, (2) the necessary and proper maintenance of existing improvements, and (3) the necessary warning or correction of a known danger.[68] The court did note that immunity would be retained for defects inherent in government-approved overall plans for improvements.[69]

Like *Neilson, Ingham v. Department of Transportation* concerned the alleged negligence in designing and constructing a road with a curve, in determining the position, shape, and size of a median, and in failing to provide adequate traffic signals. The supreme court held that all the claims fell into the judgmental planning category and were therefore immune.[70] Justice Sundberg, now dissenting in both *Neilson* and *Ingham,* decried the court's attempt at clarification which not only failed to harmonize the irreconcilable results among the district courts, but also served to compound the confusion.[71]

After the decisions in this trilogy, lower courts were called upon to differentiate between governmental acts resulting in defects inherent in an overall plan for improvement (immune)[72] and governmental acts dealing with engineering design and construction which were not considered a part of the overall plan (not immune).[73] No liability would lie for a design defect in the overall plan unless the existence of a known dangerous condition could be established.[74] The ambiguity of the term "overall plan" was not clarified. In addition, no standard was provided for determining whether a danger was "known," but the supreme court did imply in *Collom* that actual knowledge on the part of the government

66. *Id.*
67. *Id.* at 1084-85.
68. *Id.* at 1086.
69. *Id.* at 1085.
70. *Ingham,* 419 So. 2d at 1082.
71. *Neilson,* 419 So. 2d at 1079 (Sundberg, J., dissenting).
72. *Collom,* 419 So. 2d at 1085.
73. *Neilson,* 419 So. 2d at 1077.
74. *Id.* at 1078.

must be proved.[75] The trilogy holdings appeared to expand the narrow exception to the waiver of sovereign immunity for basic policy decisions at the planning level by broadening the planning function category, but no tools were provided for courts to construct the expansion. Further, if a claimant chose to sue under the "known danger" theory, a greater burden of proof was now required. Not only was a citizen's redress against negligent governmental acts further reduced, the courts below were left to continue their search for the point at which discretion or planning ends and implementation or operational acts begin.

III. POST-TRILOGY DEVELOPMENTS

A. *The District Courts*

Not surprisingly, decisions at the district court level have been unfocused and rife with uncertainty, reflecting the trilogy's lack of direction.[76] When a particular fact situation has not fit within a district court's perception of the supreme court's latest pronouncement, the California and Washington tests have been applied. If the facts then could not be logically adapted to either test, the courts have relied on instincts to administer justice.[77] Confusion has spawned numerous questions of great public importance which have been certified to the supreme court, none of which have yet been addressed.[78] The only point of unanimity among the district courts at this time is that the law of sovereign immunity is neither well-defined nor consistently applied.

---

75. *Collom*, 419 So. 2d at 1086. The court cited instances of liability when "the governmental entity *has knowledge* of the presence of people likely to be injured" and "[w]hen such a condition is *knowingly created* by a governmental entity." *Id.* (emphasis added). The court also relied upon similar holdings in other jurisdictions, referring to Larson v. Township of New Haven, 165 N.W.2d 543, 546 (Minn. 1969) (municipal employees were given actual notice of a dangerous condition).

76. *See* Everton v. Willard, 426 So. 2d 996 (Fla. 2d DCA 1983); Broward County v. Payne, 437 So. 2d 719 (Fla. 4th DCA 1983); Carter v. City of Stuart, 433 So. 2d 669 (Fla. 4th DCA 1983).

77. *See Everton*, 426 So. 2d at 1003-04; Bryan v. Department of Bus. Reg., 438 So. 2d 415 (Fla. 1st DCA 1983); Neumann v. Davis Water & Waste, Inc., 433 So. 2d 559 (Fla. 2d DCA 1983).

78. *See Payne*, 437 So. 2d at 720-21; *Carter*, 433 So. 2d at 670; Manors of Inverrary XII Condo. Ass'n v. Atreco-Florida, Inc., 438 So. 2d 490, 492 (Fla. 4th DCA 1983); Palmer v. City of Daytona Beach, 443 So. 2d 371, 372 (Fla. 5th DCA 1983); Trianon Park Condo. Ass'n v. City of Hialeah, 423 So. 2d 911, 914-15 (Fla. 3d DCA 1982). At the time of publication of this article, oral arguments had been heard by the Florida Supreme Court in *Trianon Park*, *Payne*, and *Carter*, but no decisions had been rendered. *Palmer* is scheduled for oral argument before the Florida Supreme Court in October 1984.

In one of the first relevant cases after the trilogy, *Foley v. Department of Transportation,* the First District reversed the trial court's grant of summary judgment for the Department on the basis of sovereign immunity.[79] In *Foley,* a motorcyclist alleged that the Department's negligence in allowing weeds to grow to obstruct the view of a culvert was the cause of his collision with the unmarked culvert.[80] The Department produced a schedule for inspection of highways and claimed that the schedule formulation and inspections were planning acts. Judge Shaw (now Justice Shaw), writing for the court, disagreed: "[I]f the affidavit [schedule] has the critical significance attributed to it by the trial judge, the broad waiver of immunity articulated in *Commercial Carrier* is truly illusory."[81] In a similar action against the Department of Health and Rehabilitative Services (HRS), the First District Court applied *Commercial Carrier* and the *Evangelical* four-prong test to find that an HRS employee's decision to allow a mental patient to leave the hospital on a buddy pass could have been an operational function. The court remanded for further exploration of the facts.[82]

Four months later, in *Smith v. Department of Corrections,* the First District Court again applied *Commerical Carrier* and the *Evangelical* test in reversing the trial court.[83] The court held that a post-sentencing decision to place a violent inmate in inadequately supervised confinement was not discretionary and not immune from liability.[84] In *Bryan v. Department of Business Regulation,* however, this district court declared the *Evangelical* test would be ill-suited to the planning-operational analysis in many cases, resulting in "the application of the proverbial square peg to the round hole."[85] The court agreed that the performance of elevator inspection duties by the Department of Business Regulation (DBR) was an operational function; however, the holding was not premised on the *Neilson* trilogy of cases, which the court implied were confined to their own facts—the maintenance of traffic controls or creation of a known dangerous condition on government-

79. Foley v. Department of Transp., 422 So. 2d 978, 980 (Fla. 1st DCA 1982).

80. *Id.* at 978.

81. *Id.* at 979.

82. Kirkland v. State, 424 So. 2d 925, 927 (Fla. 1st DCA 1983).

83. Smith v. Department of Corrections, 432 So. 2d 1338, 1340 (Fla. 1st DCA 1983). *See also* Newsome v. Department of Corrections, 435 So. 2d 887, 888 (Fla. 1st DCA 1983) (same holding).

84. *Smith,* 432 So. 2d at 1340.

85. Bryan v. Department of Bus. Reg., 438 So. 2d 415, 420 (Fla. 1st DCA 1983).

controlled property.[86] Ironically, the facts of *Bryan* dealt with DBR's failure to inspect and test a state university elevator which allegedly resulted in a malfunction and death of a passenger.[87] Although DBR's failure created a dangerous condition, the court failed to apply the "known dangerous" exception.

The Second District squarely and thoroughly addressed the waiver issue in *Everton v. Willard.*[88] After a cogent analysis of Florida's sovereign immunity doctrine and its many resulting tests for waiver, the court found the tests not dispositive and called for legislative guidance in this area. Further, the court postulated that *Commercial Carrier* did not impose the operational test as a mandate for determining liability. Instead, the operational function was to be viewed within the context of the entire act.[89] Applying this analysis to the facts of *Everton,* the court determined that a law enforcement officer's decision not to take an intoxicated driver into custody was both operational *and* discretionary, but, nevertheless, immune from liability. The holding was based on the premise that an officer's freedom to exercise discretion is essential to an effective criminal justice system and must of necessity be construed as a policymaking function.[90]

The Second District has continued to express its dismay with the obfuscated state of the law, echoing the First District's square-peg-round-hole complaint.[91] Although the Second District said that *Commerical Carrier* was successfully applied to clear-cut facts,[92] that same court, in *Neumann v. Davis Water & Waste, Inc.,* extended the exception to the waiver of sovereign immunity to state police-power functions.[93] The trial court's dismissal of the complaint was affirmed although the plaintiff asserted that the Florida Department of Environmental Regulation (DER) had created a known dangerous condition. The Second District opted for an overall policy analysis rather than "assign[ing] a label to DER's decision."[94]

---

86. *Id.* at 419.

87. *Id.* at 417.

88. 426 So. 2d 996 (Fla. 2d DCA 1983).

89. *Id.* at 1001.

90. *Id.* at 1003-04.

91. Neumann v. Davis Water & Waste, Inc., 433 So. 2d 559, 563 (Fla. 2d DCA 1983).

92. *See* State Dept. of Transp. v. Kennedy, 429 So. 2d 1210 (Fla. 2d DCA 1983) (failure of government to maintain sidewalk is actionable). *See also* Chapman v. Pinellas County, 423 So. 2d 578 (Fla. 2d DCA 1982) (failure of county to safely maintain park is actionable).

93. *Neumann,* 433 So. 2d at 563.

94. *Id.* at 562.

The Third District relied on *Commercial Carrier* and *Neilson* to reverse the trial court's decision in two consolidated actions. In *Armas v. Dade County*,[95] the Third District found that the city and county were liable for the failure to perform the operational function of maintaining shrubbery which obstructed traffic signs. In *Trianon Park Condominium Association v. City of Hialeah*, this district also found that a municipality did not retain its sovereign immunity when it negligently inspected a building; however, at the request of the city, a question of great public importance was certified to the supreme court: "Whether, under Section 768.28, . . . as construed in *Commercial Carrier Corp. v. Indian River County*, . . . a municipality retains its sovereign immunity from a suit predicating liability solely upon the allegedly negligent inspection of a building, where that municipality played no part in the actual construction of the building."[96]

The Fourth District mirrors the concerns of at least three of its sister courts in its search for clarification of the exceptions to the sovereign immunity waiver doctrine. In *Broward County v. Payne*, the court wrote: "The so-called *Modlin* doctrine discarded by *Commercial Carrier* may well have been unsatisfactory but at least we all understood it!"[97] In *Payne*, the court determined that the delay between the decision to install a traffic signal and the actual installation extended the immunity of the planning function. In other words, until a governmental plan is implemented it is immune—even if the delay creates a hazardous condition.[98] After struggling with the *Neilson* concept of "known danger," the following questions were certified to the supreme court:

> In the case at bar the County built a new spin-off right-of-way (Rock Island Road) at the ill fated intersection which it is suggested contributed to the accident. Was this the creation of the kind of known danger which requires a warning or an aversion of the danger? Did the decision once made of the need to install the traffic light carry with it the concomitant duty to warn until such time as the light was operational?[99]

---

95. 429 So. 2d 59 (Fla. 3d DCA 1983). *See also* Rodriguez v. Department of Highway Safety & Motor Vehicles, 9 Fla. L.W. 955 (Apr. 24, 1984).

96. Trianon Park Condo. Ass'n v. City of Hialeah, 423 So. 2d 911, 914 (Fla. 3d DCA 1982), *on reh'g*, 8 Fla. L.W. 315 (Jan. 11, 1983) (citations omitted).

97. Broward County v. Payne, 437 So. 2d 719, 721 (Fla. 4th DCA 1983).

98. *Id.* at 720.

99. *Id.*

Again citing the disarray of Florida case law relating to the planning-operational distinction, the court posited in *Carter v. City of Stuart* that the only way out was for each district court to certify each and every case to the supreme court.[100] Indeed, the Fourth District has continued to certify cases to the supreme court. In *Carter*, the following question was certified: "Is a city's failure to enforce a valid ordinance a planning decision as opposed to an operational one?"[101] The district court decided that the failure was discretionary and immune.[102] In *Manors of Inverrary XII v. Atreco-Florida, Inc.*, the Fourth District certified the following question: "Should the negligent conduct of a building inspector in approving plans, specifications, and construction that do not meet the requirements of the applicable building code be considered 'operational' conduct for which the municipality may be held liable in damages or 'discretionary' conduct to which sovereign immunity would apply?"[103] On this question, the Fourth District agreed with the Third District's holding in *Trianon Park*[104] that this type of function was operational.[105] Similarly, in another case, the Fourth District had no trouble finding that insufficient supervision on a school playground could subject a school board to liability and was not immune, absent the school board showing a policy analysis which resulted in the decision.[106] Likewise, the court later held that an allegation that a sanitation truck driver's negligence had resulted in the death of a child stated a cause of action against the city which had granted the franchise and exerted control over the company, finding both the franchise grant and the control to be operational activities.[107]

The Fifth District has applied *Collom* to find that the failure to correct or warn the public about a known dangerous condition such as a protruding manhole cover is operational and therefore actionable.[108] On the whole, the case law in this district does not reflect major problems with the waiver doctrine, although a related question was recently certified to the supreme court: "Can a city

100. Carter v. City of Stuart, 433 So. 2d 669, 670 (Fla. 4th DCA 1983).
101. *Id.*
102. *Id.* at 669.
103. Manors of Inverrary XII Condo. Ass'n v. Atreco-Florida, Inc., 438 So. 2d 490, 492 (Fla. 4th DCA 1983).
104. *Trianon Park*, 423 So. 2d at 911.
105. *Manors of Inverrary XII*, 438 So. 2d at 492.
106. Cottone v. Broward County, 431 So. 2d 355, 356 (Fla. 4th DCA 1983).
107. Pierson v. Williams, 436 So. 2d 146, 147 (Fla. 4th DCA 1983).
108. Hodges v. City of Winter Park, 433 So. 2d 1257, 1260 (Fla. 5th DCA 1983).

be held liable in tort to a property owner for damages caused by the negligent acts of the city's firefighters in combating a fire?"[109] The court realized the act was operational, but felt that the ramifications of such a holding were far-reaching.[110]

The Fifth District recently decided *Huhn v. Dixie Insurance Co.*,[111] a case on all fours with *Everton*. In *Huhn*, a police officer stopped a visibly intoxicated driver but permitted him to continue operating the motor vehicle. Shortly thereafter, the driver struck and injured a pedestrian.[112] The Fifth District reversed the trial court's determination that the victim's complaint against the city did not state a course of action.[113] Sovereign immunity did not lie because the police officer was implementing, not performing, a discretionary function.[114] The court acknowledged that its decision was in conflict with the Second District's holding in *Everton*.[115]

The First, Second, and Fourth Districts, the three districts with the largest exposure to this issue, have expressed the urgent need for clarification. While the Third and Fifth Districts have not communicated the same urgent need for clarification, they have not been presented with the complex fact situations which have been presented to their sister courts. Even so, these two courts have also certified questions to the supreme court.

B. The Supreme Court

In February 1983, *Ralph v. City of Daytona*[116] gave the supreme court its first opportunity to address the planning-operational issue after the *Neilson* trilogy. The petitioner sued the City of Daytona Beach for injuries received when she was run over by a car while sunbathing on Daytona Beach. The petitioner contended that since the beach was a public highway, the city had a responsibility to provide for the public's safety and to warn beach users of the known dangerous condition of unsupervised motor vehicles on the beach.[117] The trial court dismissed the petitioner's complaint for failure to state a cause of action. The district court affirmed,

109. Palmer v. City of Daytona Beach, 443 So. 2d 371, 372 (Fla. 5th DCA 1983).
110. *Id.*
111. 9 Fla. L.W. 1106 (May 17, 1984).
112. *Id.*
113. *Id.* at 1109.
114. *Id.* at 1108.
115. *Id.* at 1109.
116. 8 Fla. L.W. 79 (Feb. 17, 1983).
117. *Id.*

finding the regulation of traffic to be an immune planning level function.[118] The supreme court quashed the district court's decision with instructions to reinstate the complaint for failure to warn of a known dangerous condition. The holding primarily relied on the *Neilson* trilogy.[119]

In July 1983, the court ruled on the First District's opinion in *Harrison v. Escambia County School Board,*[120] which had been certified to the court as passing on questions of great public importance. The school board was the defendant in an action for an alleged violation of section 234.112, Florida Statutes,[121] which resulted in the death of a child. The trial court granted the school board's motion to dismiss because, in part, the allegations involved immune planning level decisions. The district court affirmed.[122] The supreme court agreed that the determination of placement of school bus stops was a planning/policy level decision and immune from liability.[123] However, the court indicated that had the plaintiff specifically alleged the failure to warn of a known dangerous condition, a cause of action would have been stated. Relying on the *Johnson v. State* test and the *Neilson* and *Collom* holdings, the supreme court affirmed the dismissal of the case.[124]

Two weeks later, the court deemphasized the planning-operational analysis in *Perez v. Department of Transportation.*[125] There, it was alleged that the Department was negligent in designing and failing to upgrade a bridge and failing to warn of a known dangerous condition on the bridge. The trial court granted summary judgment for the Department, and the District Court of Appeal for the First District affirmed, holding that the design of the bridge and the failure to upgrade were judgmental, planning level decisions and immune.[126] The supreme court did not disagree but instead focused on the issue of the failure to warn of a known dangerous condition. Because the lower court had not had the benefits of the *Neilson, Collom,* and *Ralph* holdings, that portion of the district court's decision which served to deny justiciability of the

---

118. *Id.*
119. *Id.* at 80.
120. 434 So. 2d 316 (Fla. 1983).
121. FLA. STAT. § 234.112 (1977) (creating a school board's duty to establish school bus stops at safe locations and provide for warning signs).
122. *Harrison,* 434 So. 2d at 319.
123. *Id.* at 321.
124. *Id.*
125. 435 So. 2d 830 (Fla. 1983).
126. *Id.* at 831.

duty to warn was quashed and remanded.[127]

Department of Transportation v. Webb[128] is the court's most recent decision on these issues. That action alleged negligence by the Department of Transportation in the design and maintenance of a highway because of the Department's (1) failure to use due care in marking the railroad crossing, (2) failure to warn approaching motorists of the known dangerous condition at the crossing, and (3) failure to demand that the railroad install proper warning devices.[129] The trial court denied the Department's motion for summary judgment which was based on sovereign immunity, and after a jury trial the Department was found negligent.[130] The First District affirmed in a per curiam opinion.[131] The court was unmoved by the Department's claim that its acts were of a planning nature and immune. The court recognized that every operational act entails some element of planning, but found that to use that element to escape liability "would cloak the department in absolute immunity."[132] Further, the Department had failed to meet the test of *Commercial Carrier*: it must be demonstrated that the act was one of "basic governmental policy" which, if judicially reviewed, would result in second-guessing those decisions for which the government must exercise discretion in order to govern.[133]

The supreme court affirmed. However, Justice Overton, writing for the majority in *Webb* as he had in the *Neilson* trilogy, took exception to the First District's implicit findings that the failure to upgrade a railroad intersection and the failure to install traffic control devices were planning acts and immune.[134] Standing alone, these findings would be in conflict with the *Neilson* and *Collum* holdings. The supreme court agreed with the district court's determination that the failure to place warning signs at a known dangerous railroad crossing and the failure to maintain that crossing were operational and actionable. Further, since the case had been submitted to the jury on the latter issues, which both courts agreed were operational acts, the supreme court approved the decision.[135]

Justice Shaw concurred specially with the results of the holding

---

127. *Id.* at 832.
128. 438 So. 2d 780 (Fla. 1983).
129. Webb v. Department of Transp., Case No. 77-1475 (Fla. 2d Cir. Ct. 1980).
130. *Id.*
131. Department of Transp. v. Webb, 409 So. 2d 1061 (Fla. 1st DCA 1981).
132. *Id.* at 1064.
133. *Commercial Carrier*, 371 So. 2d at 1022.
134. *Webb*, 438 So. 2d at 781.
135. *Id.*

but disagreed that the district court had implicitly held that the failure to upgrade a railroad intersection and the failure to install traffic control devices were operational. Instead, Justice Shaw felt that the district court had refrained from using the planning-operational analysis because such an analysis would have been superficial and not dispositive.[136] The Department of Transportation had attempted to affix a broad planning label to its acts in order to insulate itself from judicial review. The district court was simply refusing to allow that planning label to conceal a cause of action for failure to warn of a known dangerous condition.[137]

Webb reflects the supreme court's increased emphasis on a "duty to warn" approach and a movement away from the strict planning-operational analysis. This tendency may signal a move back to a *Modlin*-type test in which the state would have immunity if it could demonstrate that there was no greater duty to the victim than to the general public. At least one district court believes that this approach would be less dispositive but easier to understand and apply.[138]

IV. CALIFORNIA AND WASHINGTON TESTS REVISITED

In *Commercial Carrier,* the Florida Supreme Court adopted the tests of the states of California and Washington in order to assist lower Florida courts in determining which governmental acts would retain immunity from liability.[139] Therefore, it is appropriate to revisit these tests in order to determine whether they remain valid in the states of their origin and, if not, whether the tests should continue to be applied in Florida.

A. California

California, unlike Florida, has statutorily provided for an excep-

136. *Id.* (Shaw, J., concurring).

137. *Id.* The major aspect of *Webb,* beyond its illustration of the fragmented status of the law, is its implication of change that Justice Shaw may bring to the court on this issue in the future. As the author of the First District Court's decision in Foley v. Department of Transp., 422 So. 2d 978 (Fla. 1st DCA 1982), Shaw's advocacy of a very narrow construction of the judicially created exception to the waiver doctrine was apparent. One conjectures that Shaw probably would have joined Justice Sundberg's dissent to the *Neilson* trilogy. Like Sundberg, Shaw would limit sovereign immunity to "quasi-legislative policy-making" decisions, an approach far stricter than that of both the *Neilson* and *Webb* majority and more in line with that of the Washington Supreme Court. *See Neilson,* 419 So. 2d at 1080 (Sundberg, J., dissenting).

138. Broward County v. Payne, 437 So. 2d 719, 721 (Fla. 4th DCA 1983).

139. *Commercial Carrier,* 371 So. 2d at 1022.

tion to its waiver of sovereign immunity.[140] In the leading case, *Johnson v. State,* the California Supreme Court rejected any attempt to determine the scope of discretionary immunity by an application of the literal meaning of "discretionary" to a fact situation.[141] Instead, that court required an in-depth review of the facts of each case to support a finding that the governmental act was a decision at the quasi-legislative policymaking level and therefore immune from liability.[142] Further, a decision was regarded as discretionary "only if the act or omission in question was the result of an actual exercise of policy or planning-level discretion in which risks and advantages were deliberately weighed and a balance struck."[143] This approach remains good law in California.[144] As areas of confusion have arisen, the legislature has statutorily designated specific acts as discretionary and immune and excluded certain others as not.[145] Statutory immunities prevail over liabilities.[146] However, the courts have not narrowly construed the waiver of sovereign immunity, and have declared that "[u]nless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail."[147]

Unlike Florida, California courts have the advantage of clear legislative direction in specific areas. As a result, the planning-operational test of *Johnson* is effective in California when applied to its statutorily defined areas of immunity and liability, but the same test becomes extremely ambiguous and ineffective in Florida in the absence of the same type of statutes.

---

140. CAL. GOV'T CODE § 820.2 (West 1980), which reads in pertinent part: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

141. Johnson v. State, 73 Cal. Rptr. 240, 246 (1968).

142. *Id.* at 248-50.

143. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE 126 (1980).

144. *Id.* at 118-19. *See also* Milligan v. City of Laguna Beach, 196 Cal. Rptr. 38, 40-41 (1983); Thompson v. County, 167 Cal. Rptr. 70, 73-74 (1980).

145. SEE CAL. GOV'T CODE § 815.4 (West 1980) (liability for acts of independent contractors). *See also id.* § 815.6 (liability for breach of mandatory duty); § 818.8 (immunity for public entity's misrepresentation); § 821.6 (immunity for malicious prosecution); § 830.4 (immunity for dangerous conditions to public property for failure to provide traffic control signals); § 830.6 (immunity for design of state-approved public property).

146. A. VAN ALSTYNE, *supra* note 143, at 607.

147. Ramos v. Madera, 94 Cal. Rptr. 421, 426 (1971).

B. Washington

The State of Washington's waiver of sovereign immunity closely parallels that of Florida,[148] and that state has experienced similar problems. The Washington Supreme Court has been able to effectively resolve these problems by the continued application and refinement of the test used in *Evangelical United Brethen Church v. State.*[149] The *Evangelical* test was expanded when the Washington Supreme Court set out an additional requirement for the availability of discretionary immunity in *King v. City of Seattle*:[150]

> Immunity for "discretionary" activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, *to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place.* The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.[151]

In effect, there seems to be an implied shifting of the burden of proof to the state.

The multitude of supreme court cases on this issue supports the proposition that "discretionary governmental immunity in [Washington] . . . is an extremely limited exception."[152] "Since the concept of discretionary governmental immunity is a court-created exception to the general rule of governmental tort liability, its applicability is necessarily limited only to those high level discretionary acts exercised at a truly executive level."[153] Therefore, the scope of discretionary immunity "should be no greater than is required to give legislative and executive policy-makers sufficient breathing space in which to perform their vital policy-making functions."[154]

---

148. WASH. REV. CODE ANN. § 4.92.090 (1962 & Supp. 1984), which reads: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

149. 407 P.2d 440, 445 (Wash. 1965). *See also* Petersen v. State, 671 P.2d 230 (Wash. 1983); Bender v. City of Seattle, 664 P.2d 492 (Wash. 1983); Cougar v. State, 647 P.2d 481 (Wash. 1982).

150. 525 P.2d 228 (Wash. 1974).

151. *Id.* at 233 (emphasis added).

152. Stewart v. State, 597 P.2d 101, 106 (Wash. 1979).

153. *Bender*, 664 P.2d at 497.

154. *Petersen*, 671 P.2d at 240 (quoting Tarasoff v. Regents of Univ. of Cal., 131 Cal.

The court has used this strict approach along with the *Evangelical* and *King* tests to deny immunity for discretionary investigations by police officers,[155] to allow a cause of action against a police officer for false arrest and false imprisonment,[156] and to allow a cause of action against a city for negligent design of a bridge and lighting system.[157] In none of these cases was the state able to sustain its required showing of a policy decision. The *King* test requires more than conclusive statements. In the action for negligent design of the bridge and lighting system the state needed to demonstrate "that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate."[158] The Washington Supreme Court, like that of California, narrowly construes the exceptions to the statutory waiver of sovereign immunity. By promulgating definitive guidelines and consistently applying them, the court has avoided the confusion which Florida courts are experiencing.

V. CONCLUSION

The current state of Florida law regarding the waiver of sovereign immunity for tort liability remains fragmented and disordered, as evidenced by the recent decision in *Webb*. After *Commercial Carrier* set out an exception to the waiver for "planning," as opposed to "operational," functions, the *Neilson* trilogy amended this exception to the waiver doctrine to provide a cause of action for the creation of a known dangerous condition, but the elements of proof were not adequately defined. Courts were not certain how to merge the "known danger" component into the planning-operational scheme. As a result, that cause of action has proven difficult to isolate and identify. The *Neilson* trilogy not only fell short of clarifying the *Commercial Carrier* doctrine, it further confused it. Instead of adding to that obscurity, the supreme court should have taken the opportunity presented by *Webb* to provide definitive guidelines for the court-created waiver doctrine exception.

Rptr. 14, 30 (1976)).

155. *Bender*, 664 P.2d at 498 (overruling both Clipse v. Gillis, 582 P.2d 555 (Wash. Ct. App. 1978) and Moloney v. Tribune Publishing Co., 613 P.2d 1179 (Wash. Ct. App. 1980)).

156. *Bender*, 664 P.2d at 499-500.

157. *Stewart*, 597 P.2d at 106.

158. *Id.* at 106-07.

The Florida Supreme Court could take a giant step toward resolving these issues if it would adopt the strict approach of the Washington Supreme Court. Ironically, this was the primary rationale used by the First District in *Webb* to defeat the Department of Transportation's argument that it had been engaged in planning activities. That court declined to employ simplistic labeling and instead focused on the Department's failure to demonstrate "that its action or inaction at this admittedly dangerous railroad crossing was based upon 'basic governmental policy.' "[159] Such an approach closely parallels the *King* test. Regrettably, the Florida Supreme Court did not follow that approach.

The planning-operational dichotomy, like the governmental/proprietary and general-duty/special-duty tests, has proven ambiguous and ineffective. Courts have become entangled in semantics and are distracted from a thorough analysis of the facts. The planning-operational test adopted in *Johnson* works well for California because that state's legislature has carefully enumerated the confines of immune and nonimmune governmental acts. Unfortunately, the Florida legislature has not.

The planning-operational test should be discarded and replaced with the four-prong *Evangelical* test as modified in *King*. Florida's statutory waiver of sovereign immunity would then be more broadly applied with the following results:

(1) State liability would be presumed initially.

(2) The four questions of *Evangelical* would have to be answered in the affirmative, but this by itself would not classify the act as discretionary and immune without the state showing required by *King*.

(3) The state would bear the burden of showing that a policy decision at the executive level took place. This would require furnishing proof that inherent in that decision was a conscious balancing of risks and advantages. Conclusive statements would be inadequate; without a detailed showing of the policy-level steps involved in the decision, immunity would not lie.[160]

Use of the *Evangelical* and *King* tests would render the "known danger" test unnecessary and the narrow exception to the waiver doctrine would be used for the sole purpose of allowing the government to govern. The Florida Supreme Court would be able to re-

159. Department of Transp. v. Webb, 409 So. 2d 1061, 1064 (Fla. 1st DCA 1981).

160. This approach reflects general agreement with the recommendation of at least one commentator: Note, *Sovereign Immunity Trilogy—Commercial Carrier Revisited but Not Refined*, 10 FLA. ST. U.L. REV. 702, 721 (1983).

treat from its broad categorization of governmental functions as planning acts. While most governmental acts include some element of discretion, the court appears to strain to draw these acts into the safe harbor of a planning function. The benefit of any doubt should go to the victim and not the state.

The Second District adequately expressed the current perplexity:

> Perhaps it is time, even past time, for the issue to be definitively and specifically addressed by the legislature so that the state, its agencies and subdivisions, can, with some degree of certainty, know the extent of their liabilty and guard against it. It is evident that they cannot now be certain when the courts themselves obviously continue to be uncertain as to the present extent of sovereign immunity, especially as each case and each factual situation seems to produce a new "test." It does not to us seem fair to drift toward the practice of allowing more and more cases to proceed to a jury determination on the question of what is "operational" or "planning" or what is "discretionary" or "nondiscretionary." The danger that lies in such practice, other than the obvious one of increasingly larger jury verdicts, is that there are some functions of government that are so peculiar to the act of governing that a jury is ill-equipped to make an informed decision.[161]

Legislative guidance in this area is greatly needed and long overdue. But until the legislature speaks, the supreme court should approach Florida's doctrine of sovereign immunity with restraint, by curbing their tendencies toward broad construction of the court-created exceptions to the statutory waiver. As a minimum, this may be accomplished by adopting the State of Washington's *Evangelical* and *King* tests, which place the burden of establishing immunity where it belongs—on the state.

161. Everton v. Willard, 426 So. 2d 996, 999-1000 (Fla. 2d DCA 1983).