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Municipal Tort Liability

Floyd B. Olson

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MUNICIPAL TORT LIABILITY

FLOYD B. OLSON†

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INTRODUCTION

During the past two decades, city and county attorneys have been acutely aware of the avalanche of decisions which have abruptly modified the landscape of legislation on municipal tort liability.¹ The inability of municipalities to obtain insur-

† Deputy City Attorney, City of Minneapolis. Mr. Olson is an Adjunct Professor of Law at William Mitchell College of Law. He received his J.D. from William Mitchell College of Law in 1963. He also serves as Chairman of the Minnesota State Bar Association, Committee on Urban, State, and Local Government.

1. After the Minnesota Supreme Court abolished municipal tort immunity in 1962, the legislature responded by enacting Minnesota Statute Chapter 466 (1963). See *infra* note 7 and accompanying text. Since its enactment, the Minnesota Supreme Court declared the worker's compensation exception to liability an unconstitutional deprivation of equal protection in *Bernthal v. City of St. Paul*, 376 N.W.2d 422 (Minn. 1985); has declared that even an attempt to procure insurance is sufficient, under Minnesota Statute Section 466.06, to waive the defense of immunity up to the amount stated in the policy in *Horace Mann Ins. Co. v. Independent School Dist. No. 656*, 355 N.W.2d 413 (Minn. 1984); decided that the notice claim provision of Minnesota Statute Section 466.05 violated equal protection in *Glassman v. Miller*, 356

ance has sharpened the debate,² usually centering on the issue of who should bear the blame.³ At least three views have been advanced.⁴ One argues that there is no crisis. Another insists that the insurance industry is guilty of mismanagement.⁵ Perhaps the most vocal group looks to the judicial system and its response to issues of public liability.⁶

Since the landmark decision in *Spanel v. Mounds View School District No. 621*,⁷ four problematical phenomena have troubled lawyers practicing public law. First, the policy of the legislature in preserving certain categories of immunity⁸ found in the Municipal Tort Liability Act⁹ is rapidly eroding.¹⁰ Second, defenses which were believed to have been established have been modified in such a manner as to render them unserviceable to public law practitioners.¹¹ Third, although *Spanel* rejected the

N.W.2d 655 (Minn. 1984); modified the discretionary act defense in a series of cases culminating in *Larson v. Independent School Dist. No. 314, Braham*, 289 N.W.2d 112 (Minn. 1979); and struck down the time limitation provision for commencement of suit in *Kossak v. Stalling*, 277 N.W.2d 30 (Minn. 1979).

2. See NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, REPORT OF THE TASK FORCE ON TORT LIABILITY AND THE INSURANCE CRISIS, FIFTY FIRST ANNUAL CONFERENCE, 8 1986; see also J. PINE AND R. BICKEL, TORT LIABILITY TODAY: A GUIDE FOR STATE AND LOCAL GOVERNMENT, a joint publication of THE PUBLIC RISK AND INSURANCE MANAGEMENT ASSOCIATION AND THE NATIONAL LEAGUE OF CITIES, vii (1986).

3. See *supra* note 2, REPORT OF THE TASK FORCE ON TORT LIABILITY AND THE INSURANCE CRISIS, at 8-11.

4. See *supra* note 2. In a survey of 145 cities, the United States Conference of Mayors, while not unanimous on causes and solutions, agreed that the problem was pervasive and demanded immediate attention. Moreover, the cities polled were almost equally divided (49% and 42.8%) on whether the responsibility was assignable to the insurance industry or to high jury awards. United States Conference of Mayors, *Municipal Liability Concerns: A 145 City Survey*, 37 (1986).

5. See *supra* note 2, REPORT OF THE TASK FORCE ON TORT LIABILITY AND THE INSURANCE CRISIS. The Report notes that "[t]he New York State Governor's Advisory Commission on Liability Insurance . . . [has] found that 'the industry's poor recent financial condition largely reflects self-inflicted wounds.'" The Report attributes the crisis to "unwise investment practices" of the insurance industry. *Id.* at 10.

6. In Minnesota the legislative effort at dealing with the crisis focused on amendments to Minnesota Statute Chapter 466. See Tort Reform Act of 1986, ch. 455, 1986 Minn. Laws 840.

7. 264 Minn. 279, 118 N.W.2d 795 (1962).

8. See MINN. STAT. § 466.03 (1986).

9. MINN. STAT. Chapter 466.

10. See, e.g., *Bernthal v. City of St. Paul*, 376 N.W.2d 422 (Minn. 1985) (declaring the worker's compensation exception to liability as an unconstitutional deprivation of equal protection); *Glassman v. Miller*, 356 N.W.2d 655 (Minn. 1984) (striking down the notice of claim provision of MINN. STAT. § 466.05 as violative of equal protection).

11. The modification of the discretionary acts defense illustrates the point. To understand the evolution of the defense, the reader should analyze several cases,

rationale for preserving immunity,¹² they are continuing to be applied to the exceptions.¹³ Finally, several new issues have arisen regarding the waiver of liability limits and defenses in procuring insurance.¹⁴

In 1986, the Minnesota Legislature adopted Chapter 455,¹⁵ part of which attempted to respond to the erosion of municipal tort immunity.¹⁶ Rather than quelling the debate, Chapter 455 will probably intensify it. New arguments are likely to be raised by increasing the number of exceptions to liability for municipal torts. State and local government immunity statutes now have parallel provisions in response to claims that the differences in the state and local statutes deny equal protection of the laws.¹⁷ Oddly, while municipalities received increased pro-

including: *Wilson v. Ramacher*, 352 N.W.2d 389 (Minn. 1984); *Cairl v. State*, 323 N.W.2d 20 (Minn. 1982); *Larson v. Independent School Dist. No. 314, Braham*, 289 N.W.2d 112 (Minn. 1979); *Susla v. State*, 247 N.W.2d 907 (Minn. 1976); *Williamson v. Cain*, 310 Minn. 59, 245 N.W.2d 242 (1976); *Hansen v. City of St. Paul*, 298 Minn. 205, 214 N.W.2d 346 (1974); *Anderson v. City of Minneapolis*, 287 Minn. 287, 178 N.W.2d 215 (1970); *Silver v. City of Minneapolis*, 284 Minn. 266, 170 N.W.2d 206 (1969) (citing *Dalehite v. United States*, 346 U.S. 15 (1953)); *Johnson v. County of Nicollet*, 387 N.W.2d 209 (Minn. Ct. App. 1986); *Gonzales v. Hollins*, 386 N.W.2d 842 (Minn. Ct. App. 1986); *Ostendorf v. Kenyon*, 347 N.W.2d 300 (Minn. Ct. App. 1985); *Bjorkquist v. City of Robbinsdale*, 352 N.W.2d 817 (Minn. Ct. App. 1984). Note that, in *Bjorkquist*, the court of appeals held that the discretionary acts defense did not violate equal protection.

12. 264 Minn. 279, 118 N.W.2d 795 (1962).

13. See, e.g., *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) (involving the special duty doctrine). Note, that in *Spanel*, the Minnesota Supreme Court did not regard the financial impact of liability to be a persuasive argument for preserving immunity. In *Cracraft*, the court suggested that, "If such an expansion and change of the law is to occur, it is better that the legislature act in this field . . . to consider the extent of the financial impact of such a basic change." *Id.* at 808.

14. There is increasing difficulty in understanding what constitutes the procurement of insurance so as to effect a waiver of liability limitations and defenses. In *Horace Mann Ins. Co. v. Independent School Dist. No. 656*, 355 N.W.2d 413 (Minn. 1984), the court stated that "because the district attempted to obtain liability insurance to cover the district and its employees, it has waived 'the defense of governmental immunity to the extent of the liability stated in the policy.'" *Id.* at 420-21 (emphasis added). In *Wesala v. City of Virginia*, 390 N.W.2d 285 (Minn. Ct. App. 1986), the Minnesota Court of Appeals held that procurement of coverage through the League of Minnesota Insurance Trust constitutes insurance and, therefore, waives governmental immunity. *Id.* at 287. The court noted, however, that the procurement of insurance has no effect on the liability of the municipality beyond the coverage so provided. *Id.*

15. Tort Reform Act of 1986, ch. 455, 1986 Minn. Laws 840. Provisions of this chapter amend Minnesota Statutes, chapter 466.

16. Sections 1, 2, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 85, and 90 are the provisions of chapter 455 that deal with governmental tort liability.

17. The new exceptions to local government immunity in chapter 455 have been

tection, they are now prohibited from indemnifying and insuring their officers and employees in claims for punitive damages.¹⁸ It is premature to speculate on the effect of the 1986 amendments to the Municipal Tort Liability Act. At this stage, all that can be done is to raise issues which public debate and legal decisions must resolve.

I. RECENT DEVELOPMENTS IN MUNICIPAL TORT LIABILITY

A. Chapter 455.

The 1986 amendments to the state and local government tort liability provisions in Chapter 455 represent an attempt to make each level of government immune from liability for the same kind of claim.¹⁹ The need for similarity was raised in *Glassman v. Miller*.²⁰ In *Glassman*, the supreme court held that because the Municipal Tort Liability Act contained notice provisions different from the state act,²¹ Minnesota Statute section 466.05, subdivision 1 violated the equal protection guarantees of the Minnesota Constitution²² and the Four-

taken, with minor changes, from Minnesota Statutes section 3.736. The court, in *Glassman*, decided that no rational basis existed for the difference between the notice provisions of the Municipal Tort Liability Act and the State Tort Liability act. 356 N.W. 2d at 656.

18. Tort Reform Act, ch. 455, § 76, 1986 Minn. Laws 840, 876.

19. See Longfellow, Ellen, 1986 *Legislative Changes in Minnesota Tort Liability* 10 (April 22, 1986)(on file at the William Mitchell Law Review office). This paper was distributed to municipalities by the League of Minnesota Insurance Trust. The Trust was authorized by Minnesota Statutes section 471.981, subdivision 3, (1984) to establish a group self-insurance program to pool risks and losses of governmental units.

20. 356 N.W.2d 655, 656 (Minn. 1984); see also *Naylor v. Minnesota Daily*, 342 N.W.2d 632, 634 (Minn. 1984). In *Glassman*, Justice Scott agreed with the conclusion of the majority but added by concurring, that he was:

[T]roubled by the majority's failure to strike down the notice provisions of such statutes in their entirety. While the majority opinion cures one level of inequality - namely, the unreasonable distinction between the victims of state torts and those of municipal torts - both this case and *Naylor v. Minnesota Daily*, 342 N.W.2d 632 (Minn. 1984), accord preferential treatment to government tortfeasors. Consequently, this distinguishes between victims of governmental and private wrongdoers, in violation of the equal protection requirements of U.S. Const. amend [sic] XIV, § 1, and Minn. Const. art. I, § 2.

Glassman, 356 N.W.2d at 656.

21. MINN. STAT. § 3.736 (Supp. 1987).

22. Article I, Section 2 states, in part: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." MINN. CONST. art. I, § 2.

teenth Amendment to the United States Constitution.²³ Thus, several sections of 1986 Session Laws, Chapter 455 attempt to apply the same standards to municipalities that are applied to the state.²⁴ Others pertain mostly to claim payment responsibility.²⁵

1. *Sections 1, 2, and 65 - Proprietary Functions.*

Section 1 of Chapter 455 specifically eliminates the governmental and proprietary distinction under section 3.736, subdivision 1 for torts committed by the state.²⁶ This distinction was eliminated for torts of municipalities, their officers, employees, and agents by Section 466.02.²⁷ Thus, the old distinction between governmental and proprietary functions that existed prior to the enactment of Minnesota Statutes, Chapter 466, in 1963, has also been eliminated for tort claims against the state.²⁸ In *Bufkin v. City of Duluth*,²⁹ the distinction was applied to snow or ice conditions on public sidewalks even though the Municipal Tort Liability Act eliminated it in 1963.³⁰ Nevertheless, the state tort liability act now clearly removes the distinction in determining liability.³¹

In the 1986 amendments to sections 2 and 65, subdivision 4,

23. Section 1 of the Fourteenth Amendment states, in part: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

24. See Tort Reform Act, ch. 455, § § 1, 2, 65, 66, 67, 68, 70, 71, 72, 73, 74, and 75, 1986 Minn. Laws 840, 874-76.

25. See Tort Reform Act, ch. 455, § § 64, 67, 77, 85, and 90, 1986 Minn. Laws 840, 874, 876, 877, 882, 884.

26. Section 1 of Chapter 455, 1986 Minn. Laws, adds the language "whether arising out of a governmental or proprietary function" to subdivision 1, section 3.736 in Minnesota Statutes. *But see* *Bufkin v. City of Duluth*, 291 N.W.2d 225, 227 (Minn. 1980) where the Minnesota Supreme Court reintroduced the distinction in holding the City of Duluth liable for ice and snow conditions on a public sidewalk where the sidewalk led to an event promoted for profit. Whether this anomaly will be given consideration in the future is doubtful.

27. MINN. STAT. § 466.02 (1984). The proprietary and governmental distinction was eliminated in 1963. Municipal Tort Liability Act of 1963, ch. 798, 1963 Minn. Laws 1396.

28. See *Snider v. City of St. Paul*, 51 Minn. 456, 53 N.W. 763 (1892) (probably the first Minnesota case that recognized the distinction). See also *Stein v. Regents of the University of Minnesota*, 282 N.W.2d 552 (Minn. 1979) (setting out factors for determining whether a hospital is a proprietary or governmental activity).

29. 291 N.W.2d 225 (Minn. 1980).

30. See *supra* note 27.

31. The distinction between governmental and proprietary functions has applied to numerous activities in the past.

of Chapter 455, immunity extends to snow or ice conditions on a publicly owned sidewalk that does not abut a publicly owned building or a publicly owned parking lot, except where the condition is affirmatively caused by the negligent acts of the municipality or state.³² In actions against municipalities or the state, decisions on liability should not look to the type of city or state function being performed in publicly owned buildings, but to the negligent acts of the municipality or state relating to ice or snow conditions on public sidewalks.³³

2. Section 64 - Joint Powers Boards.

Section 64, subdivision 1 now includes joint powers boards or organizations created under Section 471.59 or other statutes as "municipalities" subject to the defenses and liability limitations in the Municipal Tort Liability Act.³⁴ No Minnesota Supreme Court case has dealt directly with the capacity of a joint powers board or its members to sue or be sued, although the capacity to be sued has been assumed.³⁵ Clarification of the status of such boards was needed in view of their extensive use in Minnesota to deal with inter-governmental problems. If they are subject to suit, the defenses and liabilities in Minnesota Statutes, Chapter 466 will now apply to them.

3. Sections 66 and 72 - Parks.

Section 66 amends Section 466.03 by adding a new subdivision to provide immunity to municipalities for claims based upon negligence in the construction, operation, or maintenance of parks and recreational areas, and claims based on the clearing and removal of refuse and the creation of nature trails.³⁶ The State Tort Liability Act confers similar immunity

32. Tort Reform Act, ch. 455, § § 2, 65, 1986 Minn. Laws 840, 840, 874.

33. *Id.* Note that these provisions only grant immunity on non-abutting public sidewalks where the condition is not affirmatively caused by the negligent acts of a municipality or state employee. *Id.* Presumably, under these sections, liability may be established where snow or ice conditions cause injuries as a result of negligent omissions to remove them. See *Robinson v. Hollatz*, 374 N.W.2d 300 (Minn. Ct. App. 1985) (snow plowing by the county held not to be a discretionary act).

34. Tort Reform Act, ch. 455, § 64, subd. 1, 1986 Minn. Laws 840, 874.

35. See *Local Gov't. Information Sys. v. Village of New Hope*, 248 N.W.2d 316 (Minn. 1976).

36. Chapter 455, section 66 provides that immunity applies to:

Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the

on the state.³⁷ The defense applies to claims by users of parks and recreational areas.³⁸ Immunity is expanded under Section 3.736, subdivision 3(g) and Section 466.03, subdivision 6(b) in cases where claims or losses have been caused by the condition of unimproved real property.³⁹

4. Section 67 - Nonpersonal and Nonproperty Losses.

Section 67 corresponds to section 3.736, subdivision 3(b) of the State Tort Liability Act, and provides immunity from any claim for loss other than injury to or loss of property, personal injury, or death.⁴⁰ Inferentially, claims for deprivations of liberty, as in false arrest cases, are now granted immunity under the Municipal Tort Liability Act.⁴¹ If this provision is upheld, the claim is likely to be made that since there is no post-deprivation remedy available under state law, such deprivations must be redressed under federal law.⁴² Unlike the state, municipalities have had increasing exposure to Section 1983 claims since 1978.⁴³

provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Tort Reform Act, ch. 455, § 66, Minn. Laws 840, 874.

37. MINN. STAT. § 3.736, subd. 3(h)(1984).

38. See *supra* note 35.

39. See *Hovet v. City of Bagley*, 325 N.W.2d 813 (Minn. 1982) (the Minnesota Supreme Court held that the Minnesota Recreational Use Statute, MINN. STAT. §§ 87.01 - .03 (1980), did not apply to cities as "owners," where a diver sustained paralyzing injuries when he made a running dive into shallow water from a dock at the beach owned and operated by the City of Bagley). See also *Milligan v. City of Laguna Beach*, 34 Cal.3d 829, 670 P.2d 1121, 196 Cal. Rptr. 38 (1983). Under a statute similar to section 466.03, subdivision 6(b), a mother and daughter brought suit against the municipality after a tree from nearby municipal property fell on their house. The California Supreme Court concluded that only users of the property were barred from making claims. Since the plaintiffs were non-users, the claim for liability could be made. In Colorado, the Colorado Supreme Court upheld as constitutional a statute establishing a presumption that a skier's collision with any object or person on a ski slope was the skier's sole responsibility. *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671 (Colo. 1985).

40. Chapter 455, section 67, confers immunity for "[A]ny claim for a loss other than injury to or loss of property or personal injury or death." Tort Reform Act, ch. 455, § 67, 1986 Minn. Laws 840, 874.

41. See *infra* note 42.

42. See 42 U.S.C. § 1983 (1982).

43. In 1978, the United States Supreme Court decided that municipalities are

5. Section 68 - Entitlement Claims.

Section 68⁴⁴ is a verbatim reproduction of section 3.736, subdivision 3(i) which provides immunity for claims arising out of loss of benefits, compensation under public assistance, or welfare programs unless the payment is mandated as a condition to receipt of federal grants-in-aid. Since counties have primary responsibility for the administration of these programs, this section will have less effect on cities than on counties.

6. Sections 69 and 90 - Licensing.

New immunity is provided to municipalities by section 69 from claims or losses based upon the failure of any person to meet the standards needed for a license, permit, or other authorizations issued by the municipality or its agents.⁴⁵ This corresponds to Section 3.736, subdivision 3(j) in the State Tort Liability Act.⁴⁶ In *Andrade v. Ellefson*,⁴⁷ the Minnesota Supreme Court reversed the court of appeals in holding that a county,

"persons" subject to liability under section 1983. See *Monell v. Department of Social Services of New York*, 436 U.S. 658, 662-700 (1978).

The issue is raised because recent decisions recognize that it is only where there has been an adequate post-deprivation hearing or remedy that section 1983 will be applied. See *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The United States Supreme Court held that:

[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post deprivation remedy.

Hudson, 468 U.S. 517, 533. See also *Hubenthal v. County of Winona*, 751 F.2d 243 (8th Cir. 1984); *Winnick v. Chisago County Board of Commissioners*, 389 N.W.2d 546 (Minn. Ct. App. 1986). Municipalities do not have the eleventh amendment protections afforded to states and state agencies. *Quern v. Jordan*, 440 U.S. 332 (1979); *Alabama v. Pugh*, 438 U.S. 781 (1978).

44. Chapter 455, § 68, 1986 Minn. Laws 840, 875.

45. Chapter 455, section 69 confers immunity for "[A]ny claim for a loss based on the failure of any person to meet the standards needed for a license, permit, or other authorization issued by the municipality or its agents." Tort Reform Act, ch. 455, § 69, 1986 Minn. Laws 840, 875.

46. Minnesota Statutes, section 3.736, subdivision 3(j) declares that the state and its employees are not liable for:

Any loss based on the failure of any person to meet the standards needed for a license, permit, or other authorization issued by the state or its agents;

47. 391 N.W.2d 836 (Minn. 1986).

when acting on behalf of the state in inspecting day care facilities for state licensure, was immune from tort liability under Section 3.736, subdivision 3(j).⁴⁸ The Minnesota Supreme Court noted that the issue had been directly responded to by the 1986 Amendments.⁴⁹

Section 90 would have required indemnification of the county by the state in *Andrade* since, for indemnification purposes, municipalities are made "employees" of the state.⁵⁰ In *Andrade*, however, the liability had been waived because Anoka County had purchased insurance.⁵¹ The issue of what constitutes "procurement of insurance" has not yet been addressed by the legislature. In *Horace Mann Ins. Co. v. Independent School Dist. No. 656*,⁵² the court decided that the employer had no duty to indemnify an employee, although a duty exists to defend the employee where malfeasance or willful or wanton neglect of duty could be found. The court also held that even though the insurance policy of the school district excluded coverage of the employee's tort, "because the district *attempted* to obtain liability insurance to cover the district and its employees, it has waived 'the defense of governmental immunity to the extent of the liability stated in the policy.'"⁵³

As a result of the insurance crisis,⁵⁴ many municipalities have either become self-insured or have joined the League of Minnesota Cities Insurance Trust.⁵⁵ Although Illinois seems to

48. *Id.* at 840.

49. In *Andrade*, the Minnesota Supreme Court, in footnote 7, stated that: Under the 1986 Tort Reform Act, the Minnesota Legislature has . . . addressed this problem. Minn. Stat. § 466.03 has been amended to add a new exception to the waiver of governmental immunity for claims based on licenses issued by a municipality. See 1986 Minn. Laws Ch. 455, § 69, effective July 1, 1986. See also a new section, Minn. Stat. § 466.132 (1986), relating to indemnification of a municipality when acting as an employee of the state.

Id. at 843.

50. *Id.* at 840.

51. *Id.* at 843 n. 7.

52. 355 N.W.2d 413, (Minn. 1984)(emphasis added); see *supra* note 14.

53. *Id.* at 420-21 & n.9.

54. See *supra* notes 2 and 5. The REPORT OF THE TASK FORCE ON TORT LIABILITY AND THE INSURANCE CRISIS notes that the crisis began when interest rates fell. The Report blames the insurance industry for the crisis in its aggressive efforts to bring in premium dollars to invest during the late 1970's and early 1980's. In the process, the Report states, "[the insurance industry] sacrificed sound underwriting methods." See also *supra* note 9.

55. In the survey of 145 cities, it was reported that more than half self-insure for at least a portion of comprehensive general and police-professional coverage. Eight-

have reached a different result,⁵⁶ it apparently is the only other state to have dealt with the issue as to what constitutes the procurement of insurance. In *Wesala v. City of Virginia*,⁵⁷ the court of appeals held that participation by a city in the League of Minnesota Cities Insurance Trust constitutes the procurement of insurance, thereby waiving governmental immunity.⁵⁸ If the view expressed in *Wesala* remains unchanged cities would have available the defenses in the Municipal Tort Liability Act if they were uninsured or self-insured, but would lose them when they obtained coverages under the League of Minnesota Cities Insurance Trust.

This result is particularly troublesome to cities because of the absence of any decision as to whether self-insurance is the equivalent of "procurement of insurance", especially in view of a recent Montana decision striking down the tort liability limitations of cities.⁵⁹ Only immediate legislative clarification can establish whether the policy of the state to add defenses em-

een cities reported they were uninsured for one or more policies. Rochester, Minnesota, reported no insurance coverage for public officials "when the only coverage available rose nearly 600 percent from the previous year." As a result of high premiums or the inability to obtain suitable coverages, cities have turned to the League of Minnesota Cities Insurance Trust, which is authorized to pool municipal risk under Minnesota Statutes, section 471.981, subdivision 3 (1986).

56. See *Antiporek v. Village of Hillside*, 482 N.E.2d 415 (Ill. App. 1985), where the court held that tort defenses were waived only where the risk of loss was covered by a commercial insurance company. The court construed two statutory provisions together and stated that "[t]his interpretation is consistent with the public policy concern 'of protecting public funds and property and preventing the diversion of tax monies from their intended purpose to payment of damages claims.'" *Id.* at 417. (quoting *Melbourne v. City of Chicago*, 76 Ill. App. 3d 595, 609, 394 N.E.2d 1291, 1301 (1979)). See also *Beckus v. Chicago Bd. of Educ.*, 78 Ill. App.3d 558, 561, 397 N.E.2d 175, 178 (Ill. App. 1979). A \$50,000 claim was denied to an injured minor under the Illinois Local Governmental and Governmental Employees Tort Immunity Act. *Id.* at 561, 397 N.E.2d at 178. There a school board had procured coverage for liability in excess of \$1,000,000, per occurrence, but had no insurance for smaller claims, which it could have chosen to do under the Act. *Id.* at 561, 397 N.E.2d at 176.

57. 390 N.W.2d 285 (Minn. Ct. App. 1986).

58. See *id.* at 287, 288. Note that, under Minnesota Statutes, section 466.06, insurance may be procured to cover (1) torts for which the municipality is immune under section 466.03, and (2) claims in excess of the limits stated in section 466.04. Thus, two areas of immunity are included in the statute - one dealing with defenses to claims, the other dealing with dollar limitations. *Wesala* deals with the waiver of the defense of governmental immunity, as did *Antiporek*.

59. Several cases have upheld the liability limits in cases where such limits have been challenged as violating equal protection of the laws. See, e.g., *Sefert v. Standard Paving Co.*, 64 Ill.2d 109, 355 N.E.2d 537 (1976); *State v. Silva*, 478 P.2d 501 (Nev. 1971); *Estate of Cargill v. City of Rochester*, 406 A.2d 704 (N.H. 1979); *Crowe v.*

bodied in the 1986 amendments is consistent with the elimination of those defenses by insuring through the League of Minnesota Cities Insurance Trust.

7. Sections 70 and 71 - Institutional Care.

These sections confer immunity on municipalities where losses are based on lack of proper care or treatment, loss or damage to property of patients or inmates of county and city institutions.⁶⁰ This immunity will apply to municipal hospitals, correctional facilities, and jails and detoxification centers.⁶¹ It is the same as section 3.736, subdivision 3(k) and 3(l).⁶²

8. Section 73 - Peace Officers.

Although identical to section 3.736, subdivision 3(m), section 73 is an unnecessary addition in Chapter 455, since it was already adopted as Section 466.03, subdivision 6a in 1982 Laws, chapter 423, Section 13.⁶³ This section provides immunity to peace officers of the state and its political subdivisions from both civil and criminal liability, when the peace officer acts in good faith and exercises due care in the care or custody of a motor vehicle taken during an arrest for driving under the influence. Since the issues of good faith and due care are requisites to immunity, it is not certain that greater protection is added. If the peace officer exercises due care, presumably in a motion for summary judgment, the peace officer would likely prevail in any event since there would be no lack of due care

John W. Harton Memorial Hosp., 579 S.W.2d 888 (Tenn. App. 1979); Stanhope v. Brown County, 90 Wis.2d 823, 280 N.W.2d 711 (1979).

Pfost v. State, 713 P.2d 495 (Mont. 1985), however, struck down the limitations under the Montana statute. In Minnesota, the issue was argued in Ahrenholz v. Hennepin County, 295 N.W.2d 645 (Minn. 1980). However, the Minnesota Supreme Court decided the case on other grounds.

60. Chapter 455, section 70 adds a new immunity for "[a]ny claim for a loss based on the usual care and treatment, or lack of care and treatment, of any person at a municipal hospital or corrections facility where reasonable use of available funds has been made to provide care." Tort Reform Act, ch. 455, § 70, 1986 Minn. Laws 840, 875. Section 71 creates immunity for "[a]ny claim for a loss, damage, or destruction of property of a patient or inmate of a municipal institution." *Id.* § 71, 1986 Minn. Laws at 875.

61. *See id.*

62. Note that these provisions do not appear to cover personal injuries. *See also* Susla v. State, 311 Minn. 166, 247 N.W.2d 907 (1976).

63. Both sections provide immunity for "[a]ny claim for a loss for which recovery is prohibited by Minnesota Statutes, section 169.121, subdivision 8."

upon which a negligence claim could be based. Whether the addition of a showing of "good faith" adds a higher level of care than "due care" is equally unclear.

9. Section 74 - Other Immunity.

Whether section 74⁶⁴ adds additional protection to municipalities is doubtful. This section provides that municipalities are immune from liability, if under section 3.736, the state would be immune for the same claim. This section appears to merely duplicate the immunity expressly provided for in the Municipal Tort Liability Act.⁶⁵

10. Section 75 - Notice Requirements.

Section 75⁶⁶ responds to the Minnesota Supreme Court's decision in *Glassman*.⁶⁷ The notice provisions in the Municipal Tort Liability Act are made equal to those in the State Tort Liability Act.⁶⁸ This amendment is likely to be evaluated by the equal protection views expressed in *Bernthal v. City of St. Paul*⁶⁹ and in the concurring opinion of Justice Scott in *Glassman*.⁷⁰ In *Bernthal*, the Minnesota Supreme Court struck down Minnesota Statutes, section 466.03, subdivision 2 which had preserved immunity to municipalities from tort actions brought by persons covered under the Worker's Compensation Act.⁷¹ Based upon its equal protection reasoning, the

64. Chapter 455, section 74 provides immunity for "[a]ny claim against a municipality, if the same claim would be excluded under section 3.736, if brought against the state." Tort Reform Act, ch. 455, § 74, 1986 Minn. Laws 840, 875.

65. If the intent of this section is to make the same immunity available to municipalities and their employees as have been available to the state and its employees, then many of the provisions in the 1986 Amendments appear redundant. Perhaps the best solution is to adopt a single state and Municipal Tort Liability Act covering all units of government.

66. Chapter 455, section 75 amended the notice of claim provisions in Minnesota Statutes, section 466.05, subdivision 1 and 2, of the Municipal Tort Liability Act by both adding and deleting language. Tort Reform Act, ch. 455, § 75, 1986 Minn. Laws 840, 875-76. Notices in claims for wrongful death remain unchanged.

67. See *supra* note 10.

68. See MINN. STAT. § 466.05 and 3.736, subs. 5 and 6.

69. 376 N.W.2d 422 (Minn. 1985).

70. See *supra* note 20.

71. *Bernthal*, 376 N.W.2d at 426 (this exception from liability was enacted in 1963). In 1970, the Minnesota Supreme Court, in *McCarty v. Village of Nashwauk*, 286 Minn. 240, 175 N.W.2d 144 (1970) recognized that a municipality was immune from liability on any claim for damages as a result of injuries when the activity giving rise to the claim was covered by the Worker's Compensation Act.

court held that no rational basis could be established for classifying public tort claims differently from private torts in applying the Worker's Compensation Act.⁷² In *Glassman*, Justice Scott rejected the idea that the notice provisions should provide preferential treatment to governmental tortfeasors.⁷³ Thus, the enactment of section 75 may have expanded the equal protection debate.

11. Section 76 - Punitive Damages.

Perhaps the most controversial section in the municipal tort provisions of Chapter 455 is section 76.⁷⁴ It prohibits a municipality from indemnifying or insuring its officers or employees for punitive damages claims⁷⁵ levied against them. It, does, however, authorize defending the employee or officer "as a necessary incident to other elements of a defense."⁷⁶ It is clear that punitive damages cannot be awarded against a municipality⁷⁷ or the state.⁷⁸ The status of employees and officers is less certain.

In *Herrman v. Fossum*,⁷⁹ the Minnesota Supreme Court recognized that municipalities are not subject to punitive damages.⁸⁰ In *Douglas v. City of Minneapolis*,⁸¹ the court decided that police officers in Minneapolis who were successfully sued under federal law could be indemnified by the city under Minnesota Stat-

72. 376 N.W.2d at 426.

73. See *supra* note 20.

74. Chapter 455, section 76 provides that "[a] municipality may not save harmless, indemnify or insure an officer or employee for punitive damages levied against the officer or employer. [sic] The municipality may provide a defense against a claim for punitive damages as a necessary incident to other elements of a defense." Tort Reform Act, ch. 455, § 76, 1986 Minn. Laws 840, 876.

75. Note that "punitive damages" means "... a willful indifference to the rights or safety of others." MINN. STAT. § 549.20, subd. 1 (1986). Under the Municipal Tort Liability Act, section 466.07, indemnification of officers and employees does not "apply in the case of malfeasance in office or wilful or wanton neglect of duty." MINN. STAT. § 466.07, subd. 2 (1963). The state tort liability law does not permit indemnification "in case of malfeasance in office or willful or wanton actions or neglect of duty." The question arises as to whether punitive damages can be awarded and indemnification allowed under Section 549.20 even though the acts of the officer or employee do not fit the language of state and Municipal Tort Liability Acts. The variation in language presumptively creates different standards.

76. See *supra* note 71.

77. MINN. STAT. § 466.04, subd. 1 (1986).

78. MINN. STAT. § 3.736, subd. 3 (1986).

79. 270 N.W.2d 18 (Minn. 1978).

80. See *Id.* at 18.

81. 304 Minn. 259, 230 N.W.2d 577 (1975).

utes, section 471.45.⁸² The United States District Court found that the arrests “were improperly motivated, undertaken not in furtherance of good faith law enforcement [and] for the purpose of harrassing those at the gathering because of their political beliefs”⁸³ *Douglas* held that the city could come to contrary conclusions in exercising its discretion to indemnify and could do so if the action was found by the city to have occurred in the performance of duty and did not arise as a result of “ ‘malfeasance in office or willful or wanton neglect of duty.’ ”⁸⁴ The court held that the fact that punitive damages could not be paid by the city if it were held liable did not prevent such awards and indemnification thereof against officers and employees of the city.⁸⁵

*Wilson v. City of Eagan*⁸⁶ confirms the *Douglas* case, but it does so under chapter 466 for a state tort claim.⁸⁷ *Horace Mann*,⁸⁸ states that “ ‘malfeasance in office or willful or wanton neglect of duty’ . . . releases the school district from its duty of indemnifying its employee[s]. . . .”⁸⁹ In a footnote, the court stated that if such conduct is found, indemnification is “barred.”⁹⁰ Thus, the question remains whether the city can come to a different conclusion on the facts for indemnification purposes than the court may have found at the trial. This uncertainty in the cases has led to the outright prohibition of indemnification in Section 76.⁹¹ When viewed in the context of the need for certainty and security in the delivery of public services, especially in law enforcement, legislative modification and clarification can be expected.⁹²

82. *Id.* at 270, 230 N.W.2d at 585.

83. *Id.* at 264, 230 N.W.2d at 582.

84. *Id.*

85. *Id.*

86. 297 N.W.2d 146 (Minn. 1980).

87. *Id.* at 148-50.

88. *See supra* note 14.

89. 355 N.W.2d at 421 (emphasis added).

90. *Id.* at 420 n.9.

91. *See supra* note 70. Note, however, that enactment of the prohibition to save harmless, indemnify, or insure officers or employees for punitive damages was not accompanied by a repeal of Minnesota Statutes, section 471.44 and 471.45 which authorized defense and indemnification of police officers in cases involving “alleged false arrest or alleged injury to person, property or character” Whether these provisions conflict or can be harmonized with Chapter 455, section 76 must be determined in an appropriate case, unless the legislature first clarifies its intent.

92. Section 76 appears to adopt *Horace Mann*, and reverses *Douglas* and *Wilson*, unless *Wilson* can be construed as allowing punitive damage awards for cases in inten-

Under Section 82, Minnesota Statutes section 549.191 has been amended to require that before a claim for punitive damages can be alleged in a complaint, a separate hearing must be held to establish that a factual basis exists to support the claim.⁹³ This provision is an attempt to eliminate the pleading of frivolous punitive damage claims. Its success at eliminating such claims at the early stages of cases will depend upon judicial notions of what is necessary to establish *prima facie* evidence to support the claim.

12. Section 77 - Custodial Medical Expenses.

In *L.P. Medical Specialists, Ltd. v. St. Louis County*⁹⁴ persons arrested by city police were injured and transported to a county jail. The county was held responsible for the expenses. Section 77 clarifies that it is “the municipality responsible for hiring, firing, training, and control of the law enforcement and other employees involved in the arrest” who would be responsible for the expenses.⁹⁵ If this provision had been operative in *L.P. Medical Specialists*, the city would have paid the expenses.

13. Section 85 - Joint and Several Liability.

Under the doctrine of joint and several liability, once the individual liability of multiple defendants is ascertained, each defendant is liable for an indivisible injury to the plaintiff in the

tional tort where “malfeasance in office or willful or wanton neglect of duty” is not found.

93. 1986 Minn. Laws, Chapter 455, Section 82 added a new section to read: Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds *prima facie* evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

94. 379 N.W.2d 104 (Minn. Ct. App. 1985).

95. Chapter 455, section 77 in its entirety provides that “[w]hen costs are assessed against a municipality for injuries incurred or other medical expenses connected with the arrest of individuals violating Minnesota Statutes, the municipality responsible for the hiring, firing, training, and control of the law enforcement and other employees involved in the arrest is responsible for those costs.” Tort Reform Act, ch. 455, § 77, 1986 Minn. Laws 840, 877.

entire amount of the award.⁹⁶ Thus, the insolvency of one of the defendants does not prevent the recovery of the total award from another defendant. Section 85 was enacted in response to efforts to abolish joint and several liability for governmental units.⁹⁷ The amendment, however, represents a compromise position under which the state or municipality, if found to be jointly liable with other tortfeasors, must not pay more than twice the amount of fault, provided that the fault of the state or municipality is less than 35 percent.⁹⁸ As a consequence, if the fault of the governmental unit is 35 percent or greater, it may be jointly and severally liable for the entire award. Plaintiffs will probably argue that no rational basis exists for distinguishing between governmental and other tortfeasors. Consequently, an equal protection challenge can be anticipated.⁹⁹

B. *The Special Duty Doctrine.*

In *Cracraft v. City of St. Louis Park*,¹⁰⁰ the Minnesota Supreme Court applied the special duty doctrine¹⁰¹ in a claim for negligence by a city inspector for failure to discover a violation of the municipal fire code. The special duty doctrine recognizes a standard of care owed to individuals as opposed to the public generally.¹⁰² In *Cracraft*, the court adopted a four factor test.¹⁰³

96. MINN. STAT. § 604.02, subd. 1 (1984).

97. Chapter 455, section 85, amended Minnesota Statutes, section 604.02, subdivision 1 by adding the language: "If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for an amount no greater than twice the amount of fault." Tort Reform Act, ch. 455, § 85 1986 Minn. Laws 840, 882.

98. *Id.*

99. *See supra* notes 10 and 20.

100. 279 N.W.2d 801 (Minn. 1979).

101. In *Cracraft*, "special duty" was defined as "nothing more than convenient terminology, in contradistinction to 'public duty' for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance." *Id.* at 806.

102. The court stated, that the question is

At what point . . . does the municipality assume to act for the protection of others as distinguished from acting for itself when it inspects the activities of third parties . . . ?

Id.

103. The four factors are:

- (1) [A]ctual knowledge of the dangerous condition is a factor which tends to impose a duty of care on the municipality.
- (2) [R]easonable reliance by persons on the municipality's representations and conduct tends to impose a duty of care. . . [T]he reasonable reli-

The court reviewed the record and found “no evidence . . . that a duty was assumed, or a special duty created” to the plaintiffs for injury and death when an unnoticed fifty-five gallon drum of volatile liquid exploded on a high school loading dock.¹⁰⁴

The most recent consideration of the special duty doctrine, in *Andrade v. Ellefson*,¹⁰⁵ illustrates the difficulty in applying the four-factor test. In *Andrade*, the plaintiffs claimed that a special relation existed between Anoka County and the plaintiffs which placed a special duty of due care on the county in performing its license and supervision functions relating to a day care home.¹⁰⁶ The Minnesota Supreme Court agreed that a special duty had been created.¹⁰⁷ The court considered each of the four factors, and concluded that a single factor was decisive,¹⁰⁸ stating:

Of the four *Cracraft* factors, the first factor is arguably met partially, but the third factor - the statutory mandate to protect a certain class - is definitely met, and this third factor is so overwhelmingly dominant that we have no difficulty in finding a “special relation” exists between the county and the small children in the day care homes that it inspects for licensure.¹⁰⁹

Andrade, therefore, appears to focus on whether the Public Welfare Licensing Act¹¹⁰ intended to create a particular protected class.¹¹¹ This analysis should be compared with *Raymond v. Baehr*,¹¹² in which negligence *per se* was found where a violation of the city building code by an individual defendant

ance must be based on specific actions or representations which cause the persons to forgo other alternatives of protecting themselves.

- (3) [A] duty of care may be created by an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole.
- (4) [T]he municipalities must use due care to avoid increasing the risk of harm.

Id. at 806-07. Note that in *Cracraft*, the court does not state that this factor must be found with one of the other three. *Id.*

104. *Id.* at 806.

105. 391 N.W.2d 836 (Minn. 1986).

106. *Id.* at 837.

107. *Id.* at 843.

108. *Id.*

109. *Id.*

110. MINN. STAT. §§ 245.781-.87 (1986).

111. 391 N.W.2d at 843.

112. 282 Minn. 109, 163 N.W.2d 51 (1968).

caused a fire in a commercial building.¹¹³ The court stated, “[i]t seems clear that plaintiffs as tenants and the employee of a tenant of the building are within the class of persons the building code was designed to protect.”¹¹⁴ Policy reasons obviously should be clarified to differentiate the responsibility of private persons in complying with ordinance and statute provisions and the responsibility of government inspectors in licensing and supervision under the same provisions. If predictability is to be served by these decisions, the line must become brighter.

CONCLUSION

The policy differences implicit in the Municipal Tort Liability Act and in court decisions interpreting the language of the Act do not appear to be narrowing. Whether the 1986 immunity amendments to chapter 466 have significantly added to the protection of municipalities will ultimately be decided judicially. Current court decisions involving waiver of defenses and liability limitations may cause municipalities to ask whether they are better off without insurance. Possibly, a different view of equal protection will emerge, or the courts may begin to recognize that exposure to risk is different, greater, or both in the public sector compared to private sector torts. Whatever the outcome, municipal tort liability and immunity will continue to remain volatile for some time and municipalities must continue to cope with the uncertainty in dealing appropriately with the risk to the municipalities themselves and their officers and employees.

113. *Id.* at 113, 163 N.W.2d at 54.

114. *Id.* See *Hage v. Stade*, 304 N.W.2d 283 (Minn. 1981) (liability claims were rejected for negligent fire inspection of a hotel by the state and city of Breckenridge); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220, 199 N.W.2d 158 (1972) (the court refused to impose liability for injuries allegedly sustained in a fire as a result of defective stairways in violation of the city building code).