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Tort Claims against the State: Comparative and Categorical Analyses of the Ohio Court of Claims Act and Interpretations of the Act in Tort Litigation against the State

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ARTICLES

TORT CLAIMS AGAINST THE STATE: COMPARATIVE AND CATEGORICAL ANALYSES OF THE OHIO COURT OF CLAIMS ACT AND INTERPRETATIONS OF THE ACT IN TORT LITIGATION AGAINST THE STATE

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I. INTRODUCTION

UPON PASSAGE OF THE OHIO COURT OF CLAIMS ACT OF 1975, the State of Ohio waived its sovereign immunity and consented to be sued in a court established solely for that purpose. Within a relatively short period of time, the Ohio Court of Claims has made a significant imprint on the development of tort law in Ohio, distinguishing itself in its efforts to provide an effective forum for those injured by the state or one of its instrumentalities while defining the limits beyond which state liability for tortious conduct will not extend. As might be expected of a new court interpreting a new statute, the court of claims at times has been a little too zealous in guarding the boundaries of governmental liability, and the methods of analysis employed by it have lacked the precision that comes with experience. This article is aimed at assisting practitioners before the court by analyzing areas that need clarification or re-examination so that the court, with the assistance of those who practice before it, may move toward greater accuracy and consistency in carrying out the remedial objective of the Act.

The article is divided into three main parts. The first part gives an overview of the Court of Claims Act, with particular reference to the concept of sovereign immunity and its particular features in Ohio. It examines the scope and effect of the waiver of immunity contained in the Act, outlines the jurisdiction, organization and procedures of the court of claims, analyzes the ramifications involved in choosing to proceed in that court, and discusses the nature and effect of administratively determined claims in that court.

The second section analyzes the disposition of tort claims in Ohio in comparison to interpretations of liability clauses of the California Tort Claims Act, the New York Court of Claims Act, and the Federal Tort Claims Act. The concept of discretionary function immunity is developed and the view of that concept taken by the Ohio courts is discussed in detail.

A more complete view of Ohio Court of Claims Act interpretations can be obtained by considering the treatment of claims by category, and this constitutes the focus of the third section. The categories discussed are administrative regulation of business activities, safety inspections, custody and control of juvenile offenders, maintenance of public highways, care and treatment of patients in state hospitals, custody and control of criminal offenders, enactment of legislation, and "orthodox tort liability." Reference is made not only to the developing jurisprudence in each category but also to the concepts that are developed in the second part of the article. In that sense, the third part has some comparative aspects to it as well.

II. THE COURT OF CLAIMS ACT

A. *Overview*

1. The Background of Immunity

The Court of Claims Act[1] provides that the state waives immunity from liability and consents to be sued in the court of claims, thus ending an era of

[1] OHIO REV. CODE ANN. ch. 2743 (Page Supp. 1978).

"sovereign" immunity in Ohio that had existed for nearly 135 years. The origin of the concept in Ohio is attributed to an Ohio Supreme Court case decided in 1840, in which the state brought an action for tax deficiency against the Franklin Bank of Columbus.[2] The bank counterclaimed that a tax from an earlier year was excessive and demanded judgment for the excess of the claimed refund over the alleged deficient payment. The court rejected the demand, saying simply and without further explanation that it could not do what the bank asked it to do. Two statements in the syllabus suggested that in the view of the court the state's claim against an individual may be subject to set-off to the extent of the debts owed by the state to that individual, but the creditor would not be able to obtain a judgment against the state to collect the excess. In this rather off-handed pronouncement, state immunity became established in the law of Ohio without reference to "the King could do no wrong," the maxim to which such immunity is often tied.[3]

The first Ohio Supreme Court case to consider *tort* liability of the state came in 1917 in *Raudabaugh v. State*,[4] where plaintiff claimed that the state negligently constructed a reservoir, causing plaintiff's lands to be flooded. The Ohio Constitution had been amended in September of 1912, adding the

[2] State v. Franklin Bank, 10 Ohio 91 (1840). The state brought a tax deficiency action. The bank claimed a refund from another year of greater amount than the deficiency. When judgment was requested in favor of the bank for the difference, the supreme court simply said: "This we cannot do." *Id.* at 100. No further explanation was given.

Paragraphs three and four of the syllabus state: "No judgment can be rendered against the state;" "In a civil action by the state, the defendant may set off a debt due to him from the state." *Id.* at 91 (syllabus para. nos. 3, 4). The court's action suggests that although the state was liable for the excess of the refund over the tax owed, sovereign immunity barred the right to collect the excess. Note, *Claims Against the State of Ohio: Sovereign Immunity, the Sundry Claims Board and the Proposed Court of Claims Act*, 35 OHIO ST. L.J. 462, 467 n.28 (1974) [hereinafter cited as *Claims*].

The first constitution of Ohio (1802) made no mention of sovereign immunity. The relevant article provided: "That all courts shall be open, and every person, for any injury done him in his lands, goods, persons or reputation, shall have remedy by the due course of law, and right and justice administered, without denial or delay." OHIO CONST. art. VIII, § 7 (1802). *See* 1 DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 297-98 (1851).

[3] *See* 1 W. BLACKSTONE, COMMENTARIES* 246. *See generally* Ehrlich, *Proceedings Against the Crown*, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY No. XII (Vinogradoff ed. 1921).

Some of the best of the voluminous sources discussing the derivation of sovereign immunity in the United States are: Borchard, *Governmental Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-25), (pts. 4-6), 36 YALE L.J. 1, 757, 1039 (1926-27); Borchard, *Governmental Responsibility in Tort*, 28 COLUM. L. REV. 577 (1928); Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795; Lawyer, *Birth and Death of Governmental Immunity*, 15 CLEV.-MAR. L. REV. 529 (1966); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Sherry, *The Myth That the King Can Do No Wrong*, 22 ADMIN. L. REV. 597 (1970).

For a discussion of trends of state sovereign immunity see Harley, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L. REV. 12 (1976); LeFlar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954); Shumate, *Tort Claims Against State Governments*, 9 L. & CONTEMP. PROB. 242 (1942); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

The basis and history of sovereign immunity in Ohio is discussed in Krause v. State, 31 Ohio St. 2d 132, 134-44, 285 N.E.2d 736, 738-44, *appeal dismissed*, 409 U.S. 1052 (1972); *Claims*, *supra* note 1, at 462-85; Comment, *Ohio Sovereign Immunity: Long Lives the King*, 28 OHIO ST. L.J. 75 (1967); Comment, *Claims Against the State of Ohio: The Need for Reform*, 36 U. CIN. L. REV. 239 (1967).

[4] 96 Ohio St. 513, 118 N.E. 102 (1917), *error dismissed*, 248 U.S. 32 (1918).

following language to article I, section 16: "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."[5] Plaintiff argued that the state was, by virtue of the new constitutional language, immediately subject to suit without further consent by the legislature. Comparing that constitutional clause with similar language in the constitutions of Alabama, Arkansas, Kentucky, Nebraska, Washington and Wisconsin, and with identical language in the California and Tennessee constitutions, the court rejected plaintiff's contentions. The court asserted that in all of those jurisdictions, court decisions had determined that the legislatures would be required to take further steps to permit legal action to be maintained against the state. Assuming that the framers of the Ohio amendment knew of the California and Tennessee courts' interpretations, which required enabling legislation to permit lawsuits against those states, the court concluded that the Ohio clause was not self-executing and affirmed the trial court's dismissal of the complaint. The doctrine of immunity, while certainly of judicial origin in Ohio, was firmly placed within the control of the legislature by the court. In effect, the decision meant that although immunity from suit was no longer a good defense for the state, the language "in such courts and in such manner as may be provided by law" made lack of consent a good defense because without that consent the courts had no subject matter jurisdiction.

In 1972 in *Krause v. State*,[6] the Ohio courts were asked to abrogate the doctrine of sovereign immunity. The action was brought by the administrator of Allison Krause, a student killed in the Kent State tragedy. Unsuccessful at the trial level, the administrator pressed the wrongful death and survivorship action on appeal, arguing that the immunity doctrine denied equal protection and that since it was judicially-created, it could be judicially undone. The court of appeals reversed, and the Ohio Supreme Court was presented with the opportunity to react to the appellate court's reasoning that the doctrine was anachronistic, that it was under judicial attack in many jurisdictions, and

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[5] OHIO CONST. art. I, § 16. Article VIII, section 7 of the constitution of 1802 was carried over as article I, section 16 of the revised constitution of 1851 without substantive change.

The constitutional convention of 1873-74 retained article 1, section 16 without substantive change. *See* 2 PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 3546 (1873).

Upon the second reading of the proposed amendment, the proponent stated that the amendment "recognizes the right of the individual to seek redress for claims against the state in such courts as may hereafter be designated. . . ." *Id.* at 1431. On the third reading the same delegate stated: "The *legislature* ought to have a right to provide by law for the adjustment of controversies between its citizens and the state. That is the sole purpose of this proposal." *Id.* at 1919 (emphasis added). The few objectors feared that juries would require the state to pay unjust claims and that a flood of litigation would result. *Id.* The proposal passed by a vote of 88 to 6. *Id.* at 1960.

During the drafting of the explanation to the people a delegate questioned whether the explanation accurately stated that "[t]he amendment says that the Legislature shall provide the method of bringing suit. Will the amendment itself confer the right to bring the suit?" *Id.* at 2028. Delegate Peck replied: "The amendment does confer that right." *Id.* This exchange has been the source of the dispute as to whether the amendment is self-executing. The supreme court has repeatedly declared that the amendment is not self-executing. *E.g.*, Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).

[6] 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

that the judiciary should overcome the inequities resulting from legislative inertia.[7] The supreme court rejected the arguments and concluded that the adoption of article I, section 16 of the Ohio Constitution by the people of the state "foreclos[ed] to this or any other court the authority to examine the 'soundness' or 'justice' of the concept of governmental immunity."[8] The strong reaffirmation of *Raudabaugh* made it quite clear that state immunity was firmly embedded within the powers of the legislature and that abrogation at common law would not be forthcoming.

Within one year of the *Krause* decision, the House Judiciary Committee of the Ohio General Assembly recommended passage of House Bill 800, which proposed the establishment of a court of claims. The bill was passed June 4, 1974, and became law as the Court of Claims Act, comprising chapter 2743 of the Ohio Revised Code.

2. Scope of the Waiver of Immunity

The Act waives the state's immunity from liability and confers its consent to be sued "and have its liability determined in the court of claims."[9] Although the waiver and consent are unlimited,[10] they are given in exchange for "the complainant's waiver of his cause of action against state officers or employees,"[11] thereby limiting the complainant's choice of defendants.

The waiver clearly excludes all governmental entities but the state from its operation.[12] "State" is defined as "the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions."[13] Political subdivisions are defined as "municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches."[14] Thus, to the extent that political subdivisions had obtained governmental immunity prior to the passage of the Act, that immunity is retained. Those entities may only be sued, if at all, in the courts of common pleas.[15]

Political subdivisions may appear as defendants in the court of claims

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[7] Krause v. State, 28 Ohio App. 2d 1, 3-12, 274 N.E.2d 321, 323-28 (10th Dist. 1971), *rev'd*, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

[8] 31 Ohio St. 2d at 147, 285 N.E.2d at 745.

[9] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[10] For a discussion of the various degrees to which a state may waive its governmental immunity, see *Claims*, *supra* note 2, at 487 n.121. The waiver of immunity in the Ohio Court of Claims Act is an unlimited, total, or "blanket," waiver. *Id.*

[11] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[12] Also not included in the waiver are hospitals owned or operated by one or more political subdivisions. *Id.* § 2743.02(B). *See* text accompanying note 120 *infra*.

[13] OHIO REV. CODE ANN. § 2743.01(A). (Page Supp. 1978).

[14] *Id.* § 2743.01(B).

[15] The following section was added to Ohio Revised Code section 2743.02, effective February 7, 1978: "The only defendant in orginal [sic] actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action except a civil action for one thousand dollars or less, that is filed in the court of claims." *Id.* § 2743.02(E). Prior to this amendment of section 2743.02, it had been held that Ohio Civil Rule 20(A) on permissive joinder permitted the joinder of political subdivisions to the state in original actions filed in the court of

under certain circumstances, however. For example, where the state has filed a third-party complaint against a political subdivision or where the state has been joined as a defendant in a common pleas action against a political subdivision and mandatory removal to the court of claims has followed, the court of claims would have jurisdiction.

3. Court of Claims — Organization and Procedure

The court of claims was created pursuant to the Ohio Constitution as one of the "courts inferior to the supreme court as may from time to time be established by law."[16] A public court of record, it sits in Franklin County, although the chief justice of the Ohio Supreme Court may direct it to sit in some other county if substantial hardships and the dictates of justice require it to be so removed.[17]

The Act also confers powers of judicial appointments for the court of claims upon the chief justice. Judges selected for temporary assignment on the court are to be chosen from the ranks of incumbent judges on the supreme court, courts of appeal, common pleas courts, or from retired judges eligible for active duty.[18] Normally, one judge will hear and determine the cases against the state, but in novel or complex cases and upon application, the chief justice may appoint a three judge panel to hear and decide them.[19] By appointment of the supreme court, the clerk and deputy clerk of the court of claims serve the administrative needs of the court. The Act requires appointees to these positions to be attorneys admitted to the Ohio bar.[20]

The Ohio Rules of Civil Procedure, except where inconsistent with the Act, apply to all actions in the court.[21] In addition, the court of claims has promulgated its own set of "local rules" pursuant to article IV, section 5 of the Ohio Constitution.[22] The party filing a complaint or other pleading requiring service of summons in the court of claims must name the defendant or defendants with specificity[23] and provide the clerk with the original of the pleading and a sufficient number of copies to serve each named defendant and the attorney general.[24] The pleading, in non-administratively determined actions, shall take the form provided in the Ohio Rules of Civil Procedure.[25]

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claims. Basham v. Jackson, 51 Ohio App. 2d 100, 367 N.E.2d 66 (10th Dist. 1977), *aff'd*, 54 Ohio St. 2d 366, 377 N.E.2d 491 (1978).

Where an action is brought against a political subdivision in common pleas court and the state is joined as a party, a petition for removal of both actions shall be filed in the court of claims. OHIO REV. CODE ANN. § 2743.03(E)(1) (Page Supp. 1978).

Substitute House Bill No. 149 has, in effect, legislatively overruled *Basham*. The only manner in which a political subdivision may now appear as a defendant in the court of claims is either by way of removal or where the state files a third-party complaint against a political subdivision.

[16] OHIO CONST. art. IV, § 1 (1851) (amended 1968, 1973).

[17] OHIO REV. CODE ANN. § 2743.03(B) (Page Supp. 1978).

[18] *Id.*

[19] *Id.* § 2743.03(C).

[20] *Id.* § 2743.07.

[21] *Id.* § 2743.03(D).

[22] OHIO CT. CL. LOCAL R. (effective December 19, 1978).

[23] OHIO REV. CODE ANN. § 2743.13(A) (Page Supp. 1978). For example, the claimant must name the department of the state under whose auspices the allegedly wrongful conduct took place.

[24] *Id.* § 2743.13(B).

[25] *Id.* § 2743.03(D).

The parties may obtain extensions of time in which to move or plead by filing a written motion stating the basis of the extension, supported by documentation and, if appropriate, affidavits.[26] Such motions must also be accompanied by a proposed order which states the duration of the extension.[27]

All motions are determined without oral argument unless otherwise ordered and must be supported by written statements of arguments and authorities in support thereof.[28] Parties opposing the motion have fourteen days from the date of service upon them to file a brief in opposition to the motion[29] and failure to do so may be cause for the court to grant the motion as filed.[30] If facts not on the record must be considered for the purposes of the motion, the moving party must file and serve copies of all the evidence supporting the motion.[31] Reply briefs or additional briefs require a showing of necessity and leave of the court.[32]

A claim against the state pending in the court may be settled by the parties with the approval of the court and the attorney general.[33] Upon a finding that the proposed settlement is unsatisfactory, the court may require the parties to reconsider their agreement.[34] Settlements are to be implemented in compliance with the procedure established for the payment of judgments in section 2743.19 of the Act.

Judgments against the state rendered in the court of claims must be made specific in their designation of the instrumentality (department, office, bureau, commission, board, agency or institution) against which liability has been imposed.[35] No execution for the payment of money is permitted to issue against the state or its instrumentalities.[36] Judgments are accomplished through a detailed procedure set out in the Act.[37] The clerk of courts sends certified copies of the judgment to the Office of Budget and Management and the state auditor[38] after all rights of appeal have been exhausted.[39] The auditor then draws a warrant on the state treasury payable to the judgment creditor in the amount certified, increased by the allowable interest.[40] Expenses of the judgment are charged against unencumbered funds in the appropriation to the instrumentality of the state against which the judgment was rendered, and the availability of such funds must be certified to the auditor by the Office of Budget and Management.[41]

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[26] OHIO CT. CL. LOCAL R. 4(B).

[27] *Id.*

[28] OHIO CT. CL. LOCAL R. 4(C).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] OHIO REV. CODE ANN. § 2743.15 (Page Supp. 1978); OHIO CT. CL. LOCAL R. 7(A).

[34] OHIO CT. CL. LOCAL R. 7(B).

[35] OHIO REV. CODE ANN. § 2743.19(A) (Page Supp. 1978).

[36] *Id.* § 2743.19(B).

[37] *Id.* § 2743.19.

[38] *Id.* § 2743.19(C)(1).

[39] *Id.* § 2743.19(D). If only part of the judgment is appealed from, the other portion of the judgment may be processed for payment as described in section 2743.19. *Id.*

[40] *Id.* § 2743.19(C)(4).

[41] *Id.* § 2743.19(C)(3).

If unencumbered funds are unavailable in the appropriation to the state instrumentality, the Office of Budget and Management makes application for the payment of the judgment out of the emergency purpose fund "or any other appropriation for emergencies or contingencies."[42] Payment will be made out of these funds if there are sufficient monies to pay all pending emergency fund requests.[43] If sufficient monies do not exist in any of these accounts, the head of the state instrumentality against which the judgment was entered will request the General Assembly to appropriate the necessary funds to pay the judgment until the appropriation is made and a proper warrant is drawn.[44]

While proceedings in execution of judgment in the normal sense may not be brought against the state,[45] the judgment creditor does have recourse. Upon failure of the clerk of the court of claims, the state auditor, the Office of Budget and Management, or the head of the defendant instrumentality to act as required, a writ of mandamus can be sought to compel the action.[46]

One of the exceptions to the "rules of law applicable to suits between private parties"[47] is a prohibition of jury trials in civil actions against the state.[48] However, with respect to actions which do not constitute a claim against the state, the parties are permitted to have the case decided by a jury.[49] Where appropriate, jury demands must be made pursuant to Rule 38 of the Ohio Rules of Civil Procedure, and removal of actions to the court do not extend the time period in which such demands must be made.[50] The party requesting a jury trial files a motion with the clerk requesting that a panel of prospective jurors be provided. The clerk in turn requests the jury commissioners of the court of common pleas in the county where the action is tried to supply the panel.[51] The state then pays the expenses incidental to the jury. trial except for the juror costs, which are taxed to the losing party.[52]

4. Court of Claims — Jurisdiction and Appeals

Jurisdiction of the court of claims is conferred in the same section of the Act which created the court. That section grants: (a) "exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02;" (b) "exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims;" (c) exclusive jurisdiction to determine damages sustained by private parties caused by the state's defective title in lake lands; (d) "jurisdiction to hear appeals from the court of claims commissioners;" (e) "full equity powers

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[42] *Id.* § 2743.19(C)(5).

[43] *Id.*

[44] *Id.* § 2743.19(C)(5)-.19(C)(6). The instrumentality may make this appropriation request through successive bienniums, if necessary. *Id.* § 2743.19(C)(6).

[45] *Id.* § 2743.19(B).

[46] *Id.* § 2743.19(C).

[47] *Id.* § 2743.02(A).

[48] *Id.* § 2743.11.

[49] *Id.* "The right to jury trial applies to claims which are removed to the court of claims pursuant to R.C. 2743.13(E)(2) [sic]." OHIO CT. CL. LOCAL R. 6(A).

[50] OHIO CT. CL. LOCAL R. 6(B).

[51] OHIO CT. CL. LOCAL R. 5(A).

[52] OHIO REV. CODE ANN. § 2743.11 (Page Supp. 1978).

in all actions within its jurisdiction;" and (f) the power to "entertain and determine all counter claims, cross claims, and third-party claims."[53] The jurisdiction is statewide, of course, but is limited in the sense that the Act has no applicability where the state has previously consented to be sued.[54] In addition, the Act confers upon the court of claims the same powers as a court of common pleas with respect to subpoenaing witnesses, compelling production of evidence, and punishing for contempt.[55]

The Act also provides for the administrative determination of claims in some circumstances. If the claim originally filed with the court is for one thousand dollars or less, the clerk of the court is required to determine the claim.[56] Procedure for administratively determined claims is established by the clerk[57] and, in keeping with the Act, that procedure is "informal and designed to accommodate persons not skilled in the law."[58] For example, the formal Ohio Rules of Evidence do not apply, and the clerk determines the probative value of proof offered in these determinations.[59] Essentially, the clerk has the same powers that the judges of the court do in regulating the conduct of such proceedings.[60] Determinations in accordance with this provision of the Act are processed for payment in the same manner as if they were judgments rendered by the court.[61]

Appeals from administrative determinations are taken by filing a motion for review by the court of claims.[62] Such appeals are decided without oral argument unless ordered by a judge of the court.[63] No further appeal from the judgment of the court rendered in review of such a case may be taken,[64] and the claimant is barred from commencing further civil actions in the court based upon the same transaction or set of facts as that of the administratively determined action.[65]

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[53] *Id.* § 2743.03(A).

[54] *Id.* § 2743.02(A). For example, Ohio Revised Code section 119.12 permits appeal to a court of common pleas from the determinations of administrative agencies covered by the Ohio Administrative Procedure Act; appeals from Workers' Compensation decisions are also permitted in common pleas courts. Landowners whose property has been appropriated by the state may sue for just compensation pursuant to Ohio Revised Code section 5519.02; claims for refunds of estate tax that have been denied may be appealed to a probate court pursuant to Ohio Revised Code section 5731.30. There are various other situations in which the state has previously given its consent to suit in like manner. The practitioner would be well-advised to fully consider the availability of such an action in the courts of general jurisdiction in a given case before instituting court of claims proceedings.

[55] *Id.* § 2743.05.

[56] *Id.* § 2743.10(A). Prior to the 1977 amendments to the Act, claims for one hundred dollars or less were subject to this procedure, and claims for between one hundred and one thousand dollars were determined by the court unless the claimant consented to have the claim determined by the clerk. Act of June 27, 1974, 133 Ohio Laws 875 (1974) (current version at OHIO REV. CODE ANN. § 2743.10(A) (Page Supp. 1978)).

[57] OHIO CT. CL. LOCAL R. 6.

[58] OHIO REV. CODE ANN. § 2743.10(C) (Page Supp. 1978).

[59] *Id.*; OHIO CT. CL. LOCAL R. 6(E).

[60] OHIO REV. CODE ANN. § 2743.10(A) (Page Supp. 1978); OHIO CT. CL. LOCAL R. 6(C).

[61] OHIO REV. CODE ANN. § 2743.10(E) (Page Supp. 1978).

[62] *Id.* § 2743.10(D); OHIO CT. CL. LOCAL R. 6(H).

[63] OHIO CT. CL. LOCAL R. 6(H)(5).

[64] OHIO REV. CODE ANN. § 2743.10(D) (Page Supp. 1978).

[65] *Id.*

All actions permitted by the Act must be commenced within the period of time "applicable to similar suits between private parties" but no later than two years from the date of the accrual of the cause of action.[66] This period of limitations is tolled, however, by disabilities, pursuant to Ohio Revised Code section 2305.16. For example, an incarcerated claimant is not entitled to have the limitation period tolled "during imprisonment unless the imprisoned person is of unsound mind."[67]

The periods of limitation now applicable represent a simplification and some liberalization of the former law. Prior to passage of amendments bringing about these changes in 1977, actions sounding in tort for personal injury, property damage and wrongful death were required to be commenced within 180 days of accrual or appointment of an executor or administrator.[68] Extending the period to the applicable general statute of limitations avoids the confusion and potential hardship presented by the special limitations language of the earlier section. However, under the original act, claimants were able to toll the limitations period for two years by filing notice of an intention to file a claim within the 180 day period,[69] a procedure no longer available under the amended section.

In addition to its original and exclusive jurisdiction of all civil actions against the state, the court of claims has "exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court . . . ."[70] In an action in any court other than the court of claims, a party who files a counterclaim against the state or who makes the state a third-party defendant is required to file a petition stating the basis for removal in the court of claims.[71] The petition for removal must be filed within 28 days after the filing of the counter-claim or third-party complaint.[72]

Appeals from the court are treated in the same manner as appeals from the courts of common pleas. Thus, since the court normally would sit in Franklin County, appeals would be taken to the Tenth District Court of Appeals.[73] It

[66] *Id.* § 2743.16.

[67] *Id.*

[68] Act of June 27, 1974 § 2743.16(A), 135 Ohio Laws 869, 878 (1974) (current version at OHIO REV. CODE ANN. § 2743.16 (Page Supp. 1978)).

[69] Act of June 27, 1974 § 2743.16(B), 138 Ohio Laws 869, 878 (1974) (current version at OHIO REV. CODE ANN. § 2743.16 (Page Supp. 1978)).

[70] OHIO REV. CODE ANN. § 2743.03(A) (Page Supp. 1978).

[71] *Id.* § 2743.03(E)(1).

[72] *Id.* Before the passage of the 1977 amendments, there was a conflict between the Court of Claims Act and the Court of Claims Rules over the time in which a petition for removal had to be filed. Both Court of Claims Rule 4(B) and former Ohio revised Code section 2743.03(E)(1) required the petition for removal to be filed within 28 days of the service of the petitioner's counterclaim when the petition for removal was based upon a counterclaim asserted against the state. However, when the petition for removal was based upon a third-party complaint against the state, the Court of Claims Rule required filing the petition within 28 days of the filing of the third-party complaint, while the statute required the petition to be filed within 14 days. In Jacobs v. Shelley & Sand, 51 Ohio App. 2d 44,365 N.E. 2d 1259 (10th Dist. 1976) the court of appeals held that the longer period of time allowed by the Court of Claims Rules would be applicable. The court also held that "[t]he failure of the clerk [of the court from which the action was removed] to properly forward all papers [as required by section 2743.03(E)(2) of the Ohio Revised Code] does not defeat the removal, or affect the fact that subject matter jurisdiction for adjudication of the removed claim has been vested in the Court of Claims." *Id.* at 49, 365 N.E.2d at 1263. The 1977 Amendments bring the rules and the statute into accord.

[73] OHIO REV. CODE ANN. § 2743.20 (Page Supp. 1978).

would follow that if the court were to sit by designation of the supreme court in some other county, appeal would be taken to the appropriate district court of appeals, but it is not clear from the statute whether this is the intention of the General Assembly or whether it intended all appeals to be taken in the Tenth District.

B. *A Closer Look*

1. Waiver for Waiver — Quid Pro Quo or Surplusage?

The original Act was amended in 1977 to include language which required the waiver of liability to be "in exchange for the complainant's waiver of his cause of action against state officers or employees."[74] The complainant's waiver is complete except in the case where the officer or employee's wrongdoing is determined by the court to have been outside the scope of employment.[75]

The exact purpose of the added language is not clear, but it apparently is an attempt to afford some measure of protection to state officers and employees from the burdens of appearing and defending lawsuits and satisfying judgments against them. For this purpose to be effective, the amendment must have some protective effect beyond what the law would provide absent the new language.

Close consideration of the operation of the law would seem to suggest that such a result has not been achieved. First, the complainant has the option of proceeding against the state in the court of claims or suing the officer or employee in one of the other courts of the state. The waiver of the cause of action against officers and employees is effective only if the former course is taken. Second, in situations where the officer or employee was acting within the scope of employment and the complainant had elected to sue the state in a losing claim, principles of res judicata would operate to protect the individual actors even absent the waiver language. Third, where the complainant has obtained a favorable judgment against the state, the obvious collectibility of the judgment[76] would seem to present no reason to pursue the individual officer or employee unless the complainant was dissatisfied with the amount of the judgment. In such a case, collateral estoppel and res judicata would provide the officer or employee the desired protection. Finally, in the case where the officer or employee has been found to have acted outside the scope of employment, the complainant's waiver is void by operation of the statute.

The phrase "[e]xcept in the case of a civil action filed by the state,"[77] which begins the second paragraph of the waiver section, is also a problem. If the intention of the phrase is that the *state* does not waive its causes of action against state officers and employees, or that a party sued by the state should be able to seek indemnification from state officers and employees, and no other meaning was intended, the language chosen was unfortunate. As it is stated, the phrase presents the issue of whether the party sued by the state

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[74] *Id.* § 2743.02(A).

[75] *Id.*

[76] *See id.* § 2743.191(B).

[77] *Id.* § 2743.02(A).

waives its causes of action against officers and employees upon filing a counterclaim against the state. If that is the desired effect, the protective function of the waiver requirement is called into further question since it should not turn upon which party filed the original action.

Furthermore, problems of policy arise where the complainant's case is dismissed for reasons other than because the state officer or employee was acting outside the scope of employment.[78] As will be discussed later, one principle of decision employed by the court of claims is that state liability will not follow from an activity for which there is no analog in the private sector.[79] It may be said that a person should be charged with knowledge that a condition of having a claim against the state adjudicated in the court of claims is the waiver of causes of action against individual actors and should therefore not be heard to complain of the obvious effects of the waiver if unsuccessful in that court. Nevertheless, the question remains why the state should wish to preclude an injured person from seeking a remedy if it is otherwise legitimate and would not result in a burden upon public funds.

If protection of individual officers and employees of the state is indeed the objective of the amendatory language, two further points can be made in response: (a) the common law regarding official privileges and immunities already provides a substantial measure of protection for such people, and (b) there are more effective methods of affording such protection.

When comparing Ohio Revised Code section 2743.02 with the indemnification policies of other jurisdictions, it becomes apparent that the Ohio scheme is weak. California[80] and New York[81] have adopted indemnification systems for the benefit of public employees who have had judgments or settlements rendered against them under certain conditions. In California, employees of public entities[82] may request the public entity employing them to defend them against suits arising from acts or omissions occurring within the scope of their employment. The public entity is authorized to pay any judgment or settlement rendered against its employees, provided that the employees cooperate in the defense and request the defense not later than ten days before the trial date. The defense may be made subject to agreements with the employers that the public entity shall pay the judgment or settlement only if it established that the injury was caused by acts or omissions within the scope of employment. An employee may recover any portion of a judgment paid by the employee and which the public entity normally would be required to pay, so long as the act was within the scope of employment and the employee has defended the suit in good faith or has reasonably cooperated with the public entity in its defense of the case. The public employer will escape the obligation to indemnify the employee in such cases

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[78] *E.g.*, McCord v. Ohio Div. of Parks & Recreation, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978). *McCord* involved a claim against the state for, among other things, the negligence of a lifeguard employed by the state. The action was dismissed because the court decided that a "recreational user" statute absolved the state from liability. The case is discussed at notes 604-09 *infra* and accompanying text.

[79] *See* notes 313-17 *infra* and accompanying text.

[80] CAL. GOV'T CODE § 825 (West Supp. 1979).

[81] N.Y. PUB. OFF. LAW ch. 47, § 17 (McKinney 1979).

[82] CAL. GOV'T CODE § 825 (West Supp. 1979).

if it can show that the employee "acted or failed to act because of actual fraud, corruption or actual malice."[83]

Generally, this California indemnification system flows in only one direction: from the public entity to the state employee. In most situations the public entity may not be indemnified by the employee for any judgment paid by the public entity.[84] The employee will be required to indemnify the employer in the case where the public entity did not conduct the defense of the employer and it establishes that the employee acted out of fraud, corruption, or malice or that the employee willfully failed to conduct a good faith defense against the lawsuit.[85] If the public entity conducts the defense of the employee subject to a reservation of rights, it may obtain indemnification from the employee if the employee fails to establish that the act causing the injury was within the scope of employment, if the public entity proves that the act was done with fraud, corruption or malice, or if it shows that the employee willfully failed to cooperate in the defense.[86] If the defense of the lawsuit was conducted by the public entity without a reservation of rights, indemnification from the employee may be sought only where the employee has failed to reasonably cooperate in good faith in the defense of the lawsuit.[87]

The New York scheme of indemnification[88] differs from the more detailed California law in several interesting respects. Indemnification of the public employee under the New York law covers acts of the employee within the scope of public employment *or* duties except where intentional or reckless wrongdoing produced the injury.[89] Provision is made for the state to pay private attorney fees for the employee if the state attorney general does not conduct the defense for the employee.[90] The state's duty to defend or indemnify is further conditioned upon the delivery of proper documentation of the proceedings to the attorney general within five days of receipt and "full cooperation" in the defense of the proceedings.[91] Upon satisfaction of the notification and cooperation requirements, the duty of the state to defend and indemnify becomes operative, subject only to the provision for state review and approval of settlement offers and the exception that indemnification for punitive or exemplary damages, fines, penalties or monies recovered pursuant to citizen-taxpayer actions under the state finance law.[92]

When compared to these two schemes of indemnification, it is difficult to conclude that the limiting language of section 2743.02 was intended to provide protection to state officers and employees. Furthermore, it appears

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[83] *Id.* § 825.2.

[84] *Id.* § 825.4.

[85] *Id.* § 825.6(a).

[86] *Id.* § 825.6(b).

[87] *Id.* § 825.6(c).

[88] N.Y. PUB. OFF. LAW ch. 47, § 17 (McKinney Supp. 1979).

[89] *Id.* ch. 47, § 17 3(a). The thrust of this additional requirement may be to restrict the increasingly liberal interpretation placed upon the concept of scope of employment by the courts. *See* Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968), *discussed in* 82 HARV. L. REV. 1568 (1969).

[90] N.Y. PUB. OFF. LAW ch. 47, § 17 2 (McKinney Supp. 1979).

[91] *Id.* ch. 47, § 17 4.

[92] *Id.* ch. 47, § 17 3(c).

that judicial application of the general indemnity principles of Ohio law may permit the state to seek indemnification from its negligent officers and employees for judgments it was required to pay in court of claims proceedings.[93]

2. Extent of the Waiver

As previously stated, the waiver of sovereign immunity is unlimited in degree. However, the scope of the waiver is limited by the language of the Act to actions brought against the state exclusive of political subdivisions and to those actions for which the state has not previously consented to suit. Two questions are immediately raised in connection with this provision: (1) whether the waiver can be *indirectly* extended to political subdivisions and, if not, what measure can be used to delineate between an action against the state and an action against a political subdivision; and (2) what constitutes a prior consent to suit. The first question will be addressed here. The second will be treated in a later section.[94]

Despite the seemingly unambiguous language of the Act which defines state as "the state of Ohio. . . . It does not include political subdivisions"[95] and political subdivisions as "areas smaller than the state to which the sovereign immunity of the state *attaches*,"[96] a claimant has challenged the lack of jurisdiction over political subdivisions. In *Haas v. Hayslip*,[97] the claimant filed concurrent actions in the Court of Common Pleas of Summit County[98] and in the court of claims,[99] alleging that two members of the City of Akron Police Department intentionally shot at and injured him. Haas also alleged that the City of Akron had been negligent in the selection, employment, and retention of the two police officers. The common pleas court dismissed the case on the ground of sovereign immunity.[100] The court of claims, upon a simple analysis of the Act, dismissed the claim for lack of subject matter jurisdiction.[101]

On appeal from the common pleas decision, the court of appeals, in a unanimous decision, reversed the dismissal, emphasizing the judicial origin of the doctrines of sovereign immunity[102] and municipal immunity.[103] The fundamental thesis of the court was that the immunity for political subdivisions was derived from and dependent upon state sovereign immunity

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[93] *See* State v. Troop, 44 Ohio St. 2d 90, 95, 338 N.E.2d 526, 530 (1975), where the court implied that such a right would exist in favor of the state. The court was, however, reading a statute which, at that time, did not contain the language discussed here and relied upon a section of the Act that was subsequently repealed for support of its conclusions regarding joinder.

[94] *See* notes 224-309 *infra* and accompanying text.

[95] OHIO REV. CODE ANN. § 2743.01(A) (Page Supp. 1978).

[96] *Id.* § 2743.01(B) (emphasis added).

[97] 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977).

[98] Haas v. Hayslip, No. 76-1136 (Ohio C.P. Summit County June 20, 1976), *rev'd*, No. 76-8205 (Ohio 9th Dist. Ct. App. Dec. 30, 1976), *decision of appeals court rev'd*, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977).

[99] Haas v. State, No. 75-0572 NI (Ohio Ct. Cl. Dec. 31, 1975).

[100] No. 76-8205, slip op. at 2 (Ohio 9th Dist. Ct. App. Dec. 30, 1976).

[101] No. 75-0572 NI, slip op. at 4 (Ohio Ct. Cl. Dec. 31, 1975).

[102] *See* notes 2-3 *supra* and accompanying text.

[103] *See* notes 109, 124 *infra*.

and that if the sovereign has waived the foundational immunity, the underpinnings for the judicial doctrine respecting municipalities are removed.[104] Maintaining that the immunity for political subdivisions could be supplied by an affirmative grant of the legislature, which would override the theory of judicial origin upon which it relied, the court found no specific creation of local immunity in the Act. Even though the definitions section of the Act specifically excluded political subdivisions, and section 2743.02(A) specifically mentioned only the state, the court reasoned that these sections meant only that actions against political subdivisions could not be brought in the court of claims. Those sections did not mean that actions against local government entities could not be brought in any *other* court of record in which a non-state party may be sued.[105] The court of appeals ordered the common pleas court to entertain the action.

The Ohio Supreme Court entertained the city's appeal and reversed the court of appeals by a 4-3 decision,[106] finding sections 2743.01 and 2743.02 of the Act to be, "forthright and unambiguous, and permit[ting] facile discernment of the legislative intent to preserve the defense of sovereign immunity to political subdivisions."[107] To the court of appeals rationale that municipal immunity was judicial in origin, was derivative in status, and required affirmative legislative re-creation when the base of state immunity was removed, the supreme court responded that no authority had been cited which precluded selective waiver of immunity. That response was inapposite to the court of appeals' holding that the legislature could not selectively waive immunity *by implication*.[108] An analysis of the theory of derivative immunity and its application in this instance demonstrates the inadequacy of the supreme court's response.

The main premise of the theory of derivative immunity is that political subdivisions were afforded immunity at common law in Ohio because they were agents of the state. The underlying principle is that sovereignty is coextensive with the constituency that comprises the sovereignty, not with the instrumentalities of government. The political subdivision, having no independent sovereignty because it is an agency of the state, attains no immunity independent of that emanating from the state.[109] The conclusion to

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[104] No. 76-8205, slip op at 4 (Ohio 9th Dist. Ct. App. Dec. 30, 1976).

[105] *Id.*

[106] Haas v. Hayslip, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977).

[107] *Id.* at 139, 364 N.E.2d at 1379.

[108] *See* No. 76-8205, slip op. at 3 (Ohio 9th Dist. Ct. App. Dec. 30, 1976).

[109] Case law in Ohio supports this view. Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927) held: "The non liability for governmental functions is placed upon the ground that the state is sovereign, that the sovereign cannot be sued without its consent, and that the municipality is the mere agent of the state and therefore cannot be sued unless the state gives its consent by legislation." *Id.* at 283, 156 N.E. at 212.

The first case in Ohio which bifurcated municipal corporations for the purpose of imposing tort liability by distinguishing between public and private functions was City of Dayton v. Pease, 4 Ohio St. 80 (1854) (citing the landmark case of Bailey v. Mayor of New York, 3 Hill 531, 38 Am. Dec. 669 (1842)). The standard set in *Pease* was reversed in Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919). *Fowler* was overruled in Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922). *See generally* Hack v. City of Salem, 174 Ohio St. 383, 391-402, 189 N.E. 2d 857, 862-69 (1963) (Gibson, J., concurring) (tracing the Ohio history of municipal immunity and listing all cases up to 1963 by their function and all articles on the subject). *See also* Spooner v.

be drawn is that when the state waives its immunity without limitation of the scope of the waiver, the former extension of immunity enjoyed by political subdivisions of the state is ended[110] unless the legislature grants a new immunity to the subdivisions.

Although the theory of derivative immunity was accurately stated by the court of appeals, it erred in its application of the theory in this instance. Crucial to its analysis was the assertion that the definition of state in the Act "cannot be considered as a legislative . . . grant of what was essentially a judicially created immunity."[111] It is clear that the judicial origin of the concept of sovereign immunity was supplanted by the affirmative act of the constituency which amended article I, section 16 of the Ohio Constitution. As previously mentioned,[112] this amendment has been conclusively interpreted as waiving sovereign immunity and substituting the jurisdictional defense of lack of consent to suit, which only the legislature has the power to implement.[113] Political subdivision immunity for governmental functions is acquired only because such functions are in pursuit of those activities in which the whole state has an interest;[114] the subdivision is acting in place of the sovereign and as its agent.[115] Activities of a governmental character performed on behalf of the state by a political subdivision cannot give rise to liability without the consent of the legislature under article I, section 16 any more than can an act of the state in its governmental capacity. Article I, section 16 is thereby operable for both sovereign immunity and municipal immunity.[116]

This constitutional mandate thus is the obstacle to relaxation of municipal immunity for which the court of appeals failed to account. The waiver of

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McConnell, 22 F. Cas. 939, 939 (C.C.D. Ohio 1838) (No. 13,245) ("sovereignty . . . resides with the constituency, and not with the functionaries of government"); State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1928) (sovereignty of state extends to municipalities); Fidelity & Cas. Co. v. Union Sav. Bank Co., 29 Ohio App. 154, 163 N.E. 221 (7th Dist.), *aff'd*, 119 Ohio St. 124, 162 N.E. 420 (1928); Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250 (1937) (tracing the history of the concept in England and its adoption by courts in the United States).

[110] There is some support for this conclusion in other jurisdictions. *E.g.*, Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Annot., 161 A.L.R. 367 (1946). The New York Court of Claims Act section 8, which provides: "The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations," does not distinguish "state" from "political subdivision" as does the Ohio Court of Claims Act. Also, there is no provision in the New York Constitution similar to article I, section 16 of the Ohio Constitution. *See* N.Y. CONST. art. 3, § 19 & art. 6, §§ 1, 9; Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964); *contra*, Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966). *See also* Conway v. Humbert, 82 S.D. 317, 145 N.W.2d 524 (1966) (dicta).

[111] No. 76-8205, slip op. at 4 (Ohio 9th Dist. Ct. App. Dec. 30, 1976).

[112] *See* note 5 *supra* and accompanying text.

[113] Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 763, *appeal dismissed*, 409 U.S. 1052 (1972); Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917), *error dismissed*, 248 U.S. 32 (1918).

[114] Wooster v. Arbenz, 116 Ohio St. 281, 284, 156 N.E. 210, 213 (1927).

[115] *Id.* at 283, 156 N.E. at 212; *accord*, Glassman v. Glassman, 309 N.Y. 436, 438, 131 N.E.2d 721, 723 (1956). *But see* City of Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941).

[116] Wooster v. Arbenz, 116 Ohio St. 281, 283, 156 N.E. 210, 212 (1927).

immunity under article I, section 16 remains inchoate until the legislature removes the lack of consent to suit as a defense. The rationale of the court of appeals that suits may be brought against political subdivisions in courts other than the court of claims simply because the legislature failed to specify a court for such actions misapprehends the nature of the lack of consent defense.[117]

Even assuming that article I, section 16 does not preclude binding common pleas jurisdiction when the state confers court of claims jurisdiction for actions against the state but fails to confer specific jurisdiction over claims against other government entities, the theory of derivative immunity does not serve. Expressed in another way, the theory maintains that, unless otherwise expressed, the immunity of political subdivisions is wiped away by waiver of sovereign immunity. That means that the extent of local government immunity is controlled by the scope of the waiver. Less than a full and unconditional waiver would undermine the court of appeals' application of the theory, if the waiver intended to retain some aspects of immunity. The intent of the Ohio General Assembly seems clear in the definition of political subdivisions: " 'Political subdivisions' means municipal corporations . . . and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than the state *to which the sovereign immunity of the state attaches*."[118] As the Ohio Supreme Court recognized, the use of the present tense "attaches" expresses the intent to retain local immunity.[119]

There is further indication of the legislative intent to retain local immunity in that the Act specifically waives immunity for hospitals owned or operated by political subdivisions.[120] If political subdivisions were intended to lose immunity by operation of the derivative theory, this waiver would be empty language.[121] It is apparent from this part of the Act and the great care which the legislature exercised in defining "state" and "political subdivision" that the phrase "state hereby waives its immunity" was not intended to extend to local immunity.[122]

The dissent in *Haas* attempted to achieve the same result as the court of appeals without utilizing the same faulty argument. Ignoring the question certified to the court, the dissent instead chose to engage in a policy-oriented argument for the abrogation of municipal immunity. The main thesis of the opinion was that since the doctrine had been judicially created, it could be judicially abrogated regardless of legislative intent.[123] Marshalling arguments advanced in other jurisdictions,[124] the dissent asserted that legislative and

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[117] *See* Haas v. Hayslip, 51 Ohio St. 2d 135, 137, 364 N.E.2d 1376, 1378 (1977); Krause v. State, 31 Ohio St. 2d 132, 136, 285 N.E.2d 736, 739, *appeal dismissed*, 409 U.S. 1052 (1972). *See also* West Park Shopping Center, Inc. v. Masheter, 6 Ohio St. 2d 142, 216 N.E.2d 761 (1966) (the Uniform Declaratory Judgments Act cannot be used to circumvent sovereign immunity).

[118] OHIO REV. CODE ANN. § 2743.01(B) (Page Supp. 1978) (emphasis added).

[119] Haas v. Hayslip, 51 Ohio St. 2d 135, 137-38, 364 N.E.2d 1376, 1378 (1977).

[120] OHIO REV. CODE ANN. § 2743.02(B) (Page Supp. 1978).

[121] Haas v. Hayslip, 51 Ohio St. 2d 135, 138-39, 364 N.E.2d 1376, 1378-79 (1977). The court of appeals admitted this finding but found no expression of intent. *See* Haas v. Hayslip, No. 76-8205 (Ohio 9th Dist. Ct. App. Dec. 30, 1976).

[122] 51 Ohio St. 2d at 138, 364 N.E.2d at 1378.

[123] *Id.* at 140, 364 N.E.2d at 1379 (Brown, W., J., dissenting).

[124] The overwhelming trend is in favor of the abolition of municipal immunity. *E.g.*, Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963) (judicially abolished); Veach v. City of Phoenix,

judicial inroads already made upon the doctrine diluted the flood of litigation objections to abrogation.[125] The ability of local governments to protect themselves with insurance eliminates the fear of financially crippling the units.[126] Inequities of the governmental-proprietary dichotomy method of deciding cases and the clear equity of placing the burden of damages on the local government rather than on the injured individual require a reversal of the tendency to blindly accept past policy under the guise of *stare decisis*, said the dissenters.

The dissent is not persuasive in this approach. Refusal to rigidly adhere to *stare decisis* may be appropriate and even laudable under some circumstances, but if a court is going to allow the jurisprudential function of *stare decisis* to be overridden for the sake of making an equitable policy operational, it should at least recognize the jurisprudential function of a logical argument responding to the constitutional questions raised by its approach. The dissent comes up short in this regard. Judicial abrogation of immunity contravenes article I, section 16 of the Ohio Constitution, which precludes the judiciary from establishing the courts and the manner in which suits may be brought against the state or anyone.[127] To hold otherwise would not only require the court to run counter to *stare decisis* and overrule precedent inconsistent with the dissent's approach but would require some argument to overcome the constitutional philosophy upon which that precedent is based. The legislative intent established in the language of the Act to permit local immunity to remain intact lends support to the conclusion that the legislature had affirmed the judicial approach taken in that line of precedent and had chosen not to exercise the power article I, section 16 confers upon the legislature to change the law. Blind adherence to *stare decisis* may well be as revolting as the dissent suggests,[128] but revulsion for one judicial tendency does not supply an adequate predicate for judicial usurpation of the legislature's constitutional power. All of the arguments

102 Ariz. 195, 427 P.2d 335 (1967) (judicially abolished); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (judicially abolished); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (judicially abolished); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (judicially abolished); Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975) (judicially abolished). For listings of actions taken by state courts and legislatures, see Haas v. Hayslip, 51 Ohio St. 2d 135, 141 n.6, 364 N.E.2d 1376, 1382 n.6 (1977); RESTATEMENT (SECOND) OF TORTS § 895A, Special Note to the Institute Regarding §§ 895B and 895C (Tent. Draft No. 19, 1973); Harley, *supra* note 2, at 33.

For critical analyses of the concept, see Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934); Green, *Freedom of Litigation III: Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Price & Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330 (1953); Van Alstyne, *Government Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963); Comment, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective*, 78 DICK. L. REV. 365 (1973).

[125] *See* Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 595, 305 A.2d 877, 882 (1973). *See also* David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1 (1959).

[126] *See* David, *supra* note 125, at 45-53.

[127] *See* Krause v. State, 31 Ohio St. 2d 132, 143-44, 285 N.E.2d 736, 743-44, *appeal dismissed*, 409 U.S. 1052 (1972).

[128] The dissent quoted Oliver Wendell Holmes' statement that "[i]t is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O. W. HOLMES, COLLECTED LEGAL PAPERS 187 (1920), *quoted at* 51 Ohio St. 2d at 142, 364 N.E.2d at 1381 (Brown, W., J., dissenting).

detailed by the dissent may well appeal to those interested in achieving a system in which culpability of a defendant is determined irrespective of its status as a private person or government entity. However, the simplistic compendium of arguments constructed by the dissent relates only to the "why" questions of abrogating immunity; it does not relate to the question of *how* to overcome the constitutional limitation of judicial power.

Abrogation of local governmental immunity, long supported by respected legal scholars, should stand upon sound legal theory as well as upon sound policy. The three dissenting justices of the Ohio Supreme Court, proffering the familiar and acceptable policy considerations, advocated an unwise judicial approach. The court of appeals opinion, concerned about the need for a sound legal theory, misapplied the derivative immunity theory and ignored clear legislative intent contrary to its holding. The majority opinion, while legally correct and heavily steeped in historical analysis, failed to address the court of appeals argument directly and declare convincingly why it is that the legislature *may* selectively waive sovereign immunity.[129]

3. Nature and Effect of Proceeding in the Court of Claims

The Act requires complaints and other pleadings in the court of claims to "name as defendant each state department, board, office, commission, agency, institution, or other instrumentality whose actions are alleged as the basis of the complaint."[130] A question which naturally arises from this requirement is whether the fact that a complaint names the wrong instrumentality is proper ground for dismissal of the claim. The court of claims has held that the answer to this question should be yes. The Franklin County Court of Appeals has implied that the answer should be no.

In *Novatny Electric Co. v. State*,[131] claimant was an electrical contractor who contracted with the state through the Department of Public Works to do electrical work for the University of Akron. Alleging that the state had caused delay in the performance of the contract, claimant filed a complaint referring to the defendant as the State of Ohio, Department of Public Works. The defendant department filed a motion to dismiss for failure to state a claim upon which relief may be granted, contending first that the Board of Trustees of the University of Akron, rather than the department, was the proper defendant and was not named on the complaint and, second, that the complaint did not state a claim regardless of which agency of the state was named. The court of claims sustained the motion on both grounds and dismissed the complaint.[132]

The reasoning of the court of claims to support its dismissal on the ground of improper designation of a party defendant was that since the Act provided for judgments in the court of claims to be satisfied from funds in the possession

[129] The majority's treatment of the power to selectively waive immunity is limited to this sentence: "Appellees fail to cite authority that the state may not selectively waive, through the general assembly, sovereign immunity with regard to political subdivisions." 51 Ohio St. 2d at 139, 364 N.E.2d at 1379. The opinion fails to cite authority in support of its view to the contrary.

[130] OHIO REV. CODE ANN. § 2743.13(A) (Page Supp. 1978), mirrored in OHIO CT. CL. LOCAL R. 4(A).

[131] 73 Ohio Op. 2d 384 (Ct. Cl.), *rev'd*, 46 Ohio App. 2d 255, 349 N.E.2d 328 (10th Dist. 1975).

[132] 73 Ohio Op. 2d at 388.

of the defendant department,[133] the party designation requirements of the Act were more than superficial.[134] It found the error "serious in that it could defeat ultimate recovery assuming the claim to be valid."[135]

Although the decision in *Novatny* was relied upon by the court of claims in subsequent decisions,[136] it was reversed by the court of appeals. The latter court found that the Department of Public Works was a proper party to the action, that the University of Akron should be joined pursuant to Rule 19(A) of the Ohio Rules of Civil Procedure, and that it was therefore error to dismiss the complaint.[137] While the court of appeals did not directly address the issue of whether failure to properly designate the defendant department should result in dismissal, the language of its opinion which maintains that it is the court of claims which has ultimate responsibility for determining which department should be liable for a judgment against the state suggests that its answer would be no.[138]

Unless the improper designation of the defendant department prejudices the state in the defense of a claim, dismissal of the suit should not follow. If the Office of the Attorney General, to which a copy of each complaint against the state is sent, is aware that a named state instrumentality is not the proper defendant, it should follow in most cases that the office knows which instrumentality should be named. In such an event, the name of the correct defendant could be substituted by appropriate motion to the court and any judgment which might result could then be satisfied from funds of the proper state instrumentality. This approach would seem to be in keeping with the Ohio Supreme Court's admonition that the Act should be "liberally construed in order to promote . . . [its] object and assist the parties in obtaining justice."[139]

This is not to say that the party designation section is of superficial importance or that attorneys engaging in practice before the court of claims should leave defendant identification to the Office of the Attorney General. Rather, practitioners should take all appropriate steps to identify and name with specificity all instrumentalities of the state which should be properly brought into the litigation. Failure to do so should not prejudice a full and fair defense of the claim. If the court of claims is unable, through the suggested procedure, to prevent such prejudice, improperly designated claims should be dismissed.

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[133] *See* OHIO REV. CODE ANN. § 2743.19 (Page Supp. 1978).

[134] 73 Ohio Op. 2d at 384.

[135] *Id.* at 388.

[136] In both Bilger v. Ohio Dep't of Transp., No. 75-0166 (Ohio Ct. Cl. May 14, 1975) and Hester v. Warden, No. 75-0272 (Ohio Ct. Cl. May 28, 1975), the court of claims dismissed plaintiffs' complaints which had inaccurately named state instrumentalities as defendants. However, in each case there were alternative grounds for dismissal, and the court did not make clear upon which ground(s) the case was dismissed.

In B.G. Danis Co. v. Jackson, No. 75-0255 (Ohio Ct. Cl. June 13, 1975), however, the court of claims found that the naming of the Director of the Department of Transportation as defendant rather than correctly naming the department to be "innocent error, if it is error," where the content of the complaint made it clear that no claim was being asserted against the director individually. *Id.*, slip op. at 2.

[137] 46 Ohio App. 2d at 261, 349 N.E.2d at 332.

[138] *Id.* at 258, 349 N.E.2d at 330.

[139] State *ex rel.* Moritz v. Troop, 44 Ohio St. 2d 90, 92, 338 N.E.2d 526, 528 (1975).

One area of procedure which has engendered some problems for the court of claims has been the permissible joinder of parties-defendant, although most of those problems seem to have been eliminated by the 1977 amendments.[140] As mentioned previously, the Ohio Rules of Civil Procedure apply to all actions in the court except where inconsistent with other provisions of the Act. Rule 20(A) of the Rules of Civil Procedure would permit the joinder of parties as defendants "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction [or] occurrence . . . and if any question of law or fact common to all defendants will arise in the action."[141] But the court of claims is a court of limited jurisdiction, and civil rule 82 requires that the rules not be "construed to extend or limit the jurisdiction of the courts of this state."[142] Thus a potential conflict existed between the civil rules and other provisions of the Act[143] in the area of permissive joinder of defendants. The statutory conferral of exclusive jurisdiction to determine civil actions against the state could be interpreted to mean that the court of claims did not have jurisdiction to hear claims against private individuals, and utilization of civil rule 20(A) would thereby be prohibited by rule 82.

The latter argument was advanced in the court of claims by the state in *Boggess v. Tarrent*,[144] a tort claim alleging injuries inflicted by state employees. Plaintiff sued the state, joined the employees and demanded relief against the state or, in the alternative, against the individual defendants. The state moved to dismiss the complaint against the private individuals on the ground that the court had no jurisdiction over private persons in original actions filed against the state. The court recognized the logic of the state's argument but overruled the motion on the basis of the anomalous situation created by the operation of another section of the Act which gave the court jurisdiction over joined parties in cases removed to the court and with respect to counterclaims, cross-claims, and third-party practice, but not with respect to joinder by plaintiffs in cases originally filed in the court. Applying a theory of pendent jurisdiction, the court permitted the joinder of employees in the original claim to "promote judicial efficiency, avoid multiplicity of suits, and avoid possible inconsistent results."[145]

The Ohio Supreme Court ratified the *Boggess* result in *State* ex rel. *Moritz v. Troop*,[146] a proceeding on a writ of prohibition sought by the director of the department who had employed the individuals Boggess had sued in the court of claims. The plaintiff in *Moritz* sought to prohibit the court of claims from exceeding its jurisdiction in adjudicating the liability of a private individual.

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[140] *See generally* Note, *Limitations on Joinder of Defendants in the Ohio Court of Claims*, 45 U. CIN. L. REV. 460 (1976).

[141] OHIO R. CIV. P. 20(A).

[142] OHIO R. CIV. P. 82.

[143] OHIO REV. CODE ANN. § 2743.02(E) (Page Supp. 1978) prevents joinder of any defendants in an original action against the state.

[144] 73 Ohio Op. 2d 345 (Ct. Cl. 1975).

[145] *Id.* at 347.

[146] 44 Ohio St. 2d 90, 338 N.E.2d 526 (1975). Following the denial of a motion to reconsider in *Boggess*, Moritz had sought a writ of prohibition from the supreme court to forbid the court of claims from exceeding its jurisdiction in *Boggess*.

However, rather than utilizing the pendent jurisdiction theory of the court of claims, the supreme court said that the Court of Claims Act was a remedial measure, was to be liberally construed, and was not inconsistent with civil rule 20(A).[147] It found no indication of legislative intent to prohibit joinder by the plaintiff in the face of the ability of the state to do so in a third-party claim.[148] It also believed the state should favor joinder for the purpose of raising indemnification claims against employees.[149]

The notions of judicial economy and efficiency, avoidance of multiple lawsuits, and avoidance of inconsistent results apparently did not convince the legislature when it considered the 1977 amendments to the Act. Waiver of liability and consent to be sued is now made conditional upon the claimant's waiver of causes of action against state officers and employees,[150] thereby legislatively overruling *Moritz*.

The question which remains is whether a plaintiff may join private individuals as parties-defendant when those parties are not officers or employees of the state. The answer is clear: the court of claims has refused to extend the pendent jurisdiction rationale of *Boggess* to attempted joinder of non-employees.[151] Furthermore, the 1977 amendments to the Act seem to have foreclosed further speculation on whether the *Moritz* approach would be applied by the court of appeals to such actions with the addition of the clause, "[t]he only defendant in original actions in the court of claims is the state."[152]

This legislative abrogation of permissive joinder of defendants is unfortunate for claimants who have been injured by a combination of state and private actions. In such circumstances, the claimant must file separate actions in separate courts, forego the action against the private individual and proceed solely against the state, or forego the action against the state and proceed against the private individual in a court of general jurisdiction. In the latter situation, the claimant may proceed with the hope that the individual defendant will file a counterclaim, cross-claim, or third-party complaint against the state.[153] Once that has occurred, the removal procedure to the court of claims becomes operable, and the court has jurisdiction over all of the parties to the case.[154] The delays, extra burdens on courts of general jurisdiction, potential for inconsistent results and needless complexity of this denial of free joinder by the 1977 amendments are obvious.

The Ohio General Assembly should move to rectify this situation and

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[147] *Id.* at 92, 95, 338 N.E.2d at 528, 529.

[148] *Id.* at 95, 338 N.E.2d at 530.

[149] *Id.*

[150] OHIO REV. CODE ANN. § 2743.02 (Page Supp. 1978).

[151] Claycraft Co. v. B. G. Danis Co., No. 75-0394 (Ohio Ct. Cl. Sept. 5, 1975); Ciampone v. Hughes, No. 75-0300 (Ohio Ct. Cl. June 5, 1975). However, the court did allow the state to join an individual as a defendant to a counterclaim asserted by the state against the plaintiff in Huffman-Wolfe Co. v. State, No. 75-0103 (Ohio Ct. Cl. Oct. 27, 1975).

[152] OHIO REV. CODE ANN. § 2743.02(E) (Page Supp. 1978).

[153] Where the suit is brought against the state, the claimant will hope that the state will do the same with respect to the private individual.

[154] OHIO REV. CODE ANN. §§ 2743.03(E)(1), 2743.031(A) (Page Supp. 1978); OHIO R. CIV. P. 13(H).

amend the Act to permit joinder of parties-defendant who are not officers or employees of the state. The judicial economy to be obtained is obvious. The Rules of Civil Procedure are adequate for dealing with possible problems created by joinder cases.[155] Furthermore, a procedure allowing for liberal joinder by plaintiffs might save the state administrative effort by bringing into the case all the appropriate parties which may be subject to the state's claim for contribution from joint tortfeasors.[156] Under present law, many of the difficulties allegedly presented by the joinder of a private party with the state[157] cannot be avoided completely, but it is certain that by requiring separate forums and separate actions for injuries arising under one set of operative facts, those problems are multiplied, not solved.[158]

Another procedural problem presented by the Act concerns the applicable statute of limitations. A person suing the state in the court of claims must do so within the limitations period that is applicable to similar suits between private parties[159] but "no later than two years after the date of the accrual of the cause of action."[160] Since the Ohio Rules of Civil Procedure require statute of limitations defenses to be affirmatively pleaded[161] and make a failure to do so a waiver of the affirmative defense,[162] the question arises whether the state can be held to have waived the statute of limitations. Since the Act requires determination to be made in the court of claims "in accordance with the same rules of law applicable to suits between private parties,"[163] it is apparent that if the state fails to raise the defense by answer or motion, it may amend its answer within the discretion of the court in accordance with civil rule 15 to assert the defense at a later time in the proceedings.[164] If the state fails entirely to assert the defense, should the court of claims dismiss the action on its own motion?

There is strong support for the conclusion that the statute of limitations defense is jurisdictional and that the court of claims may dismiss an action on its own motion when the period of limitation on a claim has run. The waiver of immunity section of the Act[165] makes the waiver "subject to the limitations"[166] of the Act. The time periods permitted for suits by section 2743.16 obviously operate as part of those limitations, and it would appear that compliance with that section is a jurisdictional element of a cause of action against the state. The statutes of limitations applicable to actions brought against the United States are considered jurisdictional, whether the action is brought in the United States Court of Claims[167] or in a federal district court under the

[155] *See* OHIO R. CIV. P. 20(B), 38(D), 39, 42.

[156] *See* OHIO REV. CODE ANN. §§ 2307.31, 2307.32 (Page Supp. 1978).

[157] *See* Uarte v. United States, 7 F.R.D. 705 (S.D. Cal. 1948). *See also* Braun v. State, 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952).

[158] *See* Lowe v. United States, 37 F. Supp. 817 (D.N.J. 1941).

[159] OHIO REV. CODE ANN. § 2743.16 (Page Supp. 1978).

[160] *Id.*

[161] OHIO R. CIV. P. 8(C).

[162] OHIO R. CIV. P. 12(H).

[163] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[164] *See* 4 HARPER, ANDERSON'S OHIO CIVIL PRACTICE 81 (1979) and cases cited therein.

[165] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[166] *Id.*

[167] United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972); Driskell v. United States, 431 F. Supp. 339 (C.D. Cal. 1977).

Federal Tort Claims Act[168] or the Tucker Act,[169] and the United States may not waive the defense.[170] The state,[171] the court of claims,[172] and the court of appeals[173] have all treated the statute of limitations defense as jurisdictional, and the court of claims on at least one occasion has taken the approach of considering the time limitations in a removal case on its own motion.[174] There seems to be little room for doubt that once the statute of limitations has run on a claim, a claimant's reliance on the waiver theory to overcome the defense will not be successful.

Finally, a third procedural problem raised by the Act concerns the scope of the prohibition of jury trials.[175] The prohibition is not considered to be a violation of Ohio Constitution, article I, section 5, which provides, "[the] right of trial by jury shall be inviolate,"[176] because under conventional legal theory the right to jury trial referred to in that section relates only to the right as it existed at the time of the adoption of the state constitution.[177] Since the state was not subject to suit when the constitution was adopted, article I, section 5 does not guarantee a jury trial in such cases.[178]

A more controversial issue is to what extent "[p]arties retain their right to jury in the court of claims of any civil actions not against the state."[179] The restrictions on joinder of parties-defendant contained in the 1977 amendments to the Act render the issue of jury trial moot in situations involving an original action in the court of claims, but what happens when the case comes to the court by way of a counterclaim, cross-claim, or third-party complaint removal proceeding? Does the prohibition operate to prevent the claimant from demanding a jury trial against the private individual defendants? If so, do the private defendants also forfeit their rights to a jury? If a jury trial may be had between the private parties but not with respect to the state, how is such a trial to be accomplished?

The Ohio Supreme Court shed some light on these questions in *State* ex rel. *Moritz v. Troop.*[180] However, since the case involved a joinder of private parties to which the 1977 amendments did not apply, and the court was not

[168] 28 U.S.C. §§ 2671-2680 (1976).

[169] Ch. 359, 24 Stat. 505 (1887).

[170] Christian Beacon v. United States, 322 F.2d 512 (3rd Cir. 1963).

[171] Westfall v. Ohio Dep't of Rehab. & Correction, No. 77-0695 (Ohio Ct. Cl. Feb. 3, 1978).

[172] Williams v. Ohio Decorative Prods., Inc., No. 78-0141 PR (Ohio Ct. Cl. Mar. 3, 1978).

[173] Aratari v. Department of Rehab. & Correction, 48 Ohio App. 2d 239, 356 N.E.2d 759 (10th Dist. 1976).

[174] Williams v. Ohio Decorative Prods., Inc., No. 78-0141 PR (Ohio Ct. Cl. Mar. 3, 1978).

[175] OHIO REV. CODE ANN. § 2743.11 (Page Supp. 1978).

[176] OHIO CONST. art. I, § 5.

[177] Pokorny v. Local 310, International Hod Carriers Union, 38 Ohio St. 2d 177, 311 N.E.2d 866 (1974); City of Cincinnati v. Cincinnati Dist. Council 51, 35 Ohio St. 2d 197, 299 N.E.2d 686 (1973), *cert. denied*, 415 U.S. 994 (1974).

[178] For similar reasons, the seventh amendment to the United States Constitution, which is not applicable to state governments in civil actions either directly or by incorporation through the fourteenth amendment, has not prohibited the denial of a jury trial to plaintiffs in actions against the United States. Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977); Galloway v. United States, 319 U.S. 372 (1943). The *Galloway* Court held that the right to trial by jury guaranteed by the seventh amendment referred only to that right as it existed in the common law when the Constitution was adopted and hence did not exist with respect to a proceeding against the United States.

[179] OHIO REV. CODE ANN. § 2743.11 (Page Supp. 1978).

[180] 44 Ohio St. 2d 90, 338 N.E.2d 526 (1975).

squarely faced with the issues raised above, the questions remain open. The state argued in *Moritz* that the employees of the state were not susceptible to suit in the court of claims because of the Act's failure to mention employees and because the prohibition of jury trials where the state was concerned would lead to conflicting decisions on the same issue if the court decided the issue relating to the state and a jury decided the issue relating to the employee. The supreme court rejected the argument and, emphasizing the language of the Act which provided that the right to jury trial was retained in actions that were not brought against the state, concluded that the court of claims could permit a jury trial of claims not against the state, at least with respect to issues "peculiarly susceptible to determination by a jury."[181] Nevertheless, the court seemed to imply that the plaintiff in the action would not be able to demand a jury in its claims against the private party. Addressing itself to the state's argument relating to possibly conflicting decisions of judge and jury, the court said the problem "could only arise where the *defendant-employee* requests a trial by jury."[182]

A court of appeals decision has indicated that jury trials should be permitted in third-party complaint situations, thereby reversing the court of claims disposition of the issue. In *Huffman Wolfe Co. v. State*,[183] the court of appeals held that a third-party defendant is entitled to a jury on claims brought against it in the third-party proceedings or which it had brought against another third-party defendant. The court interpreted section 2743.11 to mean that parties retain their rights to jury trials if the claims asserted are not against the state. This decision would seem to indicate that where the issues sought to be tried by a jury are distinct from the issues between the claimant and the state, parties engaged in litigation should be entitled to have those issues decided by a jury.

If the state asserts a counterclaim against a claimant, should that claimant be entitled to a jury trial? The plain language of section 2743.11 prohibits jury trials in claims brought against the state; it does not prohibit jury trials in claims brought *by* the state. Furthermore, if the courts were to infer the latter prohibition, potential constitutional problems would arise which are not involved in the prohibition of jury trials in claims against the state. Jury trials as a matter of right in claims against private individuals were in existence at the time of the adoption of the Ohio Constitution and would seem to be clearly protected by article I, section 5. To date, however, no Ohio court has addressed this precise issue, and both *Moritz* and *Huffman v. Wolfe Co.* resisted giving section 2743.11 its broadest possible construction. In *Radojeics v. Ohio State Reformatory*,[184] an administratively determined case, a deputy clerk of court did find Ohio Rule of Civil Procedure 13(A) inapplicable in administratively determined cases and held that the state could not counterclaim against the plaintiff, on the partial ground that the plaintiff might have a right to a jury trial on the state's counterclaim.

A brief comparison with practice in the United States Court of Claims is

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[181] *Id.* at 93, 338 N.E.2d at 529.

[182] *Id.* (emphasis added).

[183] No. 76 AP-31 (Ohio 10th Dist. Ct. App. Aug. 19, 1976).

[184] 52 Ohio Misc. 73 (Ct. Cl. 1977).

instructive on these issues surrounding the right to a jury trial. A century ago the United States Supreme Court ruled that a jury trial is unavailable in counterclaims by the government against the plaintiff.[185] The bases for the holding were that such lawsuits "are not suits at common law within its true meaning"[186] and that Congress has in effect given notice to claimants that if they avail themselves of the forum provided for pressing their claims against the government, they do so with the knowledge that the absence of a jury is a condition attached to the use of the forum.[187] In view of the Ohio Court of Claims Act provision proclaiming that suits are to be determined according to the "same rules of law applicable to suits between parties, subject to the limitations set forth in this chapter,"[188] the same reasoning would not follow. Those "same rules of law" are obviously an incorporation of the common law into the Act, and the claimant in Ohio would not seem to have clear notice that a counterclaim asserted against him by the state would not carry with it a right to a jury as one of those limitations.

If claimants are given notice by a later court decision of sufficient authority or by an amendment to the Act that a counterclaim by the state will be determined solely by the court of claims, a prohibition of a jury trial on the basis of the *McElrath v. United States*[189] reasoning would not appear to be unreasonably harsh. It then could be forcefully argued that claimants knowingly and voluntarily waived their rights to jury trials by subjecting themselves to the clear possibility of a counterclaim by the state. Perhaps distinctions between permissive counterclaims[190] and compulsory counterclaims[191] could be drawn, reserving the right to jury trials only in the former. In that way, the potential difficulties of a two-tiered trier of fact proceeding could be avoided in many situations, and the potential conflict with the Ohio constitutional guarantee of jury trials could be avoided in those situations where that guarantee would most strongly be brought to bear.

Any parties brought involuntarily into an action in the court of claims by means of permissive joinder, third party practice, interpleader, or pursuant to Ohio Rules of Civil Procedure 19 and 19.1 should retain their rights to trial by jury as to any claim asserted against them and any claim they are compelled to make against parties other than the state.[192] In those instances where parties brought involuntarily into the action have permissive claims they desire to assert against another party, it is preferable to leave it to the discretion of the court to determine with reference to the posture of the other matters involved

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[185] McElrath v. United States, 102 U.S. 426 (1880).

[186] *Id.* at 440.

[187] The Court stated that "Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a . . . counterclaim . . . upon which judgment may go against him, without the intervention of a jury. . . . " *Id.* In Tucker Act cases, it has been held that the plaintiff has no right to a jury determination of the government's counterclaim. Terminal Warehouse of New Jersey v. United States, 91 F. Supp. 327 (D.N.J. 1950) (relying upon *McElrath*).

[188] OHIO REV. CODE ANN. § 2743.02 (Page Supp. 1978).

[189] 102 U.S. 426 (1880).

[190] OHIO R. CIV. P. 13(B).

[191] OHIO R. CIV. P. 13(A).

[192] OHIO R. CIV. P. 13(A), 14(A).

in the litigation whether the permissive claim should be tried to a jury. This approach would not seem to produce a hardship on the permissive claimant, since such claimant would have the option of pursuing the claim in another forum. However, if the permissive claim brings yet another involuntary party into the litigation, the latter party's asserted right to a jury trial should be controlling.

In removal cases, there should be no doubt that all parties retain their rights to trial by jury as they existed prior to removal of the case to the court of claims. Since the court of claims must overcome the difficulties presented by having two distinct triers of fact in the same proceeding in removal cases, this state of affairs should work to undermine the counterarguments to free joinder of parties.[193]

The suggestions raised here are not insensitive to the obvious problems created by the two-tiered trier of fact situation that would be presented in such proceedings. But, as the United States Supreme Court said in *United States v. Yellow Cab Co.*,[194] those problems are not insurmountable.[195] There, the Court suggested that federal courts could look to the manner in which issues of equity are tried to the courts and factual issues of law are tried to juries in federal practice.[196] If the trial indeed found such problems to be insurmountable, the Court believed Federal Rule of Civil Procedure 42(b) could be utilized to conduct separate trials. These observations could well be applied to practice in the Ohio Court of Claims. Some further means of mitigating the difficulty in these cases can be found in *State* ex rel. *Moritz v. Troop*,[197] where the Ohio Supreme Court found the possible conflict between decisions of court and jury to be "not clearly inevitable."[198] The court suggested the possible use of an advisory jury[199] and implied that all parties could consent to a trial by jury pursuant to Ohio Rule of Civil Procedure 39(C).[200]

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[193] *See* notes 70-72, 154 *supra* and accompanying text.

[194] 340 U.S. 543 (1951).

[195] *Id.* at 555.

[196] *Id.* at 556.

[197] 44 Ohio St. 2d 90, 338 N.E.2d 526 (1975).

[198] *Id.* at 93, 338 N.E.2d at 529.

[199] For an example of the use of an advisory jury, see Moloney v. United States, 354 F. Supp. 480 (S.D.N.Y. 1972).

[200] That rule provides:

> In all actions not triable of right by jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.

OHIO R. CIV. P. 39(C). However, section 2743.03(D) of the Ohio Revised Code provides that the Rules of Civil Procedure shall govern actions in the court of claims "except insofar as inconsistent with this chapter." OHIO REV. CODE ANN. § 2743.03(D) (Page Supp. 1978). Inasmuch as section 2743.03(C) of the code requires that "[a] civil action against the state shall be heard and determined by a single judge," *id.* § 2743.03(C), it appears that rule 39(C) is inconsistent with section 2743.03(C) and is therefore inapplicable to actions in the court of claims. In United States v. Schlitz, 9 F.R.D. 259 (E.D. Va. 1949), a United States district court suggested a novel, if somewhat questionable, means of dealing with the possibly conflicting decisions of the court and the jury in a case in which the defendant had counterclaimed against the government for damages to his automobile sustained in the accident underlying the government's suit against him. The court suggested that the factual issues relating to the defendant's negligence and the United

One of the most cogent objections to jury trials in the court of claims points to the possibility of conflicting findings of fact on the amount of damages to be awarded to a claimant in a joint tortfeasor situation. That possibility of conflict has been found to be convincing enough in the federal setting to persuade a court to deny joinder of individual defendants with the United States in Federal Tort Claims Act proceedings.[201] The District of Columbia Circuit Court of Appeals, however, met the problem by producing a formula to determine the rights of contribution the respective tortfeasors would have against each other where the court and jury had reached differing verdicts on damages.[202] The jury awarded the plaintiff $15,000 in damages against the private defendant. The court, finding the government to be jointly and severally liable to the plaintiff, awarded damages of $10,000. The court decided that if the plaintiff collected the $10,000 from the United States, the private defendant would be liable to the United States for $5,000 in contribution. If the plaintiff were to collect the $15,000 from the private defendant, the government would be liable to that defendant for contribution in the amount of $6,000, this sum being the same percentage of $15,000 as $10,000 was to $25,000, the total of the awarded damages.

4. Jurisdiction of the Court of Claims—What is the "State"?

The language of the Act to which one would readily refer to determine the jurisdiction of the court of claims seems straight-forward and clear enough on its face, but the court has not been without its problems in applying that language to the realities of governmental organization. The definition of "state" includes "its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities."[203] The jurisdiction of the court covers "all civil actions against the state permitted by the waiver of immunity,"[204] "all parties in civil actions that are removed to the court of claims,"[205] "appeals from the decisions of the court of claims commissioners,"[206] "full equity powers," and "all counterclaims, cross-claims and third-party claims."[207] As discussed earlier, political subdivisions are excluded from the definition of state. But what should be the result when a municipality performs a special function as an agent of the state? Should the "agency or instrumentality" clause override the exclusion? Suppose the defendant is not clearly the exclusive agent of either the state or a political subdivision but carries out functions for both. Does the jurisdiction of the court of claims attach to such entities for the purpose of determining claims by parties injured by the activities of those entities?

States' contributory negligence be submitted to the jury by means of special interrogatories. These findings of fact would then be res judicata and binding on the court in determining whether the United States was primarily negligent.

[201] Benbow v. Wolfe, 217 F.2d 203 (9th Cir. 1954).

[202] D.C. Transit System, Inc. v. Slingland, 266 F.2d 465, 470 (D.C. Cir. 1959).

[203] OHIO REV. CODE ANN. § 2743.01(A) (Page Supp. 1978).

[204] *Id.* § 2743.03(A).

[205] *Id.*

[206] *Id.*

[207] *Id.*

In *Stahl v. City of Mansfield*,[208] claimant relied on earlier Ohio Supreme Court theory to argue that the city and its police officers should be included within the court of claims' jurisdiction as "agencies" of the state. The argument was based upon the case of *City of Cincinnati v. Gamble*,[209] which had held that when a municipality is performing duties such as police, fire, and health protection, it is acting as an agent of the state.[210] Applying this theory to the political subdivision in *Stahl*, plaintiff asserted that court of claims jurisdiction would be obtained over the defendants because of their actions in the enforcement of the criminal laws of the state. The court of claims accepted the notion of the city and its employees as agents of the state in performing governmental functions on behalf of the state but nevertheless dismissed the action. Notwithstanding the agency theory of the *Gamble* case, the court held the specific exclusion of political subdivisions from the jurisdiction of the court was controlling. On appeal, the court of appeals adopted the court of claims' reasoning but added the premise that regardless of the relationship of agency between the state and the defendants, the requirement of the Act that any judgment must be charged against unencumbered monies appropriated to the defendant entity[211] precluded any action where the only defendant was a political subdivision.[212]

A method of classification of defendants who may not clearly be considered as an agent of the entities included on the list of instrumentalities in the Act's definition of "state" has been formulated by the court of claims in *Snyder v. Crawford County Board of Elections*.[213] In that case, plaintiff named as defendants the Secretary of the State of Ohio, in his office as chairperson of the Board of Elections, and four members of the County Board of Elections. Urging that the court take jurisdiction over the four county-level defendants, claimant pointed out that the Secretary of State appointed the local members and that the county board functioned under the Secretary of State as agents of the state in administering its election laws. The court dismissed the Secretary of State from the action on the ground that he was not involved in any decision of the local board from which the claimant sought redress.[214] To aid it in its ascertainment of the relationship between the state and the local board, the court looked to the election laws contained in the Ohio Revised Code.[215] Consideration of the provisions of the code pertaining to appointment and funding of local boards of election revealed that while the members of the local boards were appointed by the Secretary of State as plaintiff had asserted, the expenses of such boards are paid from the county treasuries.[216] From that observation the court concluded that the source of

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[208] No. 76-0125 (Ohio Ct. Cl. Mar. 4, 1976), *aff'd*, No. 76 AP-289 (Ohio 10th Dist. Ct. App. July 8, 1976).

[209] 138 Ohio St. 220, 34 N.E.2d 226 (1941).

[210] *Id.* at 230, 34 N.E.2d at 231.

[211] OHIO REV. CODE ANN. § 2743.19(C)(3) (Page Supp. 1978).

[212] No. 76 AP-289 (Ohio 10th Dist. Ct. App. July 8, 1976).

[213] No. 75-0408 (Ohio Ct. Cl. Sept. 5, 1975).

[214] The secretary was immune from liability for negligent appointment of the county board members because the appointments were made in the exercise of his governmental duties.

[215] OHIO REV. CODE ANN. ch. 3501 (Page 1972).

[216] *Id.* § 3501.17.

funding determined the agency relationship[217] and that the case should be dismissed for lack of jurisdiction over an agency of the county.

The court expanded upon this classification formula in *Beegle v. State*.[218] There, plaintiff sued the Public Employees Retirement System of the State of Ohio,[219] claiming the system had breached a contract between defendant and plaintiff's deceased husband. One issue raised was whether the system was an agency of the state and thus within the jurisdiction of the court of claims. In its determination of this issue the court once again referred to the enabling provisions of the Ohio Revised Code. The court found two factors present in the make-up of the defendant to be distinctly important: (1) the employees of the system were not subject to the state civil service classification or pay schedules, and (2) the system, rather than being funded by the Ohio General Assembly, was financed by state and local government units as employers and contributions from employees. The court pointed out that under the Act no execution may issue upon a judgment,[220] and satisfaction of judgment may only be obtained by charging the judgment "against available unencumbered monies in the appropriations to whichever state departments, boards, offices, commissions, agencies, institutions, or other instrumentalities are named in the judgment."[221] Although the court dismissed the complaint on other grounds,[222] the opinion clearly indicates that since the system's financing arrangement did not include an appropriation of unencumbered funds from the legislature, it was not to be classified as an agency of the state within the contemplation of the Act.

These interpretations of the Act demonstrate that while the definitions section exclusion of political subdivision is viewed by the court as a clear and straight-forward limitation of jurisdiction to claims in which the state's activities gave rise to the claim to be litigated,[223] the definition of "state" falls short of being complete. The method of characterizing a government entity as an agency of the state by looking to the source of its funding should be considered by practitioners in cases where the entity does not, on the basis of superficially observable factors, clearly fall within the definition of "state." But a complete classification of all extant governmental entities as falling either within the definition of "state" or "political subdivision" must await further decisional analysis.

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[217] Snyder v. Crawford County Bd. of Elections, No. 75-0408, slip op at 4 (Ohio Ct. Cl. Sept. 5, 1975).

[218] No. 75-0420 (Ohio Ct. Cl. Oct. 10, 1975).

[219] *See* OHIO REV. CODE ANN. ch. 145 (Page 1978).

[220] OHIO REV. CODE ANN. § 2743.19(B) (Page Supp. 1978).

[221] *Id.* § 2743.19(C)(3).

[222] The court's treatment of the issue of the system's status as an agency of the state is dictum. The action was dismissed on the grounds that OHIO REV. CODE ANN. § 145.09 (Page 1978) constituted a prior consent to suit. No. 75-0420, slip op. at 4.

Although in a civil action between private parties the fact that a defendant is judgment proof would not affect the jurisdiction of the court, the Court of Claims Act permits the collection of judgments only by drawing a warrant on the fund appropriated to the entity named in the judgment. OHIO REV. CODE ANN. § 2743.19 (Page Supp. 1978). If the entity is not funded by the state, the implicit conclusion is that the entity does not fall within the definition of "state" and thus is not within the jurisdiction of the court of claims.

[223] Claims that are subject to the court's removal jurisdiction do not fall within this interpretation.

5. Jurisdiction of the Court of Claims—What is "Prior Consent to Suit"?

Naming the state as defendant in an action brought in the court of claims does not insure that jurisdictional requirements have been satisfied. The Act is inapplicable "[t]o the extent that the state has previously consented to be sued."[224] The Ohio General Assembly failed to specify which actions of the state amount to prior consent to suit, thereby leaving the classification of this issue to the judiciary. As yet, the courts have not fashioned a controlling definition of prior consent to suit to aid practitioners.

There is case law pertinent to the general issue to which, at the date of this writing, the court of claims has yet to refer. The United States Supreme Court has declared: "The term 'suit' means the prosecution or pursuit of some claim, demand, or request. In law language it is the prosecution of some demand *in a Court of justice.*"[225] The Ohio Supreme Court has concurred in that definition by saying, "[a] 'suit' is the pursuit *in a court of justice* of the remedy to which the party by reason of the existence of the supposed facts, believes himself to be entitled."[226]

This view of the meaning of suit is reinforced by a reference to the Ohio Constitution, article I, section 16. That section requires the legislature to provide *the courts* and the manner in which suits may be brought against the state, making it clear what is required before "lack of consent" may be said to have been removed.[227] The Ohio Supreme Court has not only frequently declared that no consent to suit exists unless the legislature has executed article I, section 16, but it also has determined that a state commission created to consider claims against the state for damages due to construction activities of the state "was not a 'court' nor was a prosecution of a claim before such a commission in the nature of a 'suit' in a court of justice within [the] meaning" of article I, section 16.[228] These examples suggest a simple approach to resolving the issue of whether prior consent to suit has been given: unless a procedure is provided by which a party may prosecute an action against the state in a court of justice, prior consent to suit cannot be said to exist, and the court of claims jurisdiction attaches.

The court of claims has not employed such a simple approach in its consideration of the consent to suit issue. It has faced the issue in three situations: (1) where a statute provides for a judicial appeal from an administrative finding to a court of common pleas; (2) where a statute provides that the administrative determination is final and no appeal to a court is permitted; and (3) where the party's only method of recovery is by way of an extraordinary remedy. The court's treatment of these three situations has been distinct.

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[224] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[225] Cohens v. Virginia, 19 U.S. 265, 407 (1821) (emphasis added).

[226] Baltimore & Ohio R.R. v. Larwill, 83 Ohio St. 108, 116, 93 N.E. 619, 621 (1910) (emphasis added).

[227] See notes 5-6 *supra* and accompanying text.

[228] Raudabaugh v. State, 26 Ohio Dec. 563 (C. P. Mercer County 1916), *aff'd*, 96 Ohio St. 513, 118 N.E. 102 (1917), *error dismissed*, 248 U.S. 32 (1918).

a. *Administrative Determination with Provision for Judicial Review*

The court of claims has consistently and properly held that where the Ohio Revised Code provides for an appeal to a court of common pleas by a party adversely affected by a final determination of an administrative board, the jurisdiction conferred by the Act does not attach. In *Simko v. Treasurer*,[229] plaintiff sought recovery for an allegedly improper revocation of a liquor license. The Department of Liquor Control had revoked plaintiff's license, and upon administrative appeal the Liquor Control Commission affirmed. Construing the provision of Ohio Revised Code section 119.12 which permits an appeal of such decisions to a court of common pleas to equate with prior consent to suit, the court found that it was without jurisdiction to hear the claim.[230]

The court of appeals has utilized the same analysis on this issue. In a case involving the denial of a license to a nursing home operator, the court of claims, in *Marshall Nursing Home v. Ackerman*,[231] found the right to appeal conferred by section 119.12 to constitute prior consent to suit and dismissed the action. The court of appeals affirmed the dismissal, stating that where a statute provides a means for a judicial review of a departmental determination, it is the exclusive means of obtaining judicial relief.[232]

The prior consent to suit clause of section 2743.02(A) of the Act most clearly applies to this type of case. The exclusive power of the legislature conferred by article I, section 16 has been executed by providing a court and the manner in which suit may be brought. The manner provided may be characterized as an administrative remedy required by statute;[233] nevertheless it satisfies the case law definition of "suit" and is thereby subject to the limitation on court of claims jurisdiction. One who fails to exhaust that remedy should not be heard to try to avoid its requirements or to try to obtain alternate decisions in different forums by seeking relief in the court of claims prior to exhaustion.[234]

b. *Administrative Determination with No Right for Judicial Review*

A few cases have been filed involving situations where the General

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[229] No. 75-0351 (Ohio Ct. Cl. Aug. 20, 1975). An excellent analysis of the Ohio procedures for judicial review of administrative decisions can be found in Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853 (1973).

[230] No. 75-0351, slip op. at 3. OHIO REV. CODE ANN. ch. 119 (Page 1978) is the Ohio Administrative Procedure Act. Section 119.12 provides for appeal by parties adversely affected by any order of an agency issued pursuant to an adjudication. Section 119.01 further defines "agency" and "adjudication."

[231] 3 Ohio Op. 3d 143 (10th Dist. Ct. App. 1976).

[232] *Id.* at 145. *See also, e.g.*, Tyus v. Moritz, 52 Ohio App. 2d 143, 368 N.E.2d 846 (10th Dist. 1976); Berke v. Ohio Dep't of Pub. Welfare, 52 Ohio App. 2d 271, 369 N.E.2d 1056 (10th Dist. 1976).

[233] *See* Eggers v. Moor, 162 Ohio St. 521, 124 N.E.2d 115 (1955). *See also* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.01-.10 (1958 & Supp. 1970).

[234] The parties must be subject to the jurisdiction of the administrative remedy procedures. *See* Drain v. Kosydar, 54 Ohio St. 2d 49, 374 N.E.2d 253 (1978); Jones v. State, No. 77 AP-688 (Ohio 10th Dist. Ct. App. Dec. 1, 1977); Kearns v. Ohio Dep't of Mental Health, No. 77-0462 (Ohio Ct. Cl. Mar. 24, 1978).

Assembly has either provided no procedure for review of local administrative decisions or has provided for a series of administrative hearings with no right to appeal a final determination to a court of common pleas. An administrative procedure of such a character does not satisfy the definition of suit offered above and should not, therefore, be considered to be prior consent to suit. The court of claims' treatment of the consent issue in the context of these cases has been inconsistent.

In two illustrative cases the court found its jurisdiction to attach because no right of judicial review existed. In *Bealine Realty, Inc. v. State*,[235] a lessor of property leased to the Department of Liquor Control sought recovery of damages for an alleged breach of the lease. Reviewing the statutes governing the actions of the department, the court noted that "[n]o court other than the Court of Common Pleas of Franklin County has jurisdiction of any action against . . . the department of liquor control, to restrain the exercise of any power or to compel the performance of any duty under Chapters 4301, and 4303, of the Revised Code."[236] However, the statutes were construed as inapplicable to an action for a breach of a lease, and no court was found to have been given jurisdiction over such matters.[237] *Kady v. Peltier*[238] involved an alleged breach of contract by the Department of Commerce for failure to pay plaintiff overtime as required by statute. The court concluded from a review of the pertinent statute[239] that there was no provision for an administrative hearing or a judicial review of claims for overtime pay.[240] Since the state had provided no means for suing for overtime, the court decided that jurisdiction attached.

The more interesting aspect of these cases is not that jurisdiction was found by reference to whether a statutory right of review existed, but rather the degree to which the court was willing to refine its analysis of the statutes. In both cases the General Assembly had provided for either a direct suit in common pleas court or a full administrative hearing procedure culminating in a right to appeal to common pleas court in most areas of activity in which the particular department was involved.[241] However, no specific procedure or right to suit was granted to cover the particular controversies in these cases, and the court of claims correctly decided that the state had not conferred its consent to be sued in such controversies.

But the court has not been consistent in inquiring whether the state has given prior consent to suit in cases of this type. For example, in *Lawrence v. Ohio Bureau of Employment*[242] the court denied jurisdiction in a claim where plaintiff sought redress for an alleged improper two-day suspension. The applicable statute provided for a full administrative hearing resulting in a right to appeal to common pleas court, but only in cases of suspension of more

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[235] No. 75-0318 (Ohio Ct. Cl. Aug. 19, 1975).

[236] *Id.*, slip op at 2, *citing* OHIO REV. CODE ANN. §§ 4301.10, 4301.31 (Page 1973).

[237] No. 75-0318, slip op. at 3.

[238] No. 76-0113 (Ohio Ct. Cl. May 5, 1976).

[239] OHIO REV. CODE ANN. § 124.04 (Page 1978).

[240] No. 76-0113, slip op. at 4.

[241] *See* OHIO REV. CODE ANN. § 124.03 (Page 1978); OHIO REV. CODE ANN. § 119.12 (Page 1968); OHIO REV. CODE ANN. § 4301.10 (Page 1973).

[242] No. 75-0520-AD (Ohio Ct. Cl. May 23, 1977).

than five days.[243] The court relied heavily upon an Ohio Supreme Court opinion which had analyzed the statute and which had concluded that "a complaint filed in the Common Pleas Court . . . seeking to test the legality of an order . . . suspending such employee for five days or less does not state a cause of action for which relief may be granted."[244] The court concluded from this that the legislature had preempted the field of employee suspensions. In so doing, it ignored the essential point that the decision upon which it relied was proper only prior to the Court of Claims Act waiver of sovereign immunity.

The court's analysis in *Lawrence* is at best questionable. A claim arising out of a suspension of employment is essentially an action for breach of a contract of employment. The General Assembly, prior to consenting to be sued in the court of claims, had chosen to limit its consent to cases in which a suspension was for *more* than five days. This limited consent is no different from the limited consent given, as noted in *Bealine*, to actions "in connection with the execution of leases"[245] but not inclusive of actions for the breach of a lease. Nor is it different from the consent to suit, referred to in *Kady*, in matters concerning "reduction in pay or position, job abolishments, layoff, suspension [of more than five days], discharge, assignment or reassignment to a new or different position classification,"[246] but not in matters concerning claims for overtime pay. The fact that the legislature had refused to extend consent to suit for suspensions of no longer than five days or had intended to occupy the field of employee suspensions prior to the enactment of the Court of Claims Act is now irrelevant. In creating the court of claims, the Act explicitly declared that the court has jurisdiction over actions against the state unless it had given prior consent to suit. The prior intention to limit actions against the state is now displaced by the general consent to suit expressed in section 2743.02 of the Act.

The issue of when prior consent to suit exists has been given equally unsatisfactory treatment by the Tenth Circuit Court of Appeals. The court of appeals affirmed the court of claims' dismissal of a complaint alleging a wrongful reduction of Aid to Families with Dependent Children[247] benefits by the Department of Public Welfare in *Bolin v. White*.[248] Properly reading Ohio Revised Code section 5107.05 to limit the plaintiff to appellate procedure within the Department of Public Welfare, the court of appeals then concluded that "no provision has been made for judicial review of the welfare questions set forth."[249] Surprisingly, the court affirmed the dismissal on the ground that to find jurisdiction would convert the court of claims into a court

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[243] OHIO REV. CODE ANN. § 124.34 (Page 1978).

[244] Anderson v. Minter, 32 Ohio St. 2d 207, 212, 291 N.E.2d 457, 461 (1972). The court of claims here seems to have confused lack of jurisdiction with failure to state a cause of action.

[245] Bealine Realty, Inc. v. State, No. 75-0318, slip op. at 1 (Ohio Ct. Cl. Aug. 19, 1975), *citing* OHIO REV. CODE ANN. § 4301.10 (Page 1973).

[246] Kady v. Peltier, No. 76-0113, slip op. at 3 (Ohio Ct. Cl. May 5, 1976), *citing* OHIO REV. CODE ANN. § 124.03 (Page 1978).

[247] *See generally* OHIO REV. CODE ANN. ch. 5107 (Page 1970).

[248] 51 Ohio App. 2d 92, 367 N.E.2d 63 (10th Dist. 1976), *aff'g* Bolin v. Department of Pub. Welfare, No. 75-0435 (Ohio Ct. Cl. Dec. 16, 1975).

[249] 51 Ohio App. 2d at 95, 367 N.E.2d at 65.

of appeals, which the court found to be outside the intention of the General Assembly.[250]

To conclude from an analysis of administrative remedies that the statutory provision of those remedies does not constitute a right of judicial review is to conclude that there exists no prior consent to suit. A full administrative hearing does not satisfy the definition of "suit" developed previously in this discussion.[251] Furthermore, finding court of claims jurisdiction over actions involving a reduction in welfare benefits would not, as the court of appeals proclaimed, convert the court of claims into a court of appellate review. The court of claims should not entertain an appeal but, rather, should conduct a trial *de novo*.[252] No cause of action against the state would accrue for an improper administrative action until the aggrieved party had exhausted the procedures for administrative review of the alleged wrongful administrative decision.[253] Only at the point of exhaustion of the administrative avenues would the claimant have the first opportunity to plead in a court of justice that a wrong had been committed. We have already seen that the General Assembly has consented to be sued to provide redress for such wrongs in the courts of common pleas.[254] In the *Bolin* case, the claimant had no such prior existing right. If this is so, the only proper conclusion to be reached is that the state has not previously consented to be sued over welfare benefits questions. The court of claims should have found jurisdiction over the claim and then proceeded to determine whether the plaintiff had stated a claim upon which relief could be granted.

Where the General Assembly has not provided for judicial review of an administrative action, the court of claims should not avoid the clear mandate of the Act. Lack of prior consent to suit requires the court to exercise its jurisdiction to determine the claim. To find that the legislature intended that administrative review procedures occupy the field or are conclusive upon the aggrieved party, and to base that finding upon pronouncements of the legislature prior to the enactment of the Court of Claims Act, is to ignore the intent of the legislature. If a party seeks relief from improper actions of the state for which that party may not otherwise pursue a remedy in a court of justice, the court of claims should take jurisdiction to determine whether a cause of action has been pleaded.

c. *Where Mandamus is the Only Prior Remedy*

Whether the availability of an extraordinary suit, such as mandamus, amounts to prior consent to suit is a question that the court of claims has had great difficulty answering. The issue has arisen specifically in instances where

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[250] *Id.* The court also declared that welfare claims do not include rules of law applicable to suits between private parties.

[251] *See* notes 224-28 *supra* and accompanying text. The argument that a suit in a court of justice is unnecessary because the claimant has been granted due process in the administrative hearings is inapposite to the issue in these cases. An administrative hearing even with full due process trappings is not the equivalent of a consent to suit.

[252] The Ohio Administrative Procedure Act provides for a trial *de novo* in certain instances. OHIO REV. CODE ANN. § 119.12 (Page 1978).

[253] *See* notes 233-34 *supra* and accompanying text.

[254] *See* notes 229-30 *supra* and accompanying text.

state activity has resulted in a taking of or damage to private property. Background of decisional and statutory law in the area of appropriation of property to state use and eminent domain proceedings is necessary to clarify the analysis which follows.

The Ohio Constitution, article I, section 19 delineates the power of eminent domain by providing: "Where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury. . . ."[255] Since this section is not self-executing,[256] the Ohio General Assembly has enacted several statutes to establish a procedure for appropriation.[257] The pertinent statutes, reflecting the constitutional provision, require the state to first attempt to purchase the property.[258] If an agreement cannot be reached with the property owner, the public agency may file a petition for appropriation with the proper court[259] and may at the same time deposit with the court an amount equal to the value of such property plus any damage to the residence.[260] Upon such deposit, the agency may take possession and enter the land.[261]

After the deposit has been made or the petition has been filed, the landowner may elect to contest the stipulated value.[262] The jurisdiction of the court in such proceedings is limited to a determination of damages.[263] Any issue concerning the authority or propriety of the action by the state must be raised by way of a prayer for injunction in a separate action.[264] The landowner is entitled to a jury determination of just compensation.[265]

Such proceedings are required only where there has been a taking of private property for public use.[266] Since the constitutional provision has been the only available means of redress prior to the enactment of the Court of Claims Act, it has been broadly construed. For example, a physical taking of the property by dispossession need not be established.[267] "Any substantial

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[255] OHIO CONST. art. I, § 16.

[256] Watson v. Trustees of Pleasant Township, 21 Ohio St. 667 (1871); McArthur v. Kelly, 5 Ohio 140 (1831).

[257] OHIO REV. CODE ANN. ch. 163 (Page 1978); OHIO REV. CODE ANN. ch. 5519 (Page 1970 & Supp. 1973) (procedure for appropriation by the state). For procedures for appropriation by other governmental entities, see Annotation to OHIO CONST. art. I, § 19 (Page 1955 & Supp. 1978).

[258] OHIO REV. CODE ANN. § 163.04 (Page Supp. 1978).

[259] *Id.* § 163.05. The statutes grant jurisdiction over appropriation actions to both common pleas and probate courts. *Id.* § 163.01(B). Only the court of common pleas will be referred to in the text.

[260] *Id.* § 163.06.

[261] *Id.* If the purpose for which the land is appropriated is the making or repairing of public roads, structures on the land may be appropriated. *Id.* § 163.06(B). For all other purposes, the right of possession upon deposit does not extend to structures. *Id.* § 163.06(A).

[262] OHIO REV. CODE ANN. §§ 163.08, 163.09 (Page 1978); OHIO REV. CODE ANN. § 5519.02 (Page 1970).

[263] OHIO REV. CODE ANN. § 163.09 (Page 1978); Thormyer v. Irvin, 170 Ohio St. 276, 164 N.E.2d 420 (1960).

[264] City of Worthington v. Carskadon, 18 Ohio St. 2d 222, 249 N.E.2d 38 (1969); Preston v. Weiler, 175 Ohio St. 107, 191 N.E.2d 832 (1963).

[265] OHIO REV. CODE ANN. § 163.09 (Page 1978).

[266] OHIO CONST. art. I, § 19.

[267] Smith v. Erie R.R., 134 Ohio St. 135, 142, 16 N.E.2d 310, 317 (1938).

interference with the elemental rights growing out of ownership of private property is considered a taking."[268] The interference need not be absolute or permanent.[269] A temporary deprivation of any valuable use is a taking *pro tanto*.[270]

When a taking has been accomplished and an action for appropriation has been commenced, the court's jurisdiction includes the determination by the jury of all damages, consequential damages as well as direct ones.[271] However, where no taking has been established, a landowner claiming an injury which is merely consequential to the taking of another's property is without a remedy; the loss is deemed *damnum absque injuria*.[272]

The significant disadvantage to the landowner under these statutes, aside from the lack of a remedy for mere consequential injury, is that only the state is empowered to initiate the proceedings. Where the state fails to take the appropriate legal action, the landowner must seek mandamus to compel the state to perform its duty.[273]

On numerous occasions landowners alleging that the state has taken or damaged property without first appropriating the property have sought jurisdiction in the court of claims without first having sought to obtain a writ of mandamus. Early decisions by the court of claims consistently denied jurisdiction over the action. Two of those decisions will serve as illustrations.

Plaintiff sought recovery in two causes of action against the defendant in *Claycraft Co. v. Ohio Department of Transportation*.[274] The first cause of action alleged negligence during highway construction which resulted in consequential injury to plaintiff's property. The second cause of action sought compensation for the taking of plaintiff's septic tank easement located on another person's property. The latter property previously had been appropriated by the state. The court dismissed both causes of action on the grounds that the only recovery permitted to a landowner is for damages arising from a taking, that appropriation could have been accomplished

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[268] *Id.* Paragraph one of the syllabus declares: "any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises, entitles the owner to compensation." *Id.* at 135, 16 N.E.2d at 310 (syllabus para. no. 1).

[269] City of Mansfield v. Balliet, 65 Ohio St. 451, 471, 63 N.E. 86, 106 (1902).

[270] *E.g.*, State *ex rel.* Royal v. City of Columbus, 3 Ohio St. 2d 154, 209 N.E.2d 405 (1965) (low and frequent airflights over property); Preston v. Weiler, 175 Ohio St. 107, 191 N.E.2d 832 (1963) (change of street grade which impairs access to the road from adjacent lot); Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958) (surface water flooding); McKay v. Kauer, 156 Ohio St. 347, 102 N.E.2d 703 (1951) (surface water flooding); City of Barberton v. Miksch, 128 Ohio St. 169, 190 N.E. 387 (1934) (percolating water); City of Norwood v. Sheen, 126 Ohio St. 482, 186 N.E. 102 (1933) (sewage overflow); Callen v. Columbus Edison Elec. Light Co., 66 Ohio St. 166, 64 N.E. 141 (1902) (telephone pole installation); City of Mansfield v. Balliet, 65 Ohio St. 451, 63 N.E. 86 (1902) (sewage overflow). *See* Masley v. City of Lorain, 48 Ohio St. 2d 334, 336, 358 N.E.2d 596, 598 (1976) (telephone pole installation). *But see* Huelsman v. Department of Transp., 56 Ohio App. 2d 100, 381 N.E.2d 950 (10th Dist. 1977) (holding no cause of action for damage due to loss of percolating water).

[271] City of Cincinnati v. Schuller, 160 Ohio St. 95, 113 N.E.2d 353 (1953); Grant v. Village of Hyde Park, 67 Ohio St. 167, 65 N.E. 891 (1902).

[272] Smith v. Erie R.R., 134 Ohio St. 135, 16 N.E.2d 310 (1938). *See also* State *ex rel.* Fejes v. City of Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1966) (vibrations from construction equipment); McKee v. City of Akron, 176 Ohio St. 282, 199 N.E.2d 592 (1964) (odor from sewage plant).

[273] Wilson v. City of Cincinnati, 172 Ohio St. 303, 175 N.E.2d 725 (1961).

[274] No. 75-0394 (Ohio Ct. Cl. Sept. 5, 1975).

through mandamus proceedings, and that article I, section 19 of the constitution requires the assessment of compensation be performed by a jury.[275]

Further evidence of the court's reluctance to take jurisdiction in claims of this nature is present in *Lehner v. State*.[276] There, the plaintiff alleged a continuing nuisance in runoff from a salt storage box caused her land to be rendered unusable for the production of crops. The box had been constructed by the state on highway property. The court construed article I, section 19 to limit the right of compensation for injury to land to those cases in which a taking could be established.[277] Upon the assumption that a *pro tanto* taking could be found, the court declared, as it did in *Claycraft*, that mandamus amounted to a prior consent to suit and dismissed the action despite the fact that it sounded in tort.

Thus the early jurisprudence of the court of claims resulted in three reasons for refusal of jurisdiction over claims raising allegations of injury to private property. The first reason was that article I, section 19 was found to be the exclusive basis for an action claiming injury to property. Mere injury that does not constitute a taking, *pro tanto* or otherwise, is *damnum absque injuria*. Second, the court concluded that where a taking of any sort could be established, the statutory procedures would be the exclusive manner of relief, and mandamus as the means of enforcing those procedures would constitute prior consent to suit. Finally, as an alternative ground for dismissal, the court has interpreted the jury requirement of article I, section 19 to be mandatory, and thus an action before a judge in lieu of appropriation proceedings would be unconstitutional.

A suggestion of change in the court's reasoning crept in by way of dictum in *Graber v. Jackson*.[278] In that case plaintiff alleged that the construction of a highway caused a great amount of silt to flow into and fill up a lake located on plaintiff's property. Plaintiff asserted that the state was negligent in the construction. The court was consistent with the earlier decisions in holding that whenever a taking can be established, the statutory proceedings for an appropriation action provide the exclusive remedy and can be enforced only by the employment of mandamus. However, the court also correctly suggested that where a mere consequential injury to property has occurred, no prior consent to suit exists and the court of claims would then have jurisdiction.[279]

The dictum of *Graber* became the holding of *Gottemoeller* v. *Ohio Department of Transportation*.[280] Plaintiff claimed that weed spray,

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[275] *See also* Johnson v. Jackson, No. 76-0410 (Ohio Ct. Cl. Oct. 4, 1976); Lemaster v. Jackson, No. 75-0364 (Ohio Ct. Cl. Sept. 11, 1975); Hairston v. State, No. 75-0326 (Ohio Ct. Cl. July 18, 1975).

[276] No. 75-0549 (Ohio Ct. Cl. Jan. 13, 1976).

[277] *Id.*, slip op. at 3. In this series of cases the court continually asserted that since article I, section 19 of the Ohio Constitution provides for compensation only where there exists a taking, no action lies for mere damage to property. The court incorrectly read article I, section 19 as prohibitive and exclusive rather than as a remedial right. *See* notes 282-83 *infra* and accompanying text.

[278] No. 76-0316 (Ohio Ct. Cl. July 9, 1976).

[279] *Id.*, slip op. at 6 (dictum).

[280] No. 75-0431 (Ohio Ct. Cl. Nov. 24, 1976).

negligently applied along the roadside by defendant, drifted onto his garden, killed his plants and thereby caused him fifty dollars in damages. In finding jurisdiction over the claim, the court fully retreated from the reasoning of its earlier decisions. The previous jurisprudence of the court had improperly relied upon Ohio Supreme Court decisions handed down prior to enactment of the Court of Claims Act to declare that mere consequential injury to property was *damnum absque injuria*.[281] The supreme court had firmly established, under the conditions of sovereign immunity, that the right to compensation under the constitution did not extend to cases where the property had been injured but not taken.[282] But the basis for that principle of decision, article I, section 19, had not barred an action for damages; it merely failed to provide compensation whenever property was merely injured. Sovereign immunity barred the cause of action. Since the Court of Claims Act waived immunity, a tort action for injury to property caused by state activity exists independent of a taking.[283]

The court of claims analysis of the consent to suit issue has frequently been flawed by the conclusion that the availability of mandamus constitutes prior consent to suit.[284] Prior to the enactment of the Court of Claims Act the Ohio Supreme Court held in several cases that mandamus against a state officer is not a suit against the state within the purview of article I, section 16 of the Ohio Constitution.[285] The reasoning behind those holdings is that as soon as a state

[281] State *ex rel.* Fejes v. City of Akron, 5 Ohio St. 2d 47, 51-52, 213 N.E.2d 353, 355-56 (1966); McKee v. City of Akron, 176 Ohio St. 282, 284, 199 N.E.2d 592, 594 (1964).

[282] McKee v. City of Akron, 176 Ohio St. 282, 284, 286, 199 N.E.2d 592, 594, 596 (1964).

[283] In such actions the constitution does not entitle the plaintiff to a trial by jury. During the 1912 constitutional debate, critics of the amendment of article I, section 16 stated: "If this door is thrown open it will be a great expense to the state. The case will have to be tried by juries . . . and the idea will be that 'The state has a lot of money and we will make the state pay.' " 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1919 (1912). *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); *Claims, supra* note 2, at 495-98.

The Ohio constitutional requirement of article I, section 5 that "the right of trial by jury shall be inviolate" has been interpreted to provide the right only as it existed at common law prior to the adoption of the constitution. Belding v. State *ex rel.* Heifner, 121 Ohio St. 393, 169 N.E. 301 (1929). Thus, the absence of a jury in the court of claims would not be unconstitutional. *Claims, supra* note 2, at 495.

[284] *E.g.*, Johnson v. Jackson, No. 75-0410, slip op. at 5 (Ohio Ct. Cl. Oct. 4, 1976); Graber v. Jackson, No. 76-0316, slip op. at 7 (Ohio Ct. Cl. July 9, 1976); Lehner v. State, No. 75-0549, slip op. at 2 (Ohio Ct. Cl. Jan. 13, 1976); J.P. Sand & Gravel Co. v. Department of Transp., No. 75-0396, slip op. at 6 (Ohio Ct. Cl. Oct. 10, 1975), *aff'd*, 51 Ohio App. 2d 83, 367 N.E.2d 54 (10th Dist. 1976); Lemaster v. Jackson, No. 75-0364, slip op. at 3 (Ohio Ct. Cl. Sept. 11, 1975); Claycraft Co. v. B.G. Danis Co., No. 75-0394, slip op. at 9 (Ohio Ct. Cl. Sept. 5, 1975); Edmisten v. Department of Transp., No. 75-0199, slip op. at 4 (Ohio Ct. Cl. Sept. 2, 1975). *Contra*, Kermetz v. Cook-Johnson Realty Corp., 54 Ohio App. 2d 220, 376 N.E.2d 1357 (10th Dist. 1977); State *ex rel.* Edmisten v. Jackson, No. 75 AP-557 (Ohio 10th Dist. Ct. App. July 1, 1976).

One other flaw in the court's analysis is that it reads Ohio Revised Code section 163.03 as constituting a prior consent to suit. Section 163.03 provides that "damages are recoverable by civil action to which the state or agency hereby consents." OHIO REV. CODE ANN. § 163.03 (Page 1978). The court fails to note that this consent applies only to actions for damages resulting from entry upon lands for the purpose of making "surveys, soundings, drillings, appraisals and examinations as are necessary and proper" under Ohio Revised Code chapter 163. The court should restrict its application of section 163.03 to actions for damages resulting from a privileged trespass by a state agency in its preliminary studies prior to appropriation.

[285] State *ex rel.* Wilson v. Preston, 173 Ohio St. 203, 181 N.E.2d 31 (1962); State *ex rel.* Nichols v. Gregory, 130 Ohio St. 165, 198 N.E. 182 (1935) (true even though the state is the real party in interest); *see* Rolston v. Missouri Fund Comm'rs, 120 U.S. 390, 411 (1886); *see generally* State *ex rel.* Ferguson v. Shoemaker, 45 Ohio App. 2d 83, 341 N.E.2d 311 (10th Dist. 1975).

activity results in a taking, the duty then arises on the part of the officer in charge of the activity to initiate the appropriate proceedings. A mandamus action lies to compel the performance of that duty and is brought against the officer, not against the state.[286] The litigation then does not constitute a suit against the state.[287] The court of claims analysis of this issue, in light of this prior case law, is extremely weak.

Another approach employed by the court of claims involves a certain measure of circular reasoning. It is founded upon the orthodox requirement that since mandamus is an extraordinary writ, the writ will not issue unless there is no adequate remedy at law.[288] In order to reach a conclusion of no jurisdiction the court of claims must first find that prior consent to suit has been given. In order to find that prior consent to suit is present, the writ of mandamus must lie. If there is an adequate remedy at law through the court of claims, the writ would *not* properly lie. The court then concludes that the Court of Claims Act is not an adequate remedy at law because the constitution requires that compensation for a taking "shall be assessed by a jury."[289] The court interprets this latter provision to mean that the right to jury trial may not be waived in such cases. Since section 2743.17 of the Act precludes the use of a jury in action against the state, the court bases its conclusion that the Act is not an adequate remedy at law upon that section.[290] Aside from the obvious circularity of such reasoning, it contains the further critical flaw of failing to recognize that a jury trial may be waived.[291] Conventional practice in all other phases of our legal system demonstrate that the right may be waived. The non-availability of a jury in the court of claims should not compel the conclusion that if someone seeks redress against the state subject to the limitations on the waiver of immunity, the process would be unconstitutional and thereby inadequate.

An illustration of how an injured party can become trapped in the circular rationale surrounding this issue is provided by *Edmisten v. Ohio Department of Transportation*[292] and *State* ex rel. *Edmisten v. Jackson*.[293] Plaintiff complained of an interference with her rights of ingress and egress to her property by a project of the department, carried out pursuant to a contract with the Village of Williamsburg. The project was for the purpose of changing the grade of the street which abutted plaintiff's property. Plaintiff first sued the state and the village for money damages in a court of common pleas. The

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[286] Rolston v. Missouri Fund Comm'rs, 120 U.S. 390, 411 (1886).

[287] *Id.*

[288] *See* Morgan v. Canary, 44 Ohio App. 2d 29, 335 N.E.2d 883 (10th Dist. 1975).

[289] OHIO CONST. art. I, § 19.

[290] *E.g.*, Johnson v. Jackson, No. 76-0410, slip op. at 5 (Ohio Ct. Cl. Oct. 4, 1976); Graber v. Jackson, No. 76-0316, slip op. at 5 (Ohio Ct. Cl. July 9, 1976); Lehner v. State, No. 75-0549, slip op. at 4 (Ohio Ct. Cl. Jan. 13, 1976); J.P. Sand & Gravel Co. v. Department of Transp., No. 75-0396, slip op. at 6 (Ohio Ct. Cl. Oct. 10, 1975), *aff'd on other grounds*, 51 Ohio App. 2d 83, 367 N.E.2d 54 (10th Dist. 1976); Lemaster v. Jackson, No. 75-0364, slip op. at 5 (Ohio Ct. Cl. Sept. 11, 1975); Claycraft Co. v. B.G. Danis Co., No. 75-0394, slip op. at 9 (Ohio Ct. Cl. Sept. 5, 1975); Edmisten v. Department of Transp., No. 75-0199, slip op. at 4, 5 (Ohio Ct. Cl. Sept. 2, 1975). *Contra*, Kermetz v. Cook-Johnson Realty Corp., 54 Ohio App. 2d 220, 376 N.E.2d 1357 (10th Dist. 1977).

[291] City of Cincinnati v. Bassert Mach. Co., 16 Ohio St. 2d 76, 79, 243 N.E.2d 105, 108 (1968); Cassidy v. Glossip, 12 Ohio St. 2d 17, 19, 231 N.E.2d 64, 66 (1967).

[292] No. 75-0199 (Ohio Ct. Cl. Sept. 2, 1975).

[293] No. 75 AP-557 (Ohio 10th Dist. Ct. App. July 7, 1976).

court properly dismissed the suit for lack of jurisdiction. Plaintiff then sought relief from the Sundry Claims Board. As required, the action was refiled in the court of claims.[294] The court of claims dismissed the action by characterizing an action in mandamus to compel the Director of the Department of Transportation to institute appropriation proceedings as a prior consent to suit.[295] Plaintiff dutifully sought a writ of mandamus in the Tenth District Court of Appeals.[296] The court of appeals denied the writ on the basis that an action in the court of claims constituted an adequate remedy at law.[297] The court concluded that plaintiff's proper remedy was in the court of claims and that her mistake was not appealing the dismissal from that court.[298]

The circle was broken by the incisive decision of the court of appeals in *Kermetz v. Cook-Johnson Realty Corp.*[299] The state was sued through third-party practice for negligently permitting the City of Youngstown to engage in the construction of a water main which interfered with a sewer system constructed by the third-party plaintiff resulting in damage to the home of the original plaintiff. The court of claims dismissed the action on the basis of its now familiar precedents. The court of appeals seized the opportunity to eliminate the conflict in its own decisions and to expand upon its holding in *State* ex rel. *Edmisten v. Jackson.*[300] The court rejected the court of claims' analysis that mandamus is a prior remedy and that the right to a jury cannot be waived. In its conclusion, the court of appeals laid out an orderly set of procedures to be followed. Where there has been a physical taking or a *pro tanto* taking, the property owner may bring an action in the court of claims; by so doing the claimant waives the right to a jury assessment of damages.[301] In the alternative, the property owner seeking an assessment by a jury may bring an original action in mandamus when a clear legal duty of a state official can be shown to exist.[302] The plaintiff's desire for a jury determination of compensation prevents the possible action in the court of claims from being viewed as an adequate remedy at law.

The *Kermetz* decision, in conjunction with the court of claims decision in *Gottemoeller*, should settle most questions concerning the jurisdiction of the court of claims over actions involving injury to private property. Where the state official recognizes the liability of the agency for a taking of private property and commences proceedings in a court of common pleas for the appropriation of the property, the landowner has no claim for further relief. The appropriation proceedings permit the landowner to be compensated for all direct and consequential injuries resulting from activities of the state.[303]

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[294] *See* Act of June 27, 1974 § 3, 135 Ohio Laws 869, 883 (1974).

[295] No. 75-0199, slip op. at 4 (Ohio Ct. Cl. Sept. 2, 1975).

[296] State *ex rel.* Edmisten v. Jackson, No. 75 AP-557 (Ohio 10th Dist. Ct. App. July 7, 1976).

[297] *Id.*, slip op. at 4.

[298] *Id.* at 5.

[299] 54 Ohio App. 2d 220, 376 N.E.2d 1357 (10th Dist. 1977).

[300] The court sought to clarify its opinions in State *ex rel.* Nicholson v. Jackson, 54 Ohio App. 2d 215, 377 N.E.2d 523 (10th Dist. 1977) and J.P. Sand & Gravel Co. v. State, 51 Ohio App. 2d 83, 367 N.E.2d 54 (10th Dist. 1976).

[301] 54 Ohio App. 2d at 227, 376 N.E.2d at 1362.

[302] *Id.* at 227-28, 376 N.E.2d at 1362.

[303] City of Cincinnati v. Schuller, 160 Ohio St. 95, 113 N.E.2d 353 (1953); Grant v. Village of Hyde Park, 67 Ohio St. 167, 179, 65 N.E. 891, 904 (1902).

The court of claims has correctly reasoned, in denying "second thought" actions,[304] that to permit an action in the court of claims subsequent to the completion of a proceeding for appropriation would run counter to the policy of avoiding a multiplicity of suits.

A landowner has alternative remedies in the situation where the state official disagrees that state activity has not amounted to a taking. One remedy is to seek a writ of mandamus to compel the initiation of appropriation proceedings. By taking this course of action, the landowner would preserve the entitlement to a jury determination of damages, but not without incurring some risk. The risk of the mandamus remedy is that the request will be denied if the injury complained of does not at least amount to a *pro tanto* taking. This is true even though the Ohio courts have taken a liberal view of what constitutes a taking.[305] The landowner must establish at minimum a temporary deprivation of an intangible interest appurtenant to his premises before mandamus will lie.[306] If this minimum is satisfied, compensation for all injury consequential to the activity complained of can be assessed.[307] Where the owner is able only to claim injury consequential to the taking of another's property, mandamus will be denied.[308] In the latter instance, the landowner would be well-advised to select the alternative remedy.

An action brought in the court of claims would avoid the pitfall that the injury complained of does not amount to a taking. As demonstrated in the *Gottemoeller* case, the court of claims will take jurisdiction over tortious injury to property without more being required. The corresponding disadvantage to the landowner in the court of claims action, however, is the waiver of jury assessment and a possible consequence that the value lost will be assessed lower than it would have been by a jury of peers.[309] If this presumption is true, the landowner must balance the chances that the injury does not constitute a taking against the possibilities that a trial to the court of claims judge may act as a restraining factor on the determination of compensation.

III. Tort Claims in Ohio—A Comparative Analysis

A. *Introduction*

One fundamental limitation on the abrogation of sovereign immunity has been retained in virtually all jurisdictions which have waived the doctrine: the courts recognize that among the totality of governmental activities some should not subject the governmental unit to liability in tort regardless of the otherwise tortious character or effect of the activity in a given case. Because this limitation requires the courts employing it to establish boundaries of governmental liability which a general and unlimited statutory waiver of immunity would not on its face suggest, it is necessarily incumbent upon the

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[304] Barr v. State, 73 Ohio Op. 2d 111, 114 (Ct. Cl. 1975). *See* De Czege v. State, No. 75-0111 (Ohio Ct. Cl. Apr. 21, 1975).

[305] Smith v. Erie R.R., 134 Ohio St. 135, 142, 16 N.E.2d 310, 317 (1938).

[306] State *ex rel.* Fejes v. City of Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1964).

[307] Grant v. Village of Hyde Park, 67 Ohio St. 167, 178-80, 65 N.E. 891, 895 (1902).

[308] *See* State *ex rel.* Fejes v. City of Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1964).

[309] *See* note 283 *supra*.

judiciary to interpret the "liability clauses" of such statutes. Those interpretations have taken the form of various doctrines which will be examined in this section: (1) the discretionary function exception; (2) the planning-operational distinction; (3) the policy formulation test; (4) the no private counterpart or uniquely governmental function test; (5) the no common law duty rule; and (6) the *ultra vires* act exception.

The language which the Ohio General Assembly chose to express the abrogation of sovereign immunity in this state is quite similar to language employed in other jurisdictions for the same purpose. Ohio has consented "to have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties . . . ."[310] The State of New York declared that the state's liability is to be "determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . ."[311] The United States is liable in tort claims "in the same manner and to the same extent as a private individual under like circumstances. . . ."[312] Interpretations of these and similar clauses, utilizing the various doctrines listed in the previous paragraph to carry out the fundamental limitation on liability mentioned earlier, have produced layers of judicial confusion and contradiction. The Ohio Court of Claims has had a rather difficult time in attempting to establish principles for decision in this area. Being relatively new and inexperienced and still at experimental stages in its jurisprudence, it has found itself struggling among those layers of confusion and contradiction.

Interpreting the liability clause of the state's waiver of immunity has proved to be particularly troublesome for the court of claims. The court has sought guidance from decisions of state and federal courts in the search for a suitable test of liability of the state. The principles adopted by the court are best understood with reference to the development of federal tort liability and interpretations of liability clauses utilized by other jurisdictions.

B. *Federal Interpretations of the "Liability" Clause of the Federal Tort Claims Act*

1. The No Private Counterpart Doctrine

The first widely accepted delineation of the United States' liability for tortious government activities was pronounced by the United States Supreme Court in *Feres v. United States*.[313] In a negligence action to recover damages for the death of a United States serviceman who had died in a barracks fire, Feres' executrix alleged first that the Army knew or should have known that a defective heating system caused the barracks to be unsafe and second that the soldiers assigned to the fire guard and their supervisors failed to exercise due care in conducting the fire watch.[314]

The Supreme Court affirmed the dismissal of the action on the ground that

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[310] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[311] N.Y. CT. CL. ACT § 8 (McKinney Supp. 1978).

[312] 28 U.S.C. § 2674 (1976).

[313] 340 U.S. 135 (1950).

[314] *Id.* at 147.

the decedent's representative could not point to a case where a private individual's liability would be even remotely analogous to that sought against the Army. Soldiers have never been permitted recovery in any jurisdiction for the negligent act of their comrades or superiors, and no new cause of action had been created by the Tort Claims Act. Since private individuals do not have the power to conscript an army, there could be no liability of a private individual to provide an analog for the plaintiff's claim. The Court thus adopted a narrow construction of the words "the United States shall be liable . . . in the same manner . . . as a private individual under like circumstances . . . ,"[315] essentially reading the phrase "under like circumstances" to mean "under the same circumstances."

Reasoning further, the Court said that if any analogy were possible at all, it would be to state militia, and state militia were immune from tort liability. To reach the opposite result and find liability would require the Court to draw a parallel between the Army and a private landlord.[316] Such a parallel was not acceptable to the Court because it would ignore the peculiar relational status of the parties and would require the selective consideration of less than all of the circumstances of the case. That kind of selectivity would produce "novel and unprecedented liabilities"[317] to be visited upon the government, an effect clearly beyond the ken of Congress. Thus the principle was born which maintained the immunity of the United States when it was engaged in an activity for which there was no counterpart in the private sector. This principle for decision was widely approved and followed,[318] but the Court soon had an opportunity to reconsider the interpretation of the liability clause established in *Feres*.

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[315] 28 U.S.C. § 2674 (1976).

[316] 340 U.S. at 141-42. One of the "circumstances" which was considered by the Court was the serviceman-government relationship between the plaintiff and the alleged tortfeasor. The Court observed that if this relationship were ignored, analogous private liability would be found. For instance, there could be liability for negligence in the civilian doctor-patient relationship or for latent defects in a landlord-tenant relationship. Since the plaintiff had produced no cases in which the federal government or a state had been found liable to servicemen or militiamen, the Court concluded that no analogous private liability could be found under all the circumstances. *Id.* The Court thus seems to disregard the statutory requirement that the government be treated "as a private person" for the purposes of tort liability.

[317] *Id.* at 142. This phraseology has found its way into other federal opinions but is now contrary to the prevailing view. *See* Indian Towing, Inc. v. United States, 350 U.S. 61 (1955), *discussed in* text accompanying notes 319-24 *infra*, where the government argued that when the activity itself was uniquely governmental, there would be no liability for negligent performance of the activity.

A hypothetical situation was posited by the Court to illustrate the bizarre result that could obtain from this approach. Suppose the chief petty officer negligently ran over a pedestrian on his way to the lighthouse. Once there, he tripped over a wire and injured someone else. He then failed to inspect an outside electrical connection which failed and caused a ship to run aground. On his way out, the officer touched a key to an uninsulated wire and caused a fire. Under the "analogous private activity" argument, the government would be liable for some of these acts and not others, and yet all were done in furtherance of the officer's duties. The Court concluded that Congress could not have intended such a result. 340 U.S. at 66-67. *See also* Rayonier, Inc. v. United States, 352 U.S. 315 (1957).

[318] *See, e.g.*, Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); Henning v. United States, 446 F.2d 774 (3rd Cir. 1971); Levin v. United States, 403 F. Supp. 99 (D. Mass. 1975); Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966); Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); Polishuk v. Beavin, 223 Tenn. 287, 444 S.W.2d 140 (1969). *But see* United States v. Brown, 348 U.S. 110 (1954).

2. "Like Circumstances Means Like Circumstances"—The *Indian Towing* Standard

In 1955 a towing company's tugboat was moving a barge loaded with phosphate up the Mississippi River when it ran aground on an island upon which the Coast Guard operated a lighthouse. The grounding caused water to enter the barge and destroy the phosphate. The towing company brought an action in *Indian Towing, Inc. v. United States*,[319] claiming that the barge went aground because the Coast Guard was negligent in maintaining the lighthouse, thereby causing the light to fail, and that the Coast Guard negligently failed to warn of the lighthouse inoperation.

The government strongly asserted, on the authority of *Feres*, that the Coast Guard was performing a "uniquely governmental function"[320] and that there could be no liability in the absence of analogous private activity. Persuaded by this argument, the trial court had dismissed the action, and the United States Court of Appeals for the Fifth Circuit had affirmed.

The Supreme Court, limiting the application of the *Feres* rationale, reversed and remanded to the District Court. Writing for the majority, Justice Frankfurter sharply criticized such a narrow construction of the liability clause of the Federal Tort Claims Act. He recognized that the government's construction changed the meaning of the liability clause from "liability . . . under like circumstances . . ." to "liability under the same circumstances;"[321] under *like* circumstances one who initiates a service to warn the public of danger and induces the public to rely upon the warning must perform the service in a non-negligent manner. To analogize the status of the United States to that of a municipal corporation or other governmental entity rather than a private individual would force federal courts to enter "the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations."[322] He rejected the *Feres* test (essentially the "non-governmental-governmental" test) as unworkable and firmly established the standard of liability of the United States as like that of a private individual.

Speaking to the duty issue in the case, Justice Frankfurter said that ordinary "hornbook" tort law would apply. Since the Coast Guard undertook the function of warning people of dangers and encouraged reliance upon such warnings by operating the lighthouse, it assumed a duty to maintain the lighthouse with ordinary care or to warn of malfunctions.

The *Indian Towing* decision was not, however, a complete rejection of the *Feres* test. Distinguishing the cases, the Supreme Court ruled that *Feres* applied only to suits involving United States servicemen because federal law is the sole authority by which the relationship of military personnel and the federal government could be described.[323] Thus *Feres* remains good

[319] 350 U.S. 61 (1955).

[320] *Id.* at 64.

[321] *Id.*

[322] *Id.* at 65. Viewing decisions from all states on the issue of municipal liability, the Court found the conflicts in the law, both interjurisdictional and intrajurisdictional, to be irreconcilable. The Court concluded that the "non-governmental—governmental" distinction was inherently unsound.

[323] *Id.* at 69. Interpreting the language of the liability clause to mean what the words seem to plainly say, *i.e.*, private individuals under like circumstances, the Federal Tort Claims Act eliminates any need to rely upon the "non-governmental—governmental" distinction. However,

precedent in a very limited area of federal law, but the decision in *Indian Towing* displaced it as the dominant pronouncement upon the liability clause of the Federal Tort Claims Act.[324]

C. *The Discretionary Function Exception to the Federal Tort Claims Act*

1. The Reasons for Discretionary Immunity

Section 2680 of the Federal Tort Claims Act states that the Act shall have no application to: "Any claim based upon . . . the performance or failure to . . . perform a discretionary function . . . [by government employees], whether or not the discretion involved be abused."[325] While legislative history on the exception is somewhat sparse, there is some evidence of the basis for setting aside discretionary functions from the general imposition of liability under the Act.

According to House Report Number 1287,[326] the discretionary function exception was intended to preclude tort actions arising from certain authorized activities such as flood control or irrigation projects, when no negligence on the part of government employees could be shown and when the only ground for recovery would be that the same conduct by private individuals would be tortious.[327] For example, in the management of a stream bed in the interest of the public generally, the government operations may at times result in injury to a private landowner; the exception precludes the landowner from bringing a civil action in tort contesting the validity of the governmental action.[328] The exception amounts to a pronouncement of

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the Court distinguished *Indian Towing* from *Feres*, ruling that the *Feres* test of liability is applicable only to United States servicemen injured while performing acts in the course of or incident to their service. *Id. Cf.* Brooks v. United States, 337 U.S. 49 (1949) (allowing recovery under the Tort Claims Act even though the negligent act was not related to the serviceman's military duty).

[324] For an interesting application of the *Indian Towing* reasoning to an activity of a solely "governmental" nature, see United States v. Gavaghan, 280 F.2d 319 (5th Cir. 1960), in which liability was imposed upon the government for the negligence of employees of the Rescue Coordination Center in conducting a coordinated land-sea-air rescue under the National Search and Rescue Plan.

[325] 28 U.S.C. § 2680(a) (1976). *See generally* 3 K. DAVIS, *supra* note 233, §§ 25.08-.13; D. SWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT § 13.107 (1970); James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957); Johnson, *Federal Tort Claims Act—A Substantive Survey*, 6 U. RICH. L. REV. 65 (1971); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968); Comment, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161 (1976); 45 U. CIN. L. REV. 157 (1976).

[326] H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945). The text of this report is set out in Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 41 n.133 (1946). Gottlieb suggested that the discretionary function exception was intended to distinguish between the act of the government "qua government" and those of a proprietary nature. However, the governmental-proprietary approach has not been adopted. *See* notes 322-23 *supra*.

[327] H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945).

[328] *See* Coates v. United States, 181 F.2d 816 (8th Cir. 1950). In *Coates*, the plaintiffs alleged damage to their lands from an unusual overflow of the Missouri River. This overflow was alleged to result from the federal government's program for control and development of the river. The court dismissed, holding that the discretionary function exception was intended to foreclose actions based upon an authorized activity such as flood control or irrigation when no negligence on the part of the government was shown. There would be grounds for recovery only if the same conduct by a private party would be tortious. *Id.* at 820.

governmental privilege to act, even in the face of injury that might otherwise be described as tortious.[329] If the privilege were based solely upon common law principles, the injured party would generally be able to overcome the privilege upon proving that the discretion had been abused by the defendant.[330] The language of the section, however, forecloses that strategy from being employed, thereby preserving a vestige of sovereign immunity in the law.

The root of discretionary immunity thus employed is the principle of separation of powers, which is of primary importance in our constitutional system of government.[331] In fundamental analysis, the responsibility for basic policy formulation and implementation has been committed in our tripartite system to the legislative and executive branches of government. The judiciary most certainly is closely involved in its role of defining and guarding the statutory and constitutional boundaries inside which those formulations and implementations must remain, but the courts have also been diligent to avoid incursions into those areas of responsibility in ways which would tend to cripple the effectiveness of coordinate branches of government.[332]

When those coordinate branches have dictated the course of official action through statute or regulation and public employees act in accordance with the judgment embodied in those dictates, actions in tort are thought to be an inappropriate manner in which to challenge the validity of the official conduct.[333] The belief is that the legislative or executive choices between alternate courses of conduct should be controlled by considerations of social, political and economic factors, not by the potential for private damage suits.[334]

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[329] A second example was suggested in the House Report. Regulatory agencies, such as the Securities and Exchange Commission, are often empowered to exercise discretion in the choice between alternative courses of action. In the issuance of a stop order to a business for alleged violations of law, for instance, the SEC assumes a quasi-legislative, quasi-judicial character. An order may subsequently be held invalid, either on the grounds that the agency abused its discretion or because the order was negligently based upon inaccurate information. The discretionary function exception would apply, according to the House Report, to preclude an action brought by the business for loss of profits during the shutdown period. H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945).

[330] *See generally* RESTATEMENT (SECOND) OF TORTS § 890 & Comments (1979).

[331] Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488, 498 (1953). This commentary reviewed various factors which have been considered in the judicial application of the exception, such as the language of the statutes under which government employees act, the type of discretion which is exercised, the position of the employee in the governmental hierarchy, the encouraging influence of a finding of liability on future damage actions and the uniquely governmental nature of a given activity. *Id.* at 492-98. The authors suggested that much of the reluctance in judicial applications of the exception has resulted from the overemphasis of one or more of these factors in many cases. However, the note concluded that the one guiding principle behind these factors was the traditional notion of the separation of powers. *Id.* at 498.

[332] *Id.* The discretionary function exception sought to reinforce the legal doctrine developed prior to the passage of the Tort Claims Act whereby the courts "scrupulously refrained from unwarranted interference with the legislative and executive departments of government."

[333] *See* 3 K. DAVIS, *supra* note 233, § 25.11.

[334] *Id.*; Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488, 492-98 (1953); Comment, *Federal Tort Claims Act: The Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 188-90 (1976). *See also* Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting); Johnson v. State, 69 Cal. 2d 782, 793, 794 n.8, 447 P.2d 352, 360, 361 n.8, 73 Cal. Rptr. 240, 248, 249 n.8 (1968).

This framework of thought should be kept in mind in the following review of interpretations of the discretionary function exception that have been rendered by the federal courts. In the evolution of the federal approach to this provision, several significantly different views of discretionary immunity have been employed. The success of each has depended upon its relative correlation to the policy underpinnings of the exception.

2. Discretionary Acts of Government—The Federal Rejection of the Governmental-Proprietary Distinction

Shortly after the enactment of the Federal Tort Claims Act two familiar concepts were suggested as modes of interpretation of the discretionary function exception.[335] The first was the governmental-proprietary distinction,[336] which had long been employed to test the extent of local government liability.[337] The other was the distinction between ministerial, or mandatory, functions of public officials and those which required the exercise of discretion. The latter approach is generally taken to determine whether a writ of mandamus will lie against a public officer.[338] It was believed that one of these approaches would be employed in interpreting the Federal Tort Claims

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[335] Gottlieb, *supra* note 326.

[336] *Id.* at 42. The author mentioned the governmental-proprietary distinction in relation to the flood control example used in House Report 1284. *See* H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945), *discussed in* text accompanying notes 326, 327, 329 *supra*. According to Gottlieb, the exception would preclude action based on the appropriation of private lands when no negligence on the part of government employees was shown. In such cases, the plaintiff would have to resort to the historic demand for just compensation under the fifth amendment, and recovery for remote or consequential damages would be disallowed. Gottlieb, *supra* note 326, at 42-43. Although the governmental-proprietary distinction has not been adopted, the federal courts have uniformly denied recovery under the Federal Tort Claims Act in appropriation cases. *See* Coates v. United States, 181 F.2d 816 (8th Cir. 1950) (denial of recovery for water damage allegedly caused by negligent placement of dikes). *But see* Jemison v. Duplex, 163 F. Supp. 947 (S.D. Ala. 1958) (recovery allowed when government engineers drafted plans for dredging of river in negligent disregard of rights of property owners along the shore).

[337] *See* 3 K. DAVIS, *supra* note 233, § 25.07. Davis termed the governmental-proprietary distinction "one of the most unsatisfactory known to the law." A Virginia case was reviewed by the author to illustrate the confusion which results from this approach. In Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939), the Virginia Supreme Court was called upon to determine whether the operation of a swimming pool by the city was governmental or proprietary. The court set out as the underlying test whether the act was for the common good of all or whether it was done for special corporate benefit or pecuniary profit. In prior cases the court had determined that the operation of a jail, the removal of garbage and the establishment of parks and playgrounds were governmental activities. On the other hand, the construction and the repair of streets and sidewalks and the operation of a waterworks were found to be proprietary in nature. Despite the similarity between a city playground and a city swimming pool, the court opted for the waterworks analogy. Since the operation of a swimming pool was for the common good, the court concluded the activity was governmental and not subject to liability. *Id.* at 156, 200 S.E. at 615.

[338] Gottlieb, *supra* note 326, at 44. *See also* Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). In this article, Peck expounded at length on the possible use of the mandamus test in the application of the discretionary function exception. The author suggested that the mandamus test would shift the focus of the exception from the general nature of the activity or the position of the official in the executive hierarchy to the actual decision made in a given case. In other words, it would be no defense to argue that the general area of activity was one in which discretion might be exercised. The government would have to show that a particular decision of a public official was in fact made in the exercise of discretionary powers vested in him. *Id.* at 221-22. This approach has been criticized for placing too great a burden on the government and for failing to define the degree of discretion which must be present for the immunity to apply. *See* Reynolds, *supra* note 325, at 114.

Act since the courts were already accustomed to applying the concepts to other circumstances challenging governmental activity.

Those expectations have not been borne out by federal jurisprudence. The United States Supreme Court definitely rejected the governmental-proprietary distinction in *Indian Towing*,[339] where it reviewed the case law in the forty-eight states and, finding it to be hopelessly confused, declined to follow that method of analysis. As discussed previously, the change in perspective of the federal courts from the *Feres* doctrine to the *Indian Towing* formula represents a relaxation of judicial caution in the area of governmental liabilities with the growth of experience. The *Feres* court adopted a rule of strict construction in favor of the government in order to avoid incursions into uncharted areas of tort liability. As it became clear to the judiciary that principles of ordinary tort law would be adequate to hold government culpability within predictable limits, the courts, through the *Indian Towing* analysis, expanded the scope of liability. However, the discretionary function exception was not directly in issue in either of these cases. The analysis of that exception must begin with consideration of the United States Supreme Court decision in *Dalehite v. United States*.[340]

3. The Planning-Operational Distinction: *Dalehite v. United States* and its Progeny

Dalehite was one of more than 300 lawsuits which arose out of the Texas City disaster in 1947. Two ships had been loaded with FGAN, a chemical fertilizer. The fertilizer was known to be flammable, yet one of the ships on which it was loaded carried a large amount of explosives. The ship caught fire and both ships carrying the substance exploded, devastating much of the city and killing many people. Plaintiff alleged that the government was negligent in investigating the properties of FGAN and transporting it in a congested area without warning of the hazard of explosion.

Justice Reed, speaking for the majority, held that all the activities alleged to have been negligently performed were within the discretionary function exception to the Federal Tort Claims Act. To appreciate the majority opinion fully, it is important to note that the entire FGAN operation was the subject of an extremely detailed plan adopted at high executive levels. The plan addressed all aspects of manufacture and shipment of the operation.[341] The Court held that the exception encompassed not only the initiation of programs

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[339] Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955). The *Indian Towing* decision was not based upon the discretionary function exception but upon section 2674 of the Federal Tort Claims Act, which imposes liability on the United States in the same manner and to the same extent as liability is imposed upon a private person under like circumstances. The Court rejected the argument that the government could be held liable in the same manner as a private person only when engaged in proprietary as opposed to governmental activities. The rejection of the governmental-proprietary distinction in this context indicated that no provision of the Federal Tort Claims Act would be interpreted as including it. *See* Reynolds, *supra* note 325, at 100.

The government conceded in *Indian Towing* that the discretionary function exception did not apply. 350 U.S. at 64. Many states have likewise rejected the governmental-proprietary distinction. Although twenty-five states still use the distinction in the determination of municipal liability, Pennsylvania appears to be the only state that applies the distinction to the liability of the state. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 25.02 (1976).

[340] 346 U.S. 15 (1953).

[341] *Id.* at 38-39. Even the type of bagging was specified.

or activities but also executive determinations in the establishment of plans, specifications, or schedules of operation.[342] It concluded that decisions made at the planning stage of the activity, as opposed to the operational level, are immune from liability under the discretionary function exception.[343]

Two main interpretations of the case have been suggested in the commentary following it.[344] One view is that whenever the initiation of a government project is a discretionary act, the subsequent performance of the project carries the discretionary immunity with it. Several lower court decisions have reached substantially that result by this broad interpretation of *Dalehite*.[345] The other interpretation draws a line between planning phases and the performance, or operational, phases of the project. Decisions at the planning phase, involving the formulation of basic public policy, are within the exception. Conduct at the operational stage is not. This second interpretation of *Dalehite* has gained the most support.[346] In *American Exch. Bank v. United States*,[347] for example, plaintiff sued for injuries sustained by falling off the steps of a post office because there was no handrail. The trial court held that the decision not to install a handrail was discretionary and thereby within the exception. The case was reversed on appeal on the ground

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[342] *Id.* at 35-36.

[343] *Id.* at 42.

[344] For a discussion of *Dalehite* and its implications, see Reynolds, *supra* note 325, at 93-113.

[345] In Harris v. United States, 205 F.2d 765 (10th Cir. 1953), the government had conducted a conservation operation which involved the spraying of herbicide over government lands. During the spraying some of the herbicide drifted over the crops of adjoining landowners. The landowners sued under the Federal Tort Claims Act for the resulting damage. The court of appeals found no significant difference between the spraying of vegetation and the manufacture and shipment of fertilizer which had been involved in *Dalehite* and affirmed the trial court's finding that the spraying operation was a discretionary function. *Id.* at 766-67. In Ashley v. United States, 215 F. Supp. 39 (D. Neb. 1963), *aff'd on other grounds*, 326 F.2d 499 (8th Cir. 1964), the plaintiff had been bitten by a bear in Yellowstone National Park. The bear had been known to have exhibited aggressive behavior in the past and was destroyed subsequent to the Ashley incident. The court held that the handling of a troublesome bear was a discretionary function within the exception, quoting the following language from *Dalehite:*

> Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a casual step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

215 F. Supp. at 46, *quoting* Dalehite v. United States, 346 U.S. at 35-36. The *Ashley* court held that discretionary immunity encompassed not only the formulation of the policy regarding the handling of wild animals but also the making of decisions effectuating the basic plan. 215 F. Supp. at 46. These cases seem to define discretion as any exercise of judgment or choice and have been criticized for applying the discretionary exception too broadly. *See* Reynolds, *supra* note 325, at 108-10.

[346] *See* the discussion of *Indian Towing, Inc. v. United States* at note 319 *supra*. Although the question of duty was at issue in *Indian Towing*, rather than the application of discretionary immunity, the implication of the exception is clear. The Court held that the Coast Guard need not have chosen to operate the lighthouse. However, once the discretion to act was exercised and reliance on the light engendered, the Guard was obligated to use due care to maintain the light or warn of its malfunction. 350 U.S. at 69. This determination has been viewed as implicit support of the planning-operational interpretation of *Dalehite*. *See* 3 K. DAVIS, *supra* note 233, § 25.10. Davis concluded from *Dalehite* and *Indian Towing* that the government would not be held liable for policy decisions at the planning stage of activity, but once the discretion to act was exercised there was an obligation to perform at the operational level in a non-negligent manner. *Id. See also* D. SWARTZ & S. JACOBY, *supra* note 325, § 13.107.3.

[347] 257 F.2d 938 (7th Cir. 1958).

that the original decision to build a post office was discretionary but the decision relating to the handrail was operational and subject to liability.[348]

As the contrasting applications of the *Dalehite* concept indicate, decisions which use the concept simplistically as a doctrinal tool to characterize the circumstances of the case in order to achieve a particular result are subject to criticism.[349] The weakness, of course, is in the failure to develop a definition for discretionary function. As long as options for decision can be presented, the government activity can be asserted as discretionary in good faith. Does the determination of discretion precede and dictate the determination of whether the activity is a planning or operational stage or vice versa? One of the best attempts to refine the concept of the planning-operational test demonstrates that the distinction inherent in the test may be artificial and merely a statement of the fundamental reasons for discretionary immunity. A district court proposed this definition in *Swanson v. United States*:[350]

> The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, or social effects of a given plan or policy. . . . The operations level decision, on the other hand, involves decisions relating to the normal day-by-day operations of government.[351]

Since this definition is merely a reflection and restatement of the interest in preserving the separation of powers in circumstances where the responsibility for basic policy formulation has been committed to coordinate branches of government, recent decisions have abandoned the planning-operational test as artificial. A new test for discretionary immunity, addressed directly to the reasons for the immunity, has begun to emerge.

4. The Policy Formulation Test

An independent test for discretionary immunity was proposed by the Sixth Circuit Court of Appeals in *Downs v. United States*.[352] A small passenger plane was hijacked and taken from Nashville, Tennessee, to Jacksonville, Florida, with the hijacker, his estranged wife, an associate and two crew members aboard. When the plane landed in Jacksonville, Federal Bureau of Investigation agents refused to allow it to refuel. When the agents used rifle fire to disable the plane, the hijacker shot his wife, the pilot, and himself. Survivors of the victims sued the F.B.I., alleging negligence in the agents' handling of the affair.[353]

The government argued that the discretionary function exception applied to law enforcement operations, negating the court's jurisdiction over the claim. The court of appeals disagreed. The court thoroughly analyzed the legislative history of the exception and criticized other courts for attempting

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[348] *Id.* at 939.

[349] See the discussion of *American Exch. Bank* and the planning-operational distinction in Reynolds, *supra* note 325, at 103.

[350] 229 F. Supp. 217 (N.D. Cal. 1964).

[351] *Id.* at 220.

[352] 522 F.2d 990 (6th Cir. 1975).

[353] *Id.* at 994.

to mold *Dalehite* into a precise standard. It also rejected the planning-operational test as inadequate because it focused on the status of the individual making the judgment.[354] The court adopted the straightforward approach of determining whether the judgments of public employees are of the nature and quality that Congress intended to put beyond the scope of judicial review. Since Congress intended discretionary functions to encompass those activities directed to the formulation of governmental policy, the court concluded that the justifications for the exception do not necessitate a broader application than decisions representing an administrator's exercise of quasi-legislative or quasi-judicial functions.[355] Under this restricted definition, the action of the F.B.I. agents in *Downs* were held not to qualify for immunity.[356]

The policy formulation approach most closely serves the policy underpinnings of the discretionary function and presents the least danger of developing as a doctrinaire mechanistic technique for deciding cases of governmental liability. If the principles of orthodox tort law can be seen as limitations on the threat of "runaway liability," then discretionary function immunity should be defined no more broadly than necessary to preserve a compelling interest the citizenry has in its government. Where legislative or administrative prerogative is shown to be at a premium to avoid dilution of the inherent separation of powers in our system of government, such a compelling interest will have been demonstrated. In such a case, the courts should apply the exception to prevent the threat of private damage actions from having that effect. However, where no such considerations appear, or where they are outweighed by the interests in providing a remedy for an injury due to governmental wrongdoing, the exception should be narrowly construed to prevent the preservation of "islands of immunity."[357]

D. *The Value of Federal Case Authority in Actions before the Ohio Court of Claims*

The Ohio Court of Claims and the Ohio Tenth District Court of Appeals

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[354] *Id.* at 996-97.

[355] *Id.* at 997-98. *See* 45 U. CIN. L. REV. 157, 162 (1976), concluding that the *Downs* court had arrived at an accurate and workable interpretation of the discretionary function. Several states have adopted the policy formulation approach to the interpretation of statutes analogous to the federal discretionary function exception. *See, e.g.*, State v. Abbott, 498 P.2d 712 (Alaska 1972). In *Abbott*, the Supreme Court of Alaska reviewed the history of the discretionary function exception in federal and state courts and concluded that the policy formulation approach was the best reasoned interpretation. *Id.* at 717-21. *See also* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[356] 552 F.2d at 997-98. The court distinguished an earlier decision in United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965), which held the actions of law enforcement officers to be within the discretionary function exception. The decisions involved in *Faneca* were those of two high executive officials in effecting the safe enrollment of a black student at the University of Mississippi. These officials had formulated a plan to serve as a guide for other government officials in similar circumstances. However, the *Downs* court held that while the formulation of law enforcement policy fell within the exception, the courts could apply the test of reasonableness to the actions of an F.B.I. agent in a given circumstance without interfering in the policy determinations of coordinate branches of government. 522 F.2d at 997-98.

[357] Boileau v. DeCecco, 125 N.J. Super. 263, 266, 310 A.2d 497, 499 (1973), *aff'd*, 65 N.J. 234, 323 A.2d 449 (1974).

have disagreed on the value of analogy to the Federal Tort Claims Act and interpretations of the discretionary function exception. The court of appeals has determined that the Federal Tort Claims Act is not a valuable resource in interpreting the Ohio Court of Claims Act[358] because of a significant difference in the language of the two statutes.[359]

There are obvious differences in the two enactments. First, the Ohio act is a general waiver of sovereign immunity,[360] while the Federal Tort Claims Act provides a remedy only for property damage or personal injury arising from the tortious conduct of public employees.[361] However, the cases in which the concept of discretionary immunity has come into play have invariably been tort actions so it would seem appropriate to utilize the federal cases as a resource for analysis.

The statutes are more closely analogous in other important respects. As previously discussed, under the federal act, the United States may be held liable when a private person would be liable under like circumstances in accordance with the law of the state in which the injury occurred.[362] Similarly, the liability of the State of Ohio is to be determined in accordance with the rules of law applicable to suits between private individuals in the state.[363] Counsel wishing to rely upon federal authority for their arguments in the court of appeals should be aware of the view of that court on the value of such authority, but that is not to say that counsel should refrain from using appropriate cases. Such use, with careful attention paid to, and accentuation of, the fundamental similarities present in the respective enactments should prove to be helpful to both the attorney and the court.

The court of claims may be more receptive to the use of federal case authority. That court has often indicated an affinity for the analog of the federal discretionary function exception in its conceptualization of state immunity in the conduct of discretionary acts.[364] However, the court's conceptualization of the exception has not been in line with the federal cases. The federal courts have interpreted the exception provision of the Federal Tort Claims Act since 1946, and the analysis has undergone a slow, but positive, evolution. The effective practitioner should not assume that federal law addressing a given factual circumstance has been received and embraced by the court of claims but instead should be aware of areas of congruence and divergence.

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[358] Shelton v. Bureau for the Prevention of Indus. Accidents & Diseases, 51 Ohio App. 2d 125, 129, 367 N.E.2d 51, 53 (10th Dist. 1976).

[359] *Id.* The court of appeals did not discuss the point beyond this initial observation.

[360] *See* OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978); text accompanying note 10 *supra.*

[361] 28 U.S.C. § 1346 (1976).

[362] *See* notes 316-25 *supra* and accompanying text.

[363] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[364] The federal discretionary function exception, 28 U.S.C. § 2680(a) (1976), was cited by the court of claims in Devoe v. State, No. 75-0105, slip op. at 19 (Ohio Ct. Cl. June 18, 1975), and in Adamov v. State, 46 Ohio Misc. 1, 8, 345 N.E.2d 661, 666 (Ct. Cl. 1975). The strength of this conclusion is evident in the fact that the court of claims has, by informal unpublished memo to the Ohio General Assembly, discussed the possible amendment to the Court of Claims Act to include an exception provision nearly identical to the Federal Tort Claims Act exception.

E. *California Interpretation of the "Liability" Clause*

The California legislature enacted rules in 1963 which enabled public entities to be held liable for injuries resulting from governmental activity.[365] Rather than attempting to capsulate the liability of the government, as does the Federal Tort Claims Act, the California scheme addresses specifically most of the situations which might engender public entity liability. For example, medical and public health related settings are addressed in one chapter,[366] while other chapters are devoted to fire protection,[367] police and corrections,[368] and dangerous conditions on public property.[369]

A general liability section was enacted as well as the specific provisions. It imposes liability upon a public entity when the acts of an employee of that entity which are within the scope of employment would subject the employee to liability.[370] That means that the public entity is subject to the same common law principles of tort liability as the public employee. The statute embodies the *Indian Towing* formula for determining governmental culpability and eliminates the need to provide analogous private activities as a means of distinguishing "non-governmental" from "governmental" activities.[371] Thus, under the California courts' interpretation of the clause, although government liability still is subject to the controls of the California Tort Claims Act, "when there is negligence, the rule is liability, immunity is the exception."[372] So long as the plaintiff is able to establish some "acceptable theory of liability" under the common law pertinent to the employee's actions, the courts, in applying the California liability clause, will have little difficulty in imposing liability against the public employer.[373]

[365] CAL. GOV'T CODE §§ 810-996.6 (West 1966 & Supp. 1979). This statute was passed in response to Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). The decision in *Muskopf*, authored by Justice Traynor of the California Supreme Court, abolished sovereign immunity for "governmental" acts when the state employees involved would be liable. Immunity of the state was preserved for "discretionary" acts, but the court, citing its decision in Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961), implied that the state could be liable in some circumstances even if its employees were immune.

[366] CAL. GOV'T CODE §§ 854-856.4 (West 1966 & Supp. 1979).

[367] *Id.* §§ 850-850.8.

[368] *Id.* §§ 844-846.

[369] *Id.* §§ 835-835.4, 840.2.

[370] The California statute addresses itself to the possible implication that a public entity may be liable even when the employee is immune by declaring that when an employee is immune from liability, the public entity shall also be immune unless a statute provides otherwise. *Id.* §§ 815.2(a), .2(b).

If a situation should occur wherein a public employee would be liable for an act or omission but the public entity is granted immunity by declaration of statute, the statutory grant of immunity prevails, and the public entity cannot be held liable for the act of its employee. *Id.* § 815(b).

[371] Prior to the decision in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), California was one of the jurisdictions struggling in the "quagmire" to which Justice Frankfurter referred in *Indian Towing*. *See* Sava v. Fuller, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).

[372] Duarte v. State, 88 Cal. App. 3d 473, 489, 151 Cal. Rptr. 727, 737 (1979) (on rehearing), *quoting Muskopf*, 55 Cal. 2d at 219, 359 P.2d at 462, 11 Cal. Rptr. at 94. *See also* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 819, 131 Cal. Rptr. 854, 857 (1976).

[373] Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 815, 819, 131 Cal. Rptr. 854, 857 (1976); *see also* Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

F. *New York Interpretation of the "Liability" Clause*

Judicial treatment of governmental liability in New York presents a confused tapestry of interpretation. Since the New York Court of Claims Act pre-dated the Federal Tort Claims Act by several years and subjected the state to the same principles of liability applied to individuals, the New York courts had occasion to face the "governmental function" argument well before the United States Supreme Court was called upon to decide *Indian Towing*.[374] In 1936, the New York Court of Appeals heard the claim of a minor plaintiff who had been committed by a police court to a private reformatory pursuant to statutory authority. Plaintiff was injured when she operated an apparatus for ironing fabrics, allegedly without adequate instruction from her supervisors. The issue presented in the action brought by the plaintiff in *Page v. State of New York*[375] was whether the officers and employees of the institution were officers and employees of the state, which would give rise to the application of the state's waiver of immunity. Over a strong dissent, which raised the argument that the reformatory was performing a delegated function of government and that the state's waiver of liability had not extended to such entities, the majority of the court affirmed a judgment for plaintiff.

Some later decisions of the New York courts applied the same type of analysis as that employed in *Indian Towing*. For example, the City of New York has been held liable for negligently removing an illegally parked motorcycle during a city campaign to relieve traffic congestion. The court declared that the city's liability would be determined as if a private individual had been carrying out the governmental activity.[376] When a state trooper failed to warn about or remove an unlighted abandoned truck on the highway, the state was held liable for the negligent exercise of the governmental function. The court quoted with approval an earlier case which had said, "[e]ven if there was no liability on the part of defendants to furnish police protection to the public, when said defendants undertook to act . . . they assumed the duty of acting carefully."[377]

However, a strain of the disfavored *Feres* rationale exists in the New York case law contemporaneously with the *Indian Towing* type of analysis. For example, in *Granger v. State*,[378] plaintiff claimed that the Commissioner of Motor Vehicles negligently failed to revoke the license of a motorist, after the commissioner had received notice that the motorist's insurance had been cancelled. Plaintiff was involved in an auto accident with the motorist and

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[374] *See* Bloom v. Jewish Bd. of Guardians, 286 N.Y. 349, 36 N.E.2d 617 (1941), which rejected the governmental function argument on the rationale that the defendant was exercising its function as a delegate of the state, and since the state had waived immunity, the derivative immunity of the defendant was thereby destroyed. Compare the approach of the Ohio courts discussed at notes 96-110 *supra* and accompanying text.

[375] 269 N.Y. 352, 199 N.E. 617 (1936).

[376] Simon v. City of New York, 53 Misc. 2d 622, 624, 279 N.Y.S.2d 223, 226 (Civ. Ct. N.Y. 1967).

[377] Peterson v. State, 37 Misc. 2d 931, 935, 235 N.Y.S.2d 397, 401 (Ct. Cl. 1962), *aff'd*, 19 App. Div. 2d 860, 245 N.Y.S.2d 345 (Sup. Ct. 1963), *quoting* Mentillo v. City of Auburn, 2 Misc. 2d 818, 150 N.Y.S.2d 94 (Sup. Ct. 1956).

[378] 14 App. Div. 2d 645, 218 N.Y.S.2d 742 (1961).

sought recovery from the state. Despite a statute directing the commissioner to take the action plaintiff was complaining had not been accomplished, the court found no liability for the reason that the function of the commissioner was not the type of activity that could be engaged in by a private individual. In *Terrace Hotel Co. v. State*,[379] the claim for damages arising from the state's attempt to appropriate negative easements on plaintiff's property for the purpose of restricting highway billboards was dismissed because the acts "could only be performed by a sovereign"[380] and not by a private person. The best that can be said then about the New York jurisprudence on the matter is that the state's liability will be that normally imposed upon persons in the private sector, except when the court is persuaded that the activity complained of is "uniquely governmental" and cannot be performed by a private individual. Given the type of activities upon which liability has been imposed, it cannot be said with any degree of certainty what acts of the state are those that "could only be performed by a sovereign" and thereby remain immune. The decisions, in their collective characteristics, present a style of judicial analysis that should not be emulated by the Ohio Court of Claims.

G. *Ohio Interpretation of the "Liability" Clause*

1. Introduction

Although Ohio's statute is not as comprehensive as the California Tort Claims Act, Ohio's liability clause is similar to the California one and bears a close resemblance to the New York and Federal Tort Claims Act clauses. Of the judicial approaches in the three jurisdictions the one that would be the least recommended to a relatively new court construing a similar statutory scheme would be the New York approach. If there is pattern to that approach, it would be best described as a "patchwork quilt" pattern of conflicting and confusing case law which conforms to no reasonably predictable direction of development. When a new court is charged with the task of construing a new statute conferring a new regime of legal relationships between government and people, a certain amount of caution and conservatism is to be expected as that court experiments with principles for decision and seeks to "work the bugs out" of the new system. Five years of operation may be too short a period of time in which to reach solid evaluative conclusions about the performance of the court of claims in its tasks. However, five years is not too short a time in which to expect some directions for development to have been identified. Unfortunately, the Ohio Court of Claims does not seem to have benefitted as much from the federal experience as one might expect,[381] and at present

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[379] 46 Misc. 2d 174, 259 N.Y.S.2d 553 (Ct. Cl. 1965).

[380] *Id.* at 178, 259 N.Y.S.2d at 558. A duty to use reasonable care to protect a potential victim has been imposed upon a state employed psychotherapist who determines or should have determined that his patient posed a serious threat of harm to that potential victim. A warning may constitute a reasonable means of fulfilling such a duty of due care. Additionally, a duty to warn the potential victim may attach to the police if a special relationship exists between them and either the potential victim or the individual threatening the harm. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

[381] The court of appeals should share this criticism, for it often decides cases without real comment upon the analysis of the court of claims. *See, e.g.*, Jones v. State, No. 77AP-688 (Ohio 10th Dist. Ct. App. Dec. 5, 1977).

its analytical approach more closely resembles that of the New York courts.

Some patterns of decision have emerged. Interpretations of the liability clause have produced essentially five theories which have repeatedly been applied in the court of claims and Tenth District Court of Appeals decisions. With some refinement of those theories the New York pattern can be avoided. That refinement will come if the Ohio courts avoid the method of reasoning *from* a result, a method which would employ legal theory in an empty and meaningless way, espousing it as if it were doctrine instead of analytical technique to be used to reason *toward* a result. The following sections examine those theories with a view to suggesting where refinement is needed. As will be seen, some imprecision and inconsistency is present in the decisions. Refinement of judicial principles for decision comes by removing imprecision and inconsistency. That task of removal is best approached by attorneys who are aware of where imprecision and inconsistency lie. This discussion is intended to assist in that task by delineating the flaws.

2. The Foundation of the Ohio Court of Claims' Philosophy of State Liability—The *Devoe* Case

a. *An Overview of* Devoe

The possibility of judicial limitation upon the liability clause of the Ohio Court of Claims Act first came in the area of tort claims arising out of administrative regulation of business activities. In *Devoe v. State*,[382] the plaintiffs brought a class action on behalf of the holders of preferred stock and beneficial trust units of three corporations, alleging fraud and violation of Ohio security law on the part of these corporations. The claim against the state was that the Division of Securities of the Ohio Department of Commerce was negligent because it had been informed of fraudulent practices of the issuers, yet failed to deny registration of the securities and remedy the fraud. Plaintiffs alleged further that the registration of the securities under these circumstances constituted a misrepresentation to the public and a violation of federal securities law. The court of claims dismissed the action for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.[383] The court was apparently convinced that to impose liability under such circumstances would render the state an insurer in the conduct of all of its regulatory activities.[384] Consequently, the court chose to construe the Court of Claims Act narrowly and to severely restrict the scope of governmental liability. Points of the opinion and the theories of law that were espoused in it are treated separately below for the sake of clarity and emphasis.

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[382] No. 75-0105 (Ohio Ct. Cl. June 18, 1975), *aff'd*, 48 Ohio App. 2d 311, 357 N.E. 2d 397 (10th Dist. 1975).

[383] No. 75-0105, slip op. at 21.

[384] *Id.* at 20. The court summarized its dismissal of the action with the following words:

> To hold the State of Ohio to be an "insurer," or "guarantor" of securities, registered as required by Ohio law, would require an unmistakable statute to that effect . . . . To insure against foolish or unwise speculative investments, commitments with a high risk factor, and uneconomic enterprises susceptible of failure, can only be accomplished by legislation revealing a clearly and unmistakably expressed intention to "insure."

Id. at 20-21.

i. Violation of Federal Law

The court quickly disposed of the part of plaintiffs' claim alleging that the state had violated federal securities law. The Federal Securities and Exchange Act of 1933[385] makes it unlawful for any person to use interstate commerce to accomplish a fraudulent sale of securities.[386] The word "person" is defined in that Act to include governments or political subdivisions.[387] However, the law is applicable only to persons who engage in the offer or sale of securities.[388] Since the state had not offered or sold any securities in the case, there could be no violation of the federal act. The court also concluded that it had no jurisdiction to hear claims based upon federal law and that the eleventh amendment would bar a similar action against the state in federal court.[389]

ii. No Common Law Duty

The misrepresentation claim was based upon the theory that "the same rules of law applicable to suits between private parties"[390] would subject the state to substantive common law principles of that tort. The court's response was quite blunt: "There can be no such thing as common law liability attaching to a sovereign state created by the enactment of a constitution by a sovereign people. . . . There is no common law duty and there can be no consequent common law liability."[391] Absent a pronouncement of official duties or a subsequent expansion or modification of them by constitutional or statutory mandate, the common law would supply no scheme of liability to modify the relationship of government to its people.

iii. Duty Imposed Only by Statute

Since the court had rather summarily disposed of the question of common law liability, it subsequently looked to the statutes authorizing the Division of Securities' activities as a possible basis for duty. The court concluded that while the purpose of those statutes was to protect the public generally from the dangers of fraud in the sale of securities, they did not impose a duty upon the division to protect individual purchasers.[392]

There are several aspects of Ohio securities law which support the negation of such a duty.[393] Not all securities sold in Ohio are subject to regulation by the division; notably excepted are those which are issued or

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[385] 15 U.S.C. § 77 (1971).

[386] *Id.* § 77q. Under this section, it is unlawful for any person, in the offer or sale of securities by means of interstate transportation or communication, to employ any device or scheme to defraud, to obtain money by means of a material misrepresentation of fact, or to engage in any transaction or practice which operates to defraud purchasers.

[387] *Id.* § 77b(2).

[388] *Id.* § 77q.

[389] No. 75-0105, slip op. at 4-5.

[390] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[391] No. 75-0105, slip op. at 5.

[392] *Id.* at 13.

[393] The Ohio "Blue Sky Law" is OHIO REV. CODE ANN. §§ 1707.01-.45 (Page Supp. 1978). For an overview of administrative procedures under this statute see Note, *Ohio Securities Act: Powers, Sanctions, and Constitutional Objections*, 17 CASE W. RES. L. REV. 1098 (1974).

guaranteed by the federal government.[394] Even among those securities which must be registered with the division, some may be rejected by description only.[395] The remaining class of securities, to which the securities in *Devoe* belong, are subject to the more stringent registration by qualification. Securities are qualified if the business of the issuer is not fraudulently conducted, the proposed offer is not grossly unfair, and the sale of the securities would not tend to defraud the public. However, an issuer applying for registration by qualification must submit statements verifying the non-fraudulent character of its securities, and the division may rely upon those statements in making its determination.[396] Further investigation of the issue may be made by the division, but it is not required to do so by the law.[397] Moreover, the initiation of enforcement proceedings against supposed violators is clearly within the discretion of division officials.[398] On the basis of the provisions which permit but do not require the suspension of registration, revocation of licenses, injunctions of sales, and initiation of criminal proceedings, the court concluded that division employees could not have been under a legal duty to do what the plaintiffs sought to have them held liable for not doing.

iv. *Ultra Vires* Acts of Public Employees

In further consideration of the plaintiffs' misrepresentation claim, the court looked to the essential elements of the cause of action based upon that theory. The fundamental tort law of misrepresentation requires the plaintiff to establish the defendant's intent to mislead. The court reasoned that since a state agency can act only within the "range of delegated authority,"[399] and state statutes do not authorize fraud and deceit, intentional torts by state employees would be *ultra vires* and outside the scope of employment. For such acts, the state could not be held liable for failure to "guarantee . . . the fidelity of any of the officers or agents whom it employs."[400]

v. No Analogous Private Activity

In attempting to explain further the inappropriateness of this particular

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[394] OHIO REV. CODE ANN. § 1707.02(B) (Page Supp. 1978). This section generally exempts all securities which are issued or guaranteed by, and recognized as the valid obligation of, the United States, a state, any political subdivisions and foreign governments with whom the United States is maintaining diplomatic relations.

[395] OHIO REV. CODE ANN. §§ 1707.03-.08 (Page 1968). Registration by description is a summary procedure. The issuer must submit a statement, verified by oath, containing the name of the issuer, a brief description of the securities, the amount of securities to be offered for sale, the price, and a brief statement of facts demonstrating that the securities fall within the class subject to registration by description.

[396] *Id.* § 1707.09(K).

[397] *Id.*

[398] *See id.* §§ 1707.23-.26.

[399] No. 75-0105, slip op. at 6.

[400] *Id.* at 7-8. The court quotes from 49 OHIO JUR. 2D *State of Ohio* § 28 (1961):

> The rule that the government itself is not responsible for the misfeasance, wrongs, negligence, or omissions of duty of subordinate officers or agents employed in the public service follows from the fact that it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations in endless embarrassments and difficulties, and losses, which would be subversive of the public interests.

No. 75-0105, slip op. at 7. *See* Hunt v. State, 20 Ohio C.C. (n.s.) 111 (Cuyahoga County 1912).

negligence claim against the state, the court in effect resurrects the *Feres* doctrine largely discredited in the federal law.[401] Its reasoning in this respect becomes somewhat obscure but essentially is as follows. The liability clause of the Court of Claims Act provides that state liability shall be determined by reference to rules of law applicable to suits between private parties; the language of that clause was intended to allow recovery for breaches of contract and ordinary negligence resulting from accidents or careless conduct. Within those areas, the bar of sovereign immunity has been removed. However, the Act did not create new causes of action, and private parties do not ordinarily operate prisons, confine the mentally ill, or provide for the public welfare through licensing and regulation of business. Therefore, since there could be no private party liability, rules of law could not be extracted from private parties' activities to cover the conduct complained of by plaintiffs, and no action could be maintained against the state.

The court emphasized the state's police powers to strengthen its conclusion, explaining that the use of the police power "to undertake to protect the public health, safety and general welfare . . ."[402] is beyond the authority of a private citizen. It quickly cautioned that the protection offered by the exercise of police power did not guarantee protection against all the injuries that an individual might incur, and the enactment of the Court of Claims Act did not change that fact.

vi. Discretionary Function Immunity

The court's treatment of discretionary function immunity was incorporated in its discussion of the imposition of a statutory duty, so it is not clear whether the court perceived the concept as an independent bar to a tort action or simply as further support for its previous determination of a lack of duty under ordinary negligence principles. At any rate, the concept was prominent in the court's analysis and will be given separate treatment here for the sake of clarity.

The court reasoned that since no duty had been imposed upon the Division of Securities, any action in regard to securities regulation was discretionary. The conferral of statutory discretion upon state officers or agents, it concluded, could not possibly lead to subjecting to liability in tort the activities of regulatory agencies in which those officers or agents exercised their vested power. Quoting the discretionary function exception section of the Federal Tort Claims Act, the Ohio Court of Claims acknowledged that no such exception was contained in the Ohio act. Nevertheless, although the language of the opinion is vague in this respect, it is clear that the exception was incorporated into the Ohio law by judicial gloss.

b. *A Closer Look at* Devoe

i. Violation of Federal Law

The court of claims' dismissal of the alleged violation of federal securities law was based upon sound reasoning. The Federal Securities and Exchange

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[401] *See* notes 323-24 *supra* and accompanying text.

[402] No. 75-0105, slip op. at 9.

Act of 1933 placed jurisdiction over alleged violations of the Act solely in the federal courts. It is a fair conclusion that if the General Assembly wished to complement that jurisdiction by declaring the violation of federal law to be grounds for the maintenance of an independent private action in state courts, it could have expressly stated that intention. At any rate, the state did not appear to have violated the terms of the federal statute.[403]

ii. The Misrepresentation Claim

There are broad ramifications of the court's dismissal of the misrepresentation theory of the action.[404] First, the logic employed by the court is fallacious. While the relevant statutes do not "authorize" fraud and deceit, neither do they "authorize" negligence or breach of contract. If conduct intended to mislead or defraud on the part of state officers or employees is *ultra vires* for that reason and cannot be imputed to the state as a predicate of governmental liability, then breaches of contract, ordinary negligence and intentional torts are likewise *ultra vires.* The court has simply dodged a difficult issue in its treatment of this aspect of *Devoe.*

A few jurisdictions recently have experimented with governmental liability for intentional torts.[405] Developments in these jurisdictions reflect a growing idea that government, as a source of great wealth and power, should compensate injured parties whenever possible within the requirements of efficient operation.[406] In most of these same jurisdictions, however, waiver of sovereign immunity has been in operation for some time, and the courts are experienced in determining the extent of liability on other grounds. Perhaps at this stage of its jurisprudence, the Ohio Court of Claims should not be subject to severe criticism for its conservative approach in construing a relatively new statute. The problem of "statutory authorization" aside, the principles employed by the court in this respect are consistent with a strict analogy to the doctrine of *respondeat superior*, which traditionally[407] has relieved the employer of liability for intentional torts of employees.

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[403] *See* notes 385-89 *supra* and accompanying text.

[404] The court outlined the requisites for common law misrepresentation. Not only must there be an intent to mislead, but the other party must rely upon the representation to his damage. Further, an action for fraud could be dismissed for gross inadequacy of consideration. The court found no consideration on the part of the state and concluded that the relationship of the state to the plaintiffs lacked the "degree of personal intimacy" required for the claim of fraud. No. 75-0105, slip op. at 5.

[405] Liability for intentional torts has most often been considered in the context of municipal police activity. *See* Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973) (vicarious liability for police intentional tort); Scruggs v. Haynes, 252 Cal. App. 2d 256, 60 Cal. Rptr. 355 (1967) (intentional tort under statute imposing vicarious liability for municipal employees' torts); City of Miami v. Simpson, 172 So. 2d 435 (Fla. 1965) (liability on agency theory for police intentional tort).

[406] *See* 1973 WASH. U.L.Q. 908, 917.

[407] *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 26.2, 26.9 (1956); 2 F. MECHEM, AGENCY § 1926 (2d ed. 1914); W. PROSSER, LAW OF TORTS 464 (4th ed. 1971). However, Ohio courts have long held private employers liable for the fraud and deceit of their employees. *See* Healey v. City Passenger R.R., 28 Ohio St. 23 (1875); Toole v. Cleveland Trust Co., 22 Ohio C.C. (n.s.) 112 (8th Dist. Ct. App. 1908). Furthermore, the distinction between intentional and negligent torts of employees for the purpose of determining questions of employers' vicarious liability is on the wane. *See* Brill, *The Liability of an Employer for the Wilful Torts of His Servants*, 45 CHI.-KENT L. REV. 1 (1968).

iii. The No Analogous Private Activity Test

The court's interpretation of the liability clause of the Court of Claims Act is more troublesome. Its approach is virtually the same as that employed in *Feres v. United States*.[408] The *Feres* approach has been criticized for limiting the scope of governmental liability too severely[409] All of the activities of government are unique. Generally the only government activities which approach those of private individuals are the ones deemed "proprietary" in nature. The semantical trap apparent in that observation lead the federal courts to repudiate the *Feres* interpretation of the Federal Tort Claims Act. Furthermore, as later discussion will point out, the application of the no private counterpart test has been applied sporadically by the court. In the area of claims alleging negligence in the maintenance of public roadways, for example, a government activity normally not carried on by private individuals, the cases appear to be in hopeless conflict. The approach should be abandoned by the Ohio Court of Claims lest it find itself inextricably lost in the labyrinth of "distinction so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."[410]

iv. Discretionary Functions—Obfuscation of Duty and Immunity?

From its analysis of Ohio securities law, the court of claims in *Devoe* concluded that the activities of the Division of Securities were matters of discretion.[411] As mentioned earlier, in one sense that analysis merely supports the court's conclusion that no duty was imposed upon the division which could support a negligence action by an individual purchaser. This reasoning equates discretion with the absence of duty. The decision most certainly stands for the proposition that when statutes authorizing state regulatory activity contain directory, as opposed to mandatory, language, the court will not be disposed toward finding a duty existent under ordinary tort principles.[412]

The court may also have used the term "discretion" in another sense. Citing the discretionary function exception to the Federal Tort Claims Act, it reasoned that because the division has a choice in the matters it is charged with regulating, the ability to exercise discretion removes any duty it may have to anyone.[413] This mixing of the concepts of governmental immunity and duty to concoct a gloss of judicial limitations upon governmental liability results in a more comprehensive limitation than that employed by the federal courts in construing the federal exception and discounts the significant developments of federal law on the matter. This result bears further comparative analysis.

As the examination of federal law in previous sections pointed out, the discretionary function exception to federal liability bars tort liability for a

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[408] 340 U.S. 135 (1950). *See* notes 313-17 *supra* and accompanying text.

[409] *See* notes 321-22 *supra* and accompanying text.

[410] Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955).

[411] *See* notes 385-98 *supra* and accompanying text.

[412] No. 75-0105, slip op. at 13-19.

[413] *Id.* at 13.

federal employee's performance or failure to perform a discretionary function. The exception was intended, however, to preserve the independence of legislative or executive decision-making from judicial intrusion in determining tort liability and amounts to a defense of immunity in applicable situations, *not* as a blanket concept for a determination of no duty. The interpretation of the exception has been refined in the federal courts from the early position resembling the Ohio Court of Claims' blanket immunity approach through the so-called planning-operational distinction, which left some governmental decisions open to tort liability, to the policy-formulation test of *Downs v. United States.*[414]

The case of *Smith v. United States*[415] illustrates the point that the policy formulation test results in a more refined consideration of claimed governmental tort liability than the court of claims approach in *Devoe*. The proprietor of a business sued the federal government on the ground that the Attorney General had failed to prosecute persons responsible for injuring plaintiff's business.[416] Under the no private counterpart analysis of *Feres*, employed by the *Devoe* court, the dismissal of the action would necessarily result. Since the liability clause of the federal act subjects the government to liability to the same extent as private individuals under like circumstances (interpreted by *Feres* to mean *same* circumstances), and since private parties are not engaged in the prosecution of criminal offenses, there could be no analogous private liability to satisfy the liability clause.

The problem with the no private counterpart analysis is that it would not only prevent recovery in cases like *Smith* but also in situations clearly within the contemplation of the Federal Tort Claims Act. House Report No. 1287 indicated that the purpose of the Act was to permit recovery for the common law torts of government employees.[417] It did not say the purpose was to impose liability upon the common law torts of government employees engaged in activities in which private individuals commonly engaged. Such a distinction would call for a clear statement of policy sustaining the conclusion that there is a real difference, and the no private counterpart analysis does not reflect that policy. The *Indian Towing Co.*[418] case wisely rejected the no private counterpart test as an inaccurate interpretation of the Federal Tort Claims Act.

Following *Dalehite v. United States*,[419] some courts held that whenever the initiation of government activity involved the exercise of discretion, any subsequent action in regard to the activity fell within the discretionary function exception.[420] Although the discussion of the *Devoe* court is sparse in this respect, there is a close parallel to its decision and this latter line of cases. The employment of that rationale would, of course, result in dismissal in *Smith*, since the enforcement of criminal statutes was within the discretion of

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[414] 522 F.2d 990 (6th Cir. 1975).

[415] 375 F.2d 243 (5th Cir.), *cert. denied*, 398 U.S. 841 (1967).

[416] 375 F.2d at 244-45.

[417] *See* notes 326-30 *supra* and accompanying text.

[418] *See* notes 319-23 *supra* and accompanying text.

[419] *See* notes 340-43 *supra* and accompanying text.

[420] *See* note 345 *supra* and accompanying text.

the Attorney General. The abstentionistic position of the courts based upon the *Dalehite* rationale has been criticized, however, for its retention of governmental immunity beyond unwarranted limits.

In *Smith* the government argued, on the authority of *Dalehite*, that the discretionary function exception should apply because the decisions of the Attorney General involved the exercise of discretion.[421] The court discussed at length the absolutist interpretations of *Dalehite* and rejected the government's argument. It suggested that *Dalehite* was unsound because it permitted the conclusion that whenever federal employees are vested with the authority to make decisions, there is sufficient discretion to qualify for immunity. As the court aptly pointed out, any conscious act involves a degree of choice.[422] Consequently, something more than the mere presence of discretion would be required to make the discretionary function exception operable.

The planning-operational distinction also was treated by the *Smith* court. The Attorney General had initially begun an investigation into the occurrence at Mr. Smith's place of business, but the investigation was subsequently discontinued. Plaintiff argued that once the investigation had been initiated, the planning stage of official conduct had ceased, the operation stage had begun, and the discretionary function exception should therefore not apply.[423] The court rejected that approach as a rationale for decision. It might provide a basis for decision in easy cases, said the court, but it was too "finespun and capricious" a standard to provide any real definition of the discretionary function exception in difficult cases.[424]

Instead, the *Smith* court applied the policy formulation test. Characterizing the Attorney General as "[t]he President's surrogate in the prosecution of all offenses against the United States,"[425] the court noted that his discretionary powers of decision may depend upon matters wholly apart from questions of probable cause. For instance, he may choose to prosecute only a strong case to test an uncertain law, or he may defer prosecution to avoid inflaming racial tensions. The discretionary function exception applied, said the court, not because the Attorney General made choices but because his choices were affected by the policy interests of the nation.[426]

The government argued a second ground for dismissal of the action in *Smith*, based upon ordinary principles of tort law. The plaintiff's theory of liability in *Smith*, as in *Devoe*, depended upon the establishment of an affirmative duty to take regulatory action. The government's contention in *Smith* was that if any duty existed, such duty was owed not to the victim of the crime, but to the general citizenry as a whole. Since no duty was owed by the defendant to provide for the protection of plaintiff, there could be no liability under ordinary tort principles. Because the court found the discretionary

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[421] 375 F.2d at 245.

[422] *Id.* at 246. "Most conscious acts of any person whether he works for the government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions." *Id.*

[423] *Id.* at 245.

[424] *Id.* at 246.

[425] *Id.* at 246-47.

[426] *Id.* at 248.

function exception applicable, it did not reach this secondary issue. However, the obvious parallels to the *Devoe* case compel some comment.

Viewed in light of *Smith*, the determination of governmental liability involves two considerations. The threshold question is whether the governmental activity falls within the scope of the discretionary function exception. The application of the exception forecloses any assessment and judgment of the wrongful character of the conduct complained of, since the defense amounts to immunity rather than a privilege which could be overcome by a showing of sufficiently culpable behavior. However, if the exception should be found inapplicable, the question of liability is still not settled. The plaintiff must then establish the requisite predicate of liability in the official conduct; the waiver of immunity does not mean that the government has become an insurer. Hence, the issue of duty, if the breach of duty is the requisite predicate of liability, becomes a secondary issue. Duty is not dependent upon the determination of the immunity issue. Immunity, likewise, is independent of the existence of a duty of care, operating as a complete defense even in the face of an admitted breach of duty.[427] Obscuring this distinction, as the *Devoe* court did, may result in preservation of a larger island of immunity than the Ohio Court of Claims Act intended.

The *Devoe* court did not discuss the full import of its statements about discretion, and it is not clear how the concept of discretionary function immunity will be applied in Ohio as a result of that shortcoming. It discussed neither of the two favored approaches to the problem present in the federal law. Some element of choice is present in virtually every official decision. The issue of whether statutory language is mandatory or merely directory is the subject of great debate in the case law[428] and provides no basis for the imposition of an exception for governmental liability which such important functional underpinnings as discretionary function immunity carry. Under the policy formulation test, the exception applies to decisions by legislative or executive employees which involve the weighing of public policy considerations. In such cases the acts of government are immune because the exception bars the judicial evaluation of the tortious character of the decisions.

Conversely, if the decision or actions are not of such a nature that the judicial determination of issues of tort liability would threaten the independence of the decision-making process, then the exception does not apply, and the determination of governmental liability is left to the principles of ordinary tort law. The *Devoe* opinion indicates that the court failed to comprehend the potential reach of its simplistic treatment of discretionary function immunity.

IV. Tort Claims in Ohio—A Categorical Analysis

A. *Introduction*

Having examined judicial attitudes about governmental liability in the

[427] *See generally* W. Prosser, *supra* note 407, at 970-87.

[428] *See* C. Sands, 1A Sutherland Statutory Construction §§ 25.02-.04 (4th ed. 1972); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 406 (1950); Sutton, *Use of "Shall" in Statutes*, 4 J. Mar. L.Q. 204 (1938). *See also* Mullen v. Board of School Directors, 436 Pa. 211, 259 A.2d 877 (1969).

federal courts, in Ohio as illustrated by *Devoe*, and in other state jurisdictions, the focus can turn to more specific consideration of the Ohio decisions. To facilitate that examination, several categories have been identified into which many Court of Claims Act lawsuits have fallen by virtue of their common features. Interestingly, reconciliation of many of the decisions on the issue of judicial limitations upon governmental liability can be accomplished only through this categorization method.

The comparative analysis of the last section will not be disregarded, however. Reference will be made to the principles developed there to test the clarity and consistency of the Ohio decisions that have followed in the wake of *Devoe*. This analysis will demonstrate that the court of claim decisions have become a bit muddled, as if the court is lost in a forest of legal concepts and is searching for a way through it. As the examination of the decisions proceeds, perhaps some pathways can be identified.

B. *Administrative Regulation of Business Activities*

The court of claims' open-ended treatment of the discretionary function exception in the *Devoe* case was soon limited in another business regulation case. In *Results, Inc. v. Secretary of State*,[429] the plaintiff corporation alleged that it had been injured by the actions of the Secretary of State in accepting articles of incorporation of another business. Plaintiff was incorporated in Ohio in 1966. A second business, also using the name "Results, Inc.," was incorporated in 1972. Under Ohio law, the Secretary of State is forbidden to accept articles of incorporation if the proposed corporate name is indistinguishable from a previously incorporated business.[430] Following successful negotiations with the second company, the first "Results, Inc." sued the secretary to recover expenses incurred in protecting its corporate identity.[431] The court of claims denied the state's motion to dismiss and held that plaintiff had stated a cause of action for which relief could be granted.[432]

The state argued that it had not waived its immunity from suit for governmental functions requiring the exercise of discretion and that the decision of the secretary on whether to accept proposed articles of incorporation was discretionary.[433] In support of this argument, the state cited the New York case of *Gross v. State*,[434] factually similar to *Results, Inc.* In broad terms, the *Gross* court had held that the decision to accept articles of incorporation required the exercise of judgment and discretion and could not provide the basis of tort liability,[435] terms that were very reminiscent of the opinion in *Devoe*.

[429] No. 75-0295AD (Ohio Ct. Cl. July 30, 1975) (clerk's denial of Motion to Dismiss).

[430] OHIO REV. CODE ANN. § 1701.05(A) (Page 1978).

[431] No. 75-0295AD, slip op. at 1.

[432] *Id.* at 2.

[433] *Id.*

[434] 33 App. Div. 2d 868, 306 N.Y.S.2d 28 (1969). In the *Gross* case, it was the second-incorporated business which brought suit. The New York Secretary of State had originally accepted the plaintiff's articles of incorporation and then required the name to be changed when a former corporation was discovered. *Id.* at 870, 306 N.Y.S.2d at 30.

[435] *Id.* at 871, 306 N.Y.S.2d at 31. The *Gross* decision rested primarily upon the governmental-non-governmental distinction, the court concluding that the activity was governmental. The court also held that the acceptance of corporate articles involved the exercise of judgment and discretion and fell within New York's judicially-created discretionary function exception. *Id.*

The court of claims rejected defendant's argument. Instead, it chose to rely upon a federal case factually distinguishable from *Results, Inc.* and *Gross.* Citing *White v. United States*[436] for the proposition that "[a] negligent exercise of discretion might well give rise to government liability,"[437] the *Results, Inc.* court decided that the incorporation laws of Ohio did not permit the secretary the discretion to accept articles of incorporation bearing the name of a pre-existing corporation.

The decision in *Results, Inc.* must be taken as a limitation upon the broad language of *Devoe.* Curiously, the court did not employ the analysis of the federal case that it had cited with approval. *White* involved a suit by the administrator of the estate of a mental patient in a Veterans' Administration hospital. The decedent had been permitted to roam the hospital grounds and used that freedom to successfully commit suicide by throwing himself under a train. His administrator contended that the employees of the hospital failed to exercise the appropriate degree of care in light of the veteran's mental condition.[438] The court in *White* applied the planning-operational distinction to conclude that the decision to extend services was a planning-level exercise of discretion, but that once the decision was made, the government was liable for any subsequent negligence in treatment.[439]

The court of claims in *Results, Inc.* did not discuss the planning-operational distinction employed in *White.* Instead, it merely relied upon the statutory description of the Secretary of State to conclude that no discretionary authority existed. Since proof of the allegations would establish a clear violation of law, the court held that a claim had been stated.[440] In effect, the court's reasoning was that the enabling statutes pertaining to these acts of the secretary were mandatory and for that reason no discretionary function immunity would arise and liability would attach for the violation of the mandatory duty.

Thus while *Devoe* may have been limited by *Results, Inc.*, the fundamental problem of *Devoe* remained: the mixed concepts of duty and discretionary function immunity. In both cases, the court of claims examined the statutes authorizing state activity to determine whether a duty to act had been imposed. In *Devoe*, a directory-only feature of the statutes was found from the repeated use of the word "may" in the sections examined. From that, the court concluded that the state was under no duty of care to individual purchasers. In *Results, Inc.*, the court determined that the pertinent statutes were mandatory in nature, relying upon the language in the statutes containing the word "shall."[441]

Questions of state liability should not be made to turn upon the results of such a mechanistic analysis of statutes. If the purposes of discretionary function immunity are called into play by the governmental conduct being

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[436] 317 F.2d 13 (4th Cir. 1963).

[437] No. 75-0295 AD, slip op. at 2.

[438] 317 F.2d at 14-17. The deceased had a long history of suicidal tendencies, which was known by the hospital personnel. *Id.*

[439] *Id.* at 18.

[440] No. 75-0295 AD, slip op. at 2.

[441] *Id.* at 16-17, *quoting* OHIO REV. CODE ANN. § 1707.05(A) (Page 1978).

complained of in a given case, application of the policy formulation test of *Downs v. United States*[442] should accurately identify those cases where tort litigation should not impede that governmental conduct. If there is no basis for the application of immunity, the official conduct should be evaluated from the standpoint of common law principles of duty, regardless of whether the enabling statutes contain the words "shall" or "may." Even in the face of statutory language saying officials "may do act X," those officials should be required to exercise that discretion with an appropriate degree of care. That degree of care can be delineated with a fair measure of reliability by reference to common law tort principles that have been carefully developed over the centuries. The issue of duty should not be couched in terms that permit the question of whether the duty was *present* to turn upon the fortuitous presence or absence of the word "shall." It should be fairly clear that the vast majority of enabling statutes passed by the Ohio General Assembly were not worded with a view to whether the official conduct—mandated or merely directed—should be immune from judicial inquiry in private tort litigation. The court of claims approach gives that effect to the language employed in a given statute.

Likewise, the question of state liability should not be couched in terms which permit the issue of breach of duty to be decided by reference to whether the statutory mandate or direction has been followed. Even in cases where a statute says an official "shall" act, and the official does act, the issue of whether, by so acting, the official breached a duty of care to the complaining party should remain distinct and independent. The answer that a governmental operative had no choice in the matter because the statutory language mandated the official action is not responsive. The official action may have been mandated indeed, but that is not to say that such action needed to be performed in a careless manner. The mechanistic approach of *Devoe* and *Results, Inc.* do not permit analysis to proceed that far.

A technique of reasoning which, in effect, refers to the state of the law prior to the passage of the Court of Claims Act has been combined with the *Devoe*[443] rule to produce a maddening circularity of reasoning. Given that prior to the Act the state was immune from suit absent specific consent, it should be a foregone conclusion that in most respects no common law duty would have arisen which would be applicable in the context of governmental operations. The Ohio courts, in recognition of this situation, have made the determination of governmental liability turn upon the presence or absence of the word "shall" in the statute.

This reasoning is illustrated in *Jones v. State*,[444] where the court of appeals affirmed the dismissal of plaintiffs' action by the court of claims. In *Jones* the plaintiffs claimed that the Division of Securities negligently supervised their credit union, resulting in a subsequent suspension and ultimate liquidation of the credit union corporation and causing plaintiffs extensive financial damage in the impairment of their shares. The court of appeals stated simply, "there is no common law liability upon the State under the circumstances involved.

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[442] 522 F.2d 990 (6th Cir. 1975). *See* notes 352-57 *supra* and accompanying text.

[443] Perhaps it would be more accurate to say that the technique *grew out of* the obscure language of the *Devoe* opinion.

[444] No. 77 AP-688 (Ohio 10th Dist. Ct. App. Dec. 5, 1977).

Any liability must be imposed by statute."[445] It then stated that there was no language in the enabling statutes "indicating an intent on the part of the State to assume responsibility for poor, negligent, incompetent, or fraudulent management of a credit union."[446] With such a focus could any other conclusion have been reached? If the courts are going to cite the paucity of common law liability against the state as a justification for looking to the statutes as a basis for imposition of liability, and then declare that no legislative intent to impose liability can be found, the liability clause of the Court of Claims Act is all but emptied of meaning. To complete the circle, and in so doing add a touch of irony to the decision, in *Jones* the court said that if the enabling statutes *had* expressed an intent to impose liability upon the state, then it would be questionable whether the Court of Claims Act would apply since then it could be said that the statutes would amount to a prior consent to suit.[447]

It would thus appear that the court of claims and tenth district court of appeals are concerned that if they embrace the theory that governmental liability should follow when a statutorily required course of conduct is not carried out and someone is injured thereby, it will render the state an insurer. Given their mechanistic approach, which confuses discretionary function immunity and duty, that concern is well-founded. If the courts can refine the approaches to the point where these independent concepts can be analyzed separately and the issues inherent in each can be independently decided, then the basis for the concern is removed. Counsel for claimants before the court of claims should not admit that there is no common law liability to be imposed against the state in a given context but instead, should argue that the very purpose of the liability clause of the Act was to create a regime of liability. The abrogation of sovereign immunity may well have created a vacuum in the law in specific contexts, making it impossible to employ the principle of *stare decisis* in determining whether the governmental defendant is liable for its acts. However, if the court believes that general principles of tort law cannot safely be borrowed from the realm of private lawsuits, it should accept its responsibility as a court at common law to establish precedent by reference to general principles of justice and fairness to the parties. The artificial device of referring to enabling statutes to "find" an imposition of liability will be, by and large, a dry exercise, leading to the circular logic of the *Jones* case.

C. *Safety Inspections*

In 1974, a boiler exploded in a refinery of the Northern Ohio Sugar Company, blinding and totally disabling an employee. Ohio law required that the boiler be inspected by the Division of Boiler Inspection of the Ohio Department of Industrial Relations, but the agency had failed to discover its defective condition. The injured employee sought recovery against the state in *Shelton v. Bureau for the Prevention of Industrial Accidents and Diseases*,[448] alleging negligent performance of the statutory duty of inspection.

[445] *Id.*, slip op. at 4.

[446] *Id.*

[447] *Id.*

[448] No. 75-0235 (Ohio Ct. Cl. Aug. 6, 1975), *aff'd*, 51 Ohio App. 2d 125, 367 N.E.2d 51 (10th Dist. 1976).

The court of claims dismissed the action for failure to state a claim upon which relief could be granted.[449] As might be predicted from the foregoing analysis of the *Devoe* line of cases, the court of claims concluded that the Division of Boiler Inspection was under no duty which would support the negligence claim of the injured worker. As in the *Devoe* case, the court based its conclusion upon the statutes authorizing the division's activities.[450]

However, the statutes applicable in *Shelton* were substantially dissimilar to those applicable in *Devoe*. In *Devoe*, the court repeatedly quoted language from the Ohio securities law, which used the term "may," to bolster its conclusion that the Division of Securities was under no duty to individual purchasers. The relevant statutes in *Shelton* declared that the inspection of boilers *shall* be made,[451] that all boilers *shall* be inspected internally and externally at least once a year,[452] and that the chief of the division *shall* enforce the applicable safety standards.[453] Despite such language, the court held that no duty to protect individual workers was imposed, concluding that the statutes were intended to protect the public health, safety, and welfare. Absent "a clear legislative directive,"[454] the court was unwilling to recognize a duty owed to individual workers.[455]

On its face, the *Shelton* decision rested upon the court's finding of a lack of duty under ordinary negligence law and no statutory duty having been imposed by the enabling legislation pertaining to the Division of Boiler Inspection. The decision was affirmed by the court of appeals on the same reasoning.[456] If discretionary function immunity was a ground for the decision, it was not directly discussed by either court. A subsequent opinion in the court of claims, however, indicates that discretionary immunity played some role in *Shelton*.

In *Spencer v. State*,[457] the court of claims implied, without analysis, that in any of its regulatory functions the Department of Industrial Relations is immune from tort liability. That case concerned the death of a lumber company employee resulting from alleged defects in the design and installation of a circular saw. The decedent's administratrix brought a wrongful death action against the Department of Industrial Relations, alleging negligence in the enforcement of safety standards by several divisions of the department.[458] The court of claims dismissed the action, citing *Shelton* for the proposition that the state did not waive its immunity from suit with regard to governmental functions involving the exercise of discretion.[459] In so doing, the court changed the emphasis of the *Shelton* decision from a lack of duty to immunity for discretionary governmental functions.

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[449] No. 75-0235, slip op. at 2.

[450] *Id.* at 2-4.

[451] OHIO REV. CODE ANN. § 4104.06 (Page 1973).

[452] *Id.* § 4104.11.

[453] *Id.* § 4104.06.

[454] No. 75-0235, slip op. at 4.

[455] *Id.*

[456] 51 Ohio App. 2d at 130-31, 367 N.E.2d at 54.

[457] No. 76-0441 (Ohio Ct. Cl. Nov. 23, 1976).

[458] *Id.*, slip op. at 1-2.

[459] *Id.* at 2.

If the application of discretionary immunity in *Devoe* was imprecise, the application of that concept in *Spencer*, with its interpretation of *Shelton*, convolutes that imprecision. At least in *Devoe* the statutes reasonably could be construed to have vested a wide range of discretion in government officials charged with the responsibility of investigating violations of and enforcing compliance with the state securities laws in a particular case. In *Shelton*, not only was inspection mandatory, but the chief of boiler inspection was required to enforce the applicable safety regulations. In the latter case, given the *Devoe* approach, from whence came the discretion to provide the basis for immunity? Whatever the deficiencies of the *Devoe* opinion in its reception of the federal discretionary function exception to governmental liability, there is some rational basis for its analysis of the statutory scheme controlling the actions of government officials. Both the *Shelton* decision, and even more so that of *Spencer*, have lost touch with even that ground for application of the exception.

It is clear that the courts in *Shelton* and *Spencer* were concerned about imposing liability upon the state which would have an uncontrollable and far-reaching impact upon the conduct of government safety programs. That concern follows directly from the concept of duty-as-mixed-with-the-concept-of-immunity analysis of *Devoe*. If duty is viewed as flowing from enabling legislation which is mandatory in nature, and the mandates of that legislation are not satisfied by the official conduct, the breach of that duty is established. A theory that imposed liability for injuries that resulted from the failure to adhere to the statutes would indeed have the effect of imposing a duty upon the state which it could have no practical expectation of fulfilling. The responsibility for safety inspections relates to virtually every place of business or employment in the state. An undertaking by the state to eradicate all hazardous conditions would demand a far more comprehensive program than the presently required periodic inspection program. Liability flowing from a missed or faulty inspection could prove to be so costly that the state might have to discontinue the program altogether. In the view of the court, the removal of immunity would possibly open the "floodgates of litigation," render the state an insurer, and impel it down the road to bankruptcy.[460]

Application of common law principles of duty, while keeping those principles distinct from immunity, would not lead to such drastic results and should satisfy the courts' concerns. If the issue of breach of duty is expressed as whether the defendant carried out the statutory requirements with the degree of care which the ordinary reasonably prudent person would have done under the circumstances, the basis for the fears of the courts fades in significance. When the injured party's claim is approached in this way, the failure to adhere to statutory strictures does not result in an automatic conclusion of negligence. The court then must look to the issue of whether that failure amounted to a failure to exercise the degree of care due to the plaintiff

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[460] *See, e.g.*, Shelton v. Bureau for Prevention of Indus. Accidents & Diseases, No. 75-0235 (Ohio Ct. Cl. Aug. 6, 1975), *aff'd*, 51 Ohio App. 2d 125, 367 N.E.2d 51 (10th Dist. 1976), where the court of claims refers to the problem of the state as insurer. No. 75-0235, slip op. at 2. The court of appeals in the same case discussed "a 'floodgate of litigation' [that] may bankrupt the state." 51 Ohio App. 2d at 128, 367 N.E.2d at 53.

under the circumstances. A trier of fact may well conclude that the conduct in violation of the statute was reasonable.

On the other hand, the application of this suggested line of reasoning would not have the effect of barring bona fide claims arising from truly culpable violations of statute. Some circumstances may excuse an officer from failure to carry out an effective safety inspection. However, the principles of ordinary negligence should adequately aid the court in determining if the circumstances justifying the excuse are present. Where they are not, and an innocent person is injured as a result of the misconduct, the injured party should be compensated. Opening up departments of the state to liability in this manner does not render the state an insurer and should not put unreasonable pressure upon the public coffers.

Further, even in the case where there has been both a breach of common law duties and statutory requirements, the state may still be protected from "runaway liability." If the decisions of the governmental functionaries are such that the principles of discretionary function immunity are present, that concept can be applied to absolve the state from liability and prevent the incursion of unwarranted tort litigation. The rough-handed, ill-considered approach of *Spencer* and *Shelton* carries immunity too far in the direction of the old law of sovereign immunity.

D. *Maintenance and Repair of State Highways*

The area in which claimants seem to have been most successful in imposing liability against the state has been in cases involving maintenance and repair of state highways. In 1976, the court of claims decided *Denis v. Department of Transportation*,[461] a case frequently cited by the court in subsequent cases as a correct statement of the law.[462] In *Denis*, plaintiff alleged that his automobile was damaged when it struck a chuckhole on an interstate highway, claiming that the chuckhole could not have been seen and avoided because it was concealed by slush covering the roadway. In its analysis of the case, the court set out the elements of proof which a plaintiff has the burden of establishing in such a case: (a) that the defendant had notice, either actual or constructive, of the evidence of the defect; (b) that the defendant, possessing the required notice, either (i) failed to respond within a reasonable time, or (ii) responded within a reasonable time, but did so in a negligent manner; (c) or, that the defendant in a general sense negligently maintains its highways.[463] Once this burden of proof is met, plaintiff has shown that the state breached its duty to "use reasonable means to keep the state highways safe by keeping the highways properly maintained and free from obstructions and defects."[464]

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[461] No. 75-0287 AD (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration).

[462] *See, e.g.*, Hampel v. Ohio Dep't of Transp., No. 77-0206 AD (Ohio Ct. Cl. Nov. 30, 1977); DeChesne v. Department of Transp., No. 76-0625 (Ohio Ct. Cl. Nov. 12, 1976); Johnson v. Ohio Dep't of Transp., No. 75-0472 (Ohio Ct. Cl. Aug. 17, 1976).

[463] No. 75-0287 AD, slip op. at 5.

[464] *Id.* at 2. The Tenth District Court of Appeals has succinctly stated the duty of the state with respect to its highways: "the state has a duty to maintain its highways in a reasonably safe condition." Knickel v. Department of Transp., 49 Ohio App. 2d 335, 339, 361 N.E.2d 486, 489 (10th Dist. 1976).

The first obstacle the plaintiff must overcome then is the requirement of notice. This can be accomplished through admissions made by the state in the Investigation Report[465] or through the production of such documents as the diary of the yard crew in whose area the defect is located or pertinent inter-office communications which detail repair work done on specific sections of highway.[466]

A review of court of claims decisions reveals that the requirement of notice is not an easy obstacle to overcome. An issue that may arise is whether repair of a defect on one occasion puts the state on notice that a particular area of the highway is hazardous. If the answer is no, then the further question arises of how many times must the defect be repaired before the state may be said to be on notice. Plaintiff in *DeChesne v. Department of Transportation*[467] claimed that her car was damaged when it struck a hole in an interstate highway on January 31, 1976. Defendant's local yard repair schedule for the month of January revealed that the hole in question had been repaired on January 13, 1976. The court concluded that notice, to be effective, must have reached defendant after January 13, but before January 31. The fact that defendant had filled the hole once before the accident was not considered sufficient to put it on notice that this specific area of the highway presented a hazard to motorists.

This conclusion by the court is interesting in light of the court's knowledge of the temporary nature of road patches during winter months. A Department of Transportation employee with thirty-two years of experience testified in the *DeChesne* case that "a hole could be patched one day and in the next two days patching might again be required."[468] The court has frequently spoken of the detrimental effect winter freeze-thaw cycles have upon impermanent cold mix patching, which is usually the only method available to the state for patching highways during the cold weather.[469] In *Denis* the court concluded, on the basis of this knowledge, that the surface of the highway upon which plaintiff's automobile sustained damage could have changed drastically within the space of two days.[470] It would seem that in the face of judicial

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[465] The defendant files the Investigation Report in addition to its answer in response to plaintiff's complaint. An allegation that the defect was created by the state is sufficient to withstand a rule 12(B)(6) motion based upon a failure to allege that the state had notice of the defect. Bennett v. Department of Highways, No. 75-0268 AD, slip op. at 2 (Ohio Ct. Cl. July 11, 1975) (ruling on motion to dismiss for failure to state a claim).

[466] *E.g.*, Department of Transportation Form AU-14. Highways are divided into sections for repair purposes. "A 'Section Number' is the most precise means of identifying repaired areas used by the Department of Transportation." Hollis v. Department of Transp., No. 76-140 AD, slip op. at 2-3 (Ohio Ct. Cl. Sept. 10, 1976).

[467] No. 76-0265 (Ohio Ct. Cl. Nov. 12, 1976).

[468] *Id.*, slip op. at 4.

[469] Hollis v. Department of Transp., No. 76-0140 AD, slip op. at 4 (Ohio Ct. Cl. Sept. 10, 1976). In *Hollis* the court noted that "cold mix" is often the only source of patching material available to the state in the winter because the cost of "hot mix" renders its production prohibitive. "Cold mix" is often penetrated by water during freeze-thaw cycles causing its adherence to the adjacent road surface to fail. The passage of constant traffic over the patched area hastens the deterioration. *See, e.g.*, Kozak v. State Highway Dep't, No. 75-0288 AD, slip op. at 2 (Ohio Ct. Cl. Nov. 19, 1976); Denis v. Department of Transp., No. 75-0287 AD, slip op. at 3 (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration).

[470] The court arrived at this appraisal while considering the state's defense of assumption of the risk because the plaintiff had driven on the same section of road only three days before the

knowledge of cold patch erosion properties, to say that the Department of Transportation was without sufficient constructive notice is an attempt to artificially limit the extent of governmental liability.[471]

Another factual problem that arises in consideration of the notice problem involves the infrequent occurrence of a phenomenon known as a "pavement blow-up." This phenomenon occurs when the adjacent ends of two sections of concrete highway buckle due to extreme subsurface pressure, creating a ramp-like condition in the highway which can cause extreme control problems in an automobile encountering it. In *Knickel v. Department of Transportation*[472] the court of claims was called upon to decide whether the state was liable for plaintiff's personal and property damage sustained when his automobile encountered a severe "pavement blow-up." The Department of Transportation had been repeatedly called upon to patch and fill an eleven and one-half mile stretch of deteriorating highway and had completed specifications for a complete overhaul of this troublesome area.[473] In July, 1974, before repair had been started, a "pavement blow-up" occurred and Mr. Knickel's car crashed, resulting in serious injuries to him.

Examining a departmental design policy memorandum dated June 13, 1975, the court noted that this phenomenon occurs suddenly and usually without advance warning. The memorandum, however, urged that pressure relief joints be inserted into areas of pavement where pressure build-up was suspected. Presented with no evidence of the existence of "blow-ups" in either the immediate or general area, the court had to determine whether nonetheless there was sufficient notice to impose liability. It concluded that since defendant had notice of the generally deteriorated and dangerous condition of the highway,[474] it need not have been given notice of the specific condition that had produced plaintiff's injuries.[475]

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accident. Since the road surface could deteriorate so rapidly, the court found that the plaintiff's prior use of the highway did not constitute assumption of the risk. No. 75-0287 AD, slip op. at 3-4.

[471] *But see* Hampel v. Department of Transp., No. 77-0206 AD (Ohio Ct. Cl. Nov. 30, 1977). In *Hampel*, approximately one month had elapsed between the patching of the road and the plaintiff's accident. The court noted that "since the cold patch material which must be used in winter has limited durability, the Department has constructive notice that further repairs to this area would likely be necessary in the future." *Id.*, slip op. at 1.

[472] No. 75-0329 (Ohio Ct. Cl. Sept. 8, 1975), *aff'd*, 49 Ohio App. 2d 335, 361 N.E.2d 486 (10th Dist. 1976). The "blow-up" caused the abutting ends of two sections of concrete highway to rise at least two feet above the level of the highway. The effect was that the plaintiff drove his car up a twelve-foot-long ramp (the length of the highway sections) to the point where the sections had met. The car then hurtled off the raised sections of highway with no road underneath. In the plaintiff's words, he felt as though he were "flying through the air." 49 Ohio App. 2d at 336, 361 N.E.2d at 488.

[473] 49 Ohio App. 2d at 336, 361 N.E.2d at 488. The overhaul included, but was not limited to, replacing worn pavement joints and resurfacing with "blacktop" at a total cost of $3.5 million. *Id.* at 336-37, 361 N.E.2d at 488.

[474] The court of claims found that the defendant's knowledge of the general condition conceded "an awareness that a hazardous condition was likely to occur, but where, when and to what extent was impossible of precise ascertainment." No. 75-0329, slip op. at 5. The court found this awareness to exist despite its reference to a departmental notice which said that " 'blow-ups' . . . occur suddenly, often with little or no advance indication." *Id.*, slip op. at 3.

The court of appeals, affirming the decision of the court of claims, ruled that "there is a general foreseeability that blow-ups will occur and that someone will be injured as the result." 49 Ohio App. 2d at 339, 361 N.E.2d at 489.

[475] No. 75-0329, slip op. at 5. This is probably the court's most liberal statement on record regarding notice and may best be explained as a means to effectuate a policy decision on the

Once plaintiff has satisfied the notice requirement, he must prove that defendant was negligent in repairing (or failing to repair) the particular defect or was generally negligent in the maintenance of its highways.[476] The debate focuses upon the question of whether the defendant's actions (or failure to act) were reasonable under the circumstances.

A favored defense at this stage of the inquiry is that repair of the defect was impossible because of weather conditions. In order for the defense to be successful, however, the state must clearly establish the weather conditions on the dates surrounding the incident in question.[477] A general allegation that the weather would not permit repairs or a proffered department work schedule showing a preponderance of time devoted to snow removal will not suffice.[478] The court generally finds the weather defense persuasive when supported by evidence of actual weather conditions prevailing at and near the time of the accident giving rise to the claim.[479] However, when an area of highway has so many holes or holes of such size that the highway section may be considered extraordinarily dangerous,[480] the court has noted that the state may be under a duty to repair the area immediately, even in the face of inclement weather.[481]

The state frequently offers the further defense that it has only limited resources with which to maintain its highways. The court has not consistently

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question of who should bear the loss occasioned by the occurrence of a "blow-up." The court of appeals posed the question as "who will bear the burden of the loss due to sudden blow-ups: the state of Ohio which has the duty to maintain highways in a reasonably safe condition, or the general public . . . ." 49 Ohio App. 2d at 339, 361 N.E.2d at 489. The court of appeals agreed with the court of claims' holding that the state should bear the loss.

[476] *See* note 463 *supra* and accompanying text. It is difficult to imagine a situation in which the plaintiff would prevail by proving that the defendant generally maintains its highways in a negligent manner. Establishing that the defendant has negligently maintained sections of highway other than the one upon which the plaintiff sustained his injuries seems irrelevant. Indeed, proving such an allegation seems to evade the likely argument that the state maintains the section of highway where the plaintiff was injured in a non-negligent manner.

[477] *See* Keller v. Ohio Dep't of Transp., No. 76-0219, slip op. at 2 (Ohio Ct. Cl. Aug. 31, 1976); Johnson v. Ohio Dep't of Transp., No. 75-0472, slip op. at 5 (Ohio Ct. Cl. Aug. 17, 1976).

[478] *But see* DeChesne v. Department of Transp., No. 76-0265, slip op. at 4-5 (Ohio Ct. Cl. Nov. 12, 1976). The discussion of the reasonableness of the state's action was undertaken after the court had found that notice was insufficient. *See* text accompanying note 467 *supra*.

[479] Hollis v. Department of Transp., No. 76-0140 AD (Ohio Ct. Cl. Sept. 10, 1976), contains an example of a successful defense of impossibility due to weather conditions. In *Hollis*, the state showed that snow had fallen every day between the date of the plaintiff's accident and the date the particular section of highway had last been repaired. Each day during this time span the average snowfall was one and one-tenth inches, accumulating to depths ranging from two to six inches. *Id.*, slip op. at 3. The court concluded that "[t]hese figures illustrate that road repair operations . . . would have been dangerous if not impossible." *Id.*

[480] In Johnson v. Ohio Dep't of Transp., No. 75-0472 (Ohio Ct. Cl. Aug. 17, 1976), a state highway department employee testified that in order for a chuckhole to be classified as "dangerous" it must be at least three inches deep and two feet square. *Id.*, slip op. at 4. A second employee testified that the chuckhole at issue in *Johnson* was not deep enough to require immediate action, that is, it did not have dimensions sufficient to classify it as "dangerous." *Id.* *See* Denis v. Department of Transp., No. 75-0287 AD (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration). While describing a period of continuous snowfall, the *Denis* court noted that "during this period, Defendant did have an obligation to repair abnormal and extraordinarily dangerous defects of which it had, or should have had, notice." *Id.*, slip op. at 6.

[481] Johnson v. Ohio Dep't of Transp., No. 75-0472, slip op. at 5 (Ohio Ct. Cl. Aug. 17, 1976) (dictum). The court, in referring to the evidence, commented that the state had offered no evidence to establish that the weather on the day the plaintiff sustained his injuries was too severe to permit the defendant to repair the road.

found this "economic impossibility" defense persuasive.[482] When it has declared the defense successful, it has done so on the basis that the increased funding necessary to enable the more rapid and efficient repair of highway defects would have to come from taxpayers, placing a "constant burden on the public."[483] This approach reflects the policy decision that economic burdens of physical injuries sustained by people using the highway should be borne by the individual and not the general taxpaying public. However, when faced with a case of severe injuries and the infrequently occurring but highly dangerous hazard of a "pavement blow-up" in *Knickel*, both the court of claims and the court of appeals expressed the policy that the state should bear the burden, rejecting the economic impossibility defense.

The state may, in keeping with the language of the liability clause of the Court of Claims Act,[484] raise any defense available to a private party in similar circumstances.[485] It is common for the state in highway defect cases to raise the defenses of assumption of risk and contributory negligence.[486] Of course the principles of these defenses do not change simply by virtue of their being raised in litigation with the state, but it is interesting to note the results of their application in specific instances. For example, the state contended in *Denis* that three days prior to the accident plaintiff had traversed the section of highway where his car was wrecked and that in going back over the section on the fateful day, he assumed the risk. The court determined that plaintiff's familiarity did not constitute assumption of the risk because during the winter months, with periods of heavy precipitation and freeze-thaw cycles, the surface of a highway may change significantly during a short period of time.[487] It seems by this analysis that the plaintiff must be shown to have

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[482] Typical of this position are the court's statements in Hollis v. Department of Transp., No. 76-0140 AD (Ohio Ct. Cl. Sept. 10, 1976):

> Defendant is responsible for an immense highway system. Its potential liability is almost without limit. Defendant's liability must be determined in light of its capabilities. Given unlimited funds and unlimited personnel, defendant could be charged with keeping the highways in near-perfect condition. The defendant does not have unlimited funds or unlimited personnel. It must within the capabilities it does possess make priorities and trade-offs.

Id., slip op. at 4.

[483] Denis v. Department of Transp., No. 75-0287, slip op. at 8 (Ohio Ct. Cl. Feb. 27, 1976). *But see* Miller v. Ohio Highway Dep't, No. 75-0336 AD (Ohio Ct. Cl. May 28, 1976) (overruling state's motion to dismiss) in which the court ruled that the maintenance of forty-seven metal expansion joints in one area of highway is not an "excessively burdensome or unreasonable task." *Id.*, slip op. at 4.

[484] OHIO REV. CODE ANN. § 2743.02(A) (Page Supp. 1978).

[485] Baker v. Highway Dep't, No. 76-0271 AD (Ohio Ct. Cl. July 5, 1977) involved a situation in which a motorist passing through a highway construction project had her car struck by a piece of pipe carried by a worker. Another worker had been directing traffic. The state offered the proposition that in all such situations the motorist is in a better position to avoid an accident than the worker. Such an argument would seem to raise a presumption of negligence on the part of motorists proceeding through construction areas, leaving no doubt about the state's position on the policy question. While the court found the proposition inapplicable in *Baker*, it specifically reserved judgment about its general validity. *Id.*, slip op. at 1.

[486] *See, e.g.*, Johnson v. Ohio Dep't of Transp., No. 75-0472 (Ohio Ct. Cl. Aug. 17, 1976); Denis v. Department of Transp., No. 75-0287 AD (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration). In fact, there is no reason to believe that these defenses are not applicable in all cases in which the state is charged with negligence.

[487] *See* notes 470, 471 *supra*. *Quaere*, if the accident had occurred during the summer months, would the court have approached the case in the same way?

current knowledge of a specific hazard in order to have assumed the risk. In *Johnson v. Department of Transportation*,[488] the state argued that riding a motorcycle equipped with an extended fork and raised handlebars on a much-travelled highway constituted contributory negligence.[489] The court rejected the argument, noting that such devices were within the law and that riders of motorcycles so equipped are licensed by the state.

Two related areas deserve brief mention here: the liability of the state for failure to post warning signs and its liability for improperly designed highways. On the subject of warnings, the court of claims has declared that no concrete definition of a duty to warn motorists can be devised; instead it will consider whether a duty can be established on a case-by-case basis.[490] The court has declared further that the state's duty to warn extends only to extraordinarily dangerous conditions.[491] It has suggested two methods for proving the existence of such conditions: plaintiff may show that the section of highway where injuries were sustained was significantly more dangerous than other sections in the vicinity, or plaintiff may show that other motorists suffered injuries on the same highway section at the same time.[492] On the subject of highway design, the court has held that the state has a duty to "do the best it possibly can"[493] to provide "reasonable, practical, and feasible construction"[494] of highways. It does not mean, however, that the state is under a higher duty than ordinary care. The "best it possibly can" means that which reasonably might be expected after weighing such factors as feasibility, cost, and notice of potential dangers.[495]

An interesting feature of the decisions in this area of tort claims against the state is the technique employed by the court of claims in identifying the sources of the state's duty upon which liability is sought to be sustained. In the

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[488] No. 75-0472 (Ohio Ct. Cl. Aug. 17, 1976).

[489] *Id.*, slip op. at 7. The state produced a Department of Highway Safety specialist whose expert opinion was that these devices decrease stability and steering control, especially in emergency situations.

[490] Denis v. Department of Transp., No. 75-0287 AD, slip op. at 6-7 (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration).

[491] On this point the court has relied upon the law in other states: Petree v. Crowe, 272 So. 2d 399 (La. Ct. App. 1973), which concluded that a driver is not required to anticipate extraordinary highway damage, and Barton v. King County, 18 Wash. 2d 573, 139 P.2d 1019 (1943), which held that a municipality's duty to warn extended to inherently dangerous situations or those likely to mislead a prudent traveler.

The extension of a duty to warn about extraordinarily dangerous conditions was also declared in Echard v. Department of Transp., No. 75-0308 AD (Ohio Ct. Cl. Nov. 18, 1976).

[492] Denis v. Department of Transp., No. 75-0287 AD, slip op. at 7 (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration).

[493] Haskins v. Jackson, No. 75-0275, slip op. at 8 (Ohio Ct. Cl. Oct. 8, 1976). The court also stated that, "[r]easonableness requires only that a governmental agency do the best it possibly can, and it is not required to meet every possible situation no matter when or where it may occur." *Id.*

The court gave no indication of the source of this duty, whether by statute or previous decision. In comparison, a portion of the California waiver of immunity deals directly with this situation. CAL. GOV'T CODE § 830.6 (West 1966). It provides that there will be no liability for design of or construction on public property if the plan was approved in advance by a body exercising discretionary authority, or if the plan was prepared in accordance with previously approved standards, unless there is no reasonable basis for such approval.

[494] Haskins v. Jackson, No. 75-0275, slip op. at 3 (Ohio Ct. Cl. Oct. 8, 1976).

[495] *Id.* at 8.

leading case of *Denis v. Department of Transportation*,[496] for example, the court quoted from a section of the Ohio Revised Code entitled "Duties and powers of director,"[497] which provides that "[t]he director of transportation shall have general supervision of all roads comprising the state highway system. He may . . . improve, maintain, repair, and preserve any road or highway on the state highway system."[498]

However, the court looked beyond the language of the code directed to the state. It also considered code provisions establishing the liability of counties, municipalities, and townships for lapses of street and highway maintenance.[499] Furthermore, it cited approvingly the jury charge issued in *District of Columbia v. Woodbury*[500] which it believed to be an accurate statement of general common law principles applicable to highway defect cases.[501] Combining the common law principles with the statutory law applicable to the state, counties, municipalities and townships, the court synthesized the elements of proof to be imposed upon the plaintiff.

This glaring difference of approach between the line of cases represented by *Denis*, on the one hand, and the lines of cases represented by *Devoe* and *Shelton* on the other, certainly raises the need for further inquiry. If no basis in logic or policy can be identified and the different approaches cannot be reconciled, then one or the other of those approaches should be abandoned.

As we have seen in the business regulation cases and the safety inspection cases, the court of claims will focus its consideration of the question of the existence of a state duty upon the language of the statute enabling

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[496] No. 75-0287 AD (Ohio Ct. Cl. Feb. 27, 1976).

[497] OHIO REV. CODE ANN. § 5501.31 (Page Supp. 1978).

[498] No. 75-0287 AD, slip op. at 1. The court also referred to other duties of the director, none of which were pertinent to the issue of negligence. OHIO REV. CODE ANN. § 5501.04 (Page Supp. 1978). Section 5501.04 deals with the administrative designation within the Department of Transportation, commanding the director to distribute the department's activities among the separate divisions. Section 5501.42 rests in the director the responsibility for all trees and shrubs within state highway limits.

Denis also cites section 2 of Bill 584, effective August 1, 1975 (Appropriation Act) as containing a duty of the director of the Department of Transportation. It states:

> "Notwithstanding Chapter 5521 and sections 5501.41 and 5511.01 of the Revised Code, the director of transportation shall remove snow and ice, and maintain, repair or improve, and provide lighting upon interstate highways which are located within the boundaries of municipal corporations, adequate to meet the requirements of the federal highway administration."

Act of June 29, 1973 § 5501.41, 135 Ohio Laws 1301, 1374 (1973) (current version at OHIO REV. CODE ANN. § 5501.41 (Page Supp. 1978)).

This might have been an adequate statutory basis upon which to predicate the state's duty to maintain highways as explained in *Denis* because the chuckhole struck by the plaintiff was located in an interstate highway (I-77) within the borders of the city of Cleveland. No. 75-0287 AD, slip op. at 3.

However, as noted by the court, Amended House Bill 584 became effective subsequent to the incurrence of damage alleged in *Denis*. In fact, a provision of the code was in force on January 10, 1975, declaring that the Director of Transportation had no duty to resurface, maintain, or repair state highways within the borders of municipal corporations. OHIO REV. CODE ANN. § 5501.31 (Page Supp. 1978).

[499] OHIO REV. CODE ANN. § 305.12 (Page 1979); OHIO REV. CODE ANN. § 723.01 (Page 1976); OHIO REV. CODE ANN. § 5571.02 (Page Supp. 1978); *id.* § 5571.10 (as amended 1978).

[500] 136 U.S. 450 (1890).

[501] Denis v. Department of Transp., No. 75-0287 AD, slip op. at 3 (Ohio Ct. Cl. Feb. 27, 1976) (on reconsideration).

governmental action.[502] A statute which directs that a department or agency of the state "may" engage in certain activity or "may" refrain from certain activity has been held to endow that department or agency with a range of discretion from which no liability may arise.[503] Yet, the code language quoted in *Denis* provides that the director "may . . . improve, maintain, repair, and preserve . . ."[504] state highways. The court neglected to refer to other provisions of the same statute which would seem to repudiate any allegations of duty to be imposed against the Director of Transportation where the highways are situated within the boundaries of municipal corporations.[505] The application of the *Devoe* and *Shelton* reasoning would lead to the conclusion that the statutes simply granted authority to act and a measure of discretion to act or not to act within that authority. The conclusion to be reached would be that liability would not be imposed for injuries resulting from the exercise of that discretion. Since that was not the result in *Denis*, there are three alternative explanations for the difference: (1) the court was incorrect in its construction of the statute; (2) the court was abandoning the method of statutory construction employed by *Devoe* and *Shelton*; or (3) the statutory basis of liability, or lack thereof, would not be the determinative factor in the court's consideration of the duty issue.

Given the wide latitude of judicial decisions dealing with the meanings of "may" and "shall," it cannot be maintained with any degree of authority that the court was "incorrect" in its construction of the statutory language. Courts have construed "shall" to mean the statute is directory only and have declared that "may" does not obviate a mandatory purpose.[506] This observation further points up the problem with making discretionary function immunity dependent upon construction of such language.

The court of appeals has not abandoned the *Devoe* and *Shelton* method of statutory construction, and if later decisions are indicative, neither has the court of claims. For example, two years after *Denis* in *Jones v. State*,[507] the court of appeals affirmed the court of claims dismissal of the case upon a finding that the statute imposed no duty to suspend the business' operations.

The court of claims has reached the point in its jurisprudence where it will go beyond a statutory scheme supportive of a discretionary construction to ascertain governmental duty, at least in highway defect cases. The question remains why the court would be willing to extend its analysis beyond an inquiry into the statutes to find a predicate of state liability as it did in *Denis*. The answer lies, perhaps, in the court's appreciation of common law decisions in other jurisdictions.[508] In *Denis* the court relied heavily upon the jury charge

[502] *See* text accompanying notes 441-47, 451-55 *supra*.

[503] Devoe v. State, No. 75-0105 (Ohio Ct. Cl. June 18, 1975), *aff'd*, 48 Ohio App. 2d 311, 357 N.E.2d 296 (10th Dist. 1975); Adamov v. State, 460 Ohio Misc. 1, 345 N.E.2d 661 (Ct. Cl. 1975).

[504] OHIO REV. CODE ANN. § 5501.31 (Page Supp. 1978).

[505] *Id.*

[506] *E.g.*, Jones v. State, No. 77 AP-688 (Ohio 10th Dist. Ct. App. Dec. 5, 1977).

[507] *Id. See* text accompanying note 444 *supra*.

[508] *See generally* Annot., 61 A.L.R.2D 425 (1958); Annot., 62 A.L.R.2D 1222 (1958). For example, the New York courts have determined that actions sounding in negligence may be brought against the state under the New York Court of Claims Act for failure to "maintain the highway in a reasonably safe condition for travel at all seasons of the year." Dunn v. State, 52 N.Y.S.2d 128, 130 (Ct. Cl. 1944). *See also* Torrey v. State, 266 App. Div. 900, 42 N.Y.S.2d 567 (1943).

in *District of Columbia v. Woodbury*,[509] a United States Supreme Court decision affirming liability of the district for injuries sustained by plaintiff because of improperly maintained sidewalks. The charge to the jury in that case stated that the district was under a "duty of supervising the streets of Washington, and keeping them in a condition fit for convenient use and safe against accidents to travellers using them."[510] Cautioning the jury that the governmental unit was not an insurer, the trial judge had said further, "[i]t is simply bound to practice due care and diligence in the exercise of its powers and in the application of its resources toward the objects named."[511]

In other words, "common law liability,"[512] missing in the other cases, was present in *Denis*. From that, the court then constructed the state's duty by analogy to the duties imposed by the Ohio Revised Code upon governmental entities other than the state.[513] Thus it is clear that the court is not willing to proceed along unmarked paths in the development of common law. Rather, once other jurisdictions have marked the way, and the statutory scheme pertaining to the state department or agency does not prohibit the imposition of duty, the court will entertain a cause of action sounding in negligence. Practitioners before the court would be well-advised, therefore, not to proceed upon a theory of liability which relies solely upon the imposition of duty by statute, but to identify cases from other jurisdictions, on point or analogous, which mark the way through the application of ordinary tort principles for the court.

E. *State Custody over Juvenile Offenders*

In *Adamov v. State*[514] the Ohio Court of Claims set forth its approach for dealing with state liability for injuries inflicted by a juvenile released from state custody. Plaintiffs contended that the Ohio Youth Commission had been negligent in its decision to release a juvenile in light of his history of violent acts.[515] The state's motion for summary judgment was granted upon several grounds.

One proposition offered by the court in support of its decision was that there was no analogous private counterpart to the state's activity. Confinement of juvenile offenders was considered by the court to be a unique state activity having no analog in the private sector, and since the liability of the state was to be determined in accordance with rules of law applicable to suits between private parties, tort liability could not arise from this activity.[516] As previously discussed, this approach does not provide a workable standard for the determination of governmental liability, since most functions of state have no private counterpart, and there does not appear to be such a far-reaching limitation in the express language of the state's consent to suit.[517]

[509] 136 U.S. 450 (1889).

[510] *Id.* at 463.

[511] *Id.*

[512] See notes 390-91 *supra* and accompanying text.

[513] The court observed that the analogy was not complete because "the potential exposure of the state is much greater than that of counties, municipal corporations, and townships." No. 75-0287 AD, slip op. at 3.

[514] 46 Ohio Misc. 1, 345 N.E.2d 661 (Ct. Cl. 1975).

[515] *Id.* at 2, 345 N.E.2d at 662.

[516] *Id.* at 6-7, 345 N.E.2d at 664-65.

[517] See notes 409-10 *supra* and accompanying text.

In other respects, however, the decision in *Adamov* was sound. As it had done in the business activity regulation cases led by *Devoe*, the court discussed the question of discretionary immunity in terms of the statutes authorizing state activity. However, while the concept of discretionary function immunity was rather poorly defined in *Devoe*, the reasoning in *Adamov* was very similar to the policy formulation test used in *Downs v. United States* in determining the application of that type of immunity.

The statutes outlining the functions and duties of the Ohio Youth Commission are directed toward a dual purpose. The commission is directed to order the treatment of each child committed to its custody in the way that it considers best suited to the needs of the individual and the interests of the public.[518] The commission is vested with wide discretion in its decisions whether to confine or release a child, and those decisions involve balancing the child's needs against the public interest in protection from the consequences of criminal behavior.[519] In *Adamov*, the court of claims concluded that, in light of the federal discretionary function exception, the exercise of discretion by the Ohio Youth Commission could not provide a basis for tort liability.[520] The analysis did not stop there, however. The court went on to discuss the concept of discretion in rather precise terms. To qualify for discretionary immunity, the court suggested, an official decision must relate to basic governmental policy or objective and must be essential to the attainment of that end. Furthermore, the court said that the decision must involve evaluation and judgment based upon expertise and be grounded upon requisite statutory authority. Since the decisions of the Ohio Youth Commission involved the balancing of public interests against the need for rehabilitative treatment of the child, the court held that the commission was immune from liability.[521]

This reasoning reflects the same considerations as the policy formulation test of discretionary function immunity employed by federal courts. The Ohio Youth Commission is charged with the responsibility for basic policy decisions in the treatment of youthful offenders committed to its custody. Given the importance of the competing interests to be placed in balance in decisions whether to confine or release, it could be argued that those decisions should be free of the threat of private tort litigation. The court's analysis should withstand any criticism based upon the premise that the state activity does not fall properly within the scope of discretionary immunity.

While the plaintiff in *Adamov* did not perfect an appeal, the later case of *Hahn v. Brown*[522] was decided upon substantially similar grounds, and the decision was affirmed by the court of appeals. However, the *Hahn* case

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[518] OHIO REV. CODE ANN. § 5139.04(C) (Page 1973).

[519] This balancing process is also reflected in the motivating philosophy of juvenile court procedures. The court is directed to provide for the cure, protection, and mental and physical development of juveniles, as well as to protect the public interest in removing the consequences of criminal behavior. OHIO REV. CODE ANN. § 2151.01 (Page 1976).

[520] 46 Ohio Misc. at 5, 345 N.E.2d at 666.

[521] *Id.* The approach was borrowed from a Washington case, Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965), *discussed in* text accompanying notes 526-29 *infra*.

[522] No. 75-0119 (Ohio Ct. Cl. Apr. 13, 1976), *aff'd*, 51 Ohio App. 2d 177, 367 N.E.2d 884 (10th Dist. 1976).

involved different facts in as much as the alleged injury was inflicted by two *escapees* from the Maumee Youth Camp. Plaintiff claimed that the youths damaged his automobile and that the selection and enforcement of security measures at the camp had been negligent.[523] The court of claims dismissed the action on the authority of its decision in *Adamov*.[524]

Plaintiff sought to avoid the *Adamov* holding on the basis of the different facts. The youth who attacked Mrs. Adamov had been intentionally released from official custody on the specific statutory authority of the Ohio Youth Commission. In *Hahn* there was no intention to release the offenders; they escaped because those charged with custody inadvertently permitted it. The court of claims explicitly rejected the attempted distinction and held that the selection of adequate security precautions, like the decision whether to confine or release, required the exercise of judgment and discretion.[525]

The court cited a Washington case, *Evangelical United Brethren Church v. State*,[526] in support of its approach. In that case, a boy with known pyromaniac propensities escaped from a state youth detention facility and set fire to a church. The Washington Supreme Court discussed several approaches to the determination of discretionary immunity and held the state not liable under the principle.[527] One of the approaches the court considered was the planning-operational distinction prevalently used by the federal courts at that time. Noting the efficacy of that approach, the court chose instead to adopt its own version of the policy formulation test. In order to qualify for discretionary function immunity a state decision must involve a basic public policy objective, be essential to the accomplishment of that policy, as opposed to a choice which would not change the course or direction of public policy, be based upon judgment and expertise, and be grounded upon requisite constitutional or statutory authority.[528] Under this concept of discretionary function, the Washington court held the selection of security measures at a youth camp were immune.[529]

The Washington Supreme Court approach is obviously the one embraced by the court in *Adamov*. Although the *Adamov* definition was not repeated in *Hahn*, the court did suggest that a balancing of governmental objectives was inherent in the decision of the camp administrators. The selection of security measures, the court concluded, involved the balancing of the rehabilitative needs of the child and the community interest in being free from criminal behavior. The state was held to be immune under the discretionary function exception.[530]

[523] 51 Ohio App. 2d at 177, 367 N.E.2d at 884. The plaintiff also argued that the state should be liable under Ohio Revised Code section 3109.09, which allows a property owner to recover damages from the parents of a minor child who willfully damages the owner's property. *See* OHIO REV. CODE ANN. § 3109.09 (Page 1973). Both the court of claims and the court of appeals concluded that whatever the rights and responsibilities of the state with regard to juveniles within its custody, the state was not a "parent" within the meaning of this statute. 51 Ohio App. 2d at 178, 367 N.E.2d at 886.

[524] No. 75-0119, slip op. at 8.

[525] *Id.* at 6.

[526] 67 Wash. 2d 246, 407 P.2d 440 (1965).

[527] *Id.* at 252-55, 407 P.2d at 444-45.

[528] *Id.* at 255, 407 P.2d at 445.

[529] *Id.* at 258, 407 P.2d at 446-47.

[530] No. 75-0119, slip op. at 6.

Unfortunately, although the court of appeals affirmed *Hahn*, it did not employ the policy formulation test. Plaintiff had argued that the court of claims had erred in relying upon *Adamov*,[531] a very weak ground for appeal, since the court of appeals would not be inclined to collaterally review an earlier unappealed trial court decision.[532] The court of appeals' review of the *Adamov* case was limited to a general expression of approval of the decision. However, that statement of approval was immediately followed by the court's reiteration of the no analogous private counterpart proposition. There is thus no reason to believe that the policy formulation test will become attractive to the court of appeals in the near future.[533]

F. *Care and Custody of Patients in State Hospitals*

Because of the involvement of the same policy considerations as those arising in the context of care and custody of youthful offenders in the state, one would expect the court of claims' analysis to be similar when the focus changes to questions of state liability in the context of care and custody of patients in state hospitals. That expectation has not been completely borne out in the decisions. The first type of claim to be considered is the allegation of official negligence in the treatment of patients entrusted to the care of state hospitals. Generally, the court of claims has acknowledged the liability of the state in such claims. However, it appears that the standard of care to be applied to the hospital and its personnel will vary, depending largely upon the type of illness afflicting the patient and the nature of the patient's claim.

The court has held that the standard of care generally to be applied to the state is set forth in section 5122.27 of the Ohio Revised Code: "Every patient shall be entitled to humane care and treatment and, to the extent that facilities, equipment, and personnel are available, to medical care and treatment in accordance with the highest standards accepted in medical practice."[534] While acknowledging that this standard amounts to "less than the approved"[535] (less than what might be approved in a private medical setting?), the court suggests that the standard "appears to accept reality."[536]

The standard was applied in *Hale v. Portsmouth Receiving Hospital*.[537] Plaintiff contended that the defendant physician negligently refused her admission to a state mental hospital despite his knowledge of her suicidal tendencies[538] and that this negligence was the proximate cause of her later

[531] 51 Ohio App. 2d at 179, 367 N.E.2d at 886.

[532] *Id.*

[533] *See* Leverett v. Western Reserve Psychiatric Habilitation Center, No. 77 AP-107 (Ohio 10th Dist. Ct. App. Oct. 27, 1978), where plaintiff claimed the Center had wrongfully released a patient who later shot and killed plaintiff's husband. The case is discussed at notes 544-47 *infra* and accompanying text.

[534] OHIO REV. CODE ANN. § 5122.27 (Page Supp. 1978).

[535] *See* Lynch v. State, No. 75-0492, slip op. at 7 (Ohio Ct. Cl. Dec. 2, 1975).

[536] *Id.*

[537] No. 75-0104 (Ohio Ct. Cl. Dec. 29, 1976), *aff'd*, No. 76 AP-946 (Ohio 10th Dist. Ct. App. April 28, 1977).

[538] No. 75-0104, slip op. at 2. The California waiver of immunity contains a provision covering this situation. CAL. GOV'T CODE § 856.4 (West 1966). It provides that no liability may ensue for an injury caused by the failure to admit a person to a public medical facility, unless the facility is under a mandatory statutory duty to protect against the particular type of injury that is suffered. If this should be the case, the public entity may still escape liability by establishing that it exercised reasonable diligence in attempting to fulfill its duty. *Id.* § 815.6.

attempted suicide. Paying great deference to the budgetary constraints upon provision of state services, the court dismissed the complaint. Pointing out the qualifying language of the statute making the standard of care dependent upon the extent of availability of facilities, equipment and personnel, the court held that the qualification cast the physician's denial of admission into an area where no liability should attach. The provision of medical facilities, equipment and personnel was considered to be a matter for legislative determination, and the shortcomings in such areas could not form the basis for a claim in negligence.[539]

The obvious danger in such a rationale is in its blanket application to all refusals of admission. Unless it is clear that the refusal was based upon an appraisal of facilities, equipment and personnel which showed the hospital resources were taxed beyond consideration of the admission of one more patient, the application of the qualifying language to impose a lesser standard of care would be an erroneous interpretation of the law. Even if the hospital to which the claimant sought admission were overextended in its resources, the question would still remain whether the defendant's duty of care extended to finding a hospital that could admit her. It is not clear from the opinion whether the court considered these aspects of the claim.

When the claim involves a patient alleging injury inflicted by another patient, the standard is further lowered. In *Siegle v. Moritz*,[540] a claim based upon one patient striking another patient in the eye with a broom, the court of appeals held that the state owes only a duty of reasonable care to prevent harm from other patients. The decision relied upon the patients' rights section of the Ohio Revised Code, which provides that a mental patient "shall be given reasonable protection from assault or battery by any other person."[541] Although the decision is not clear on the matter, it seems to suggest that the reasonableness standard imposed by the statutory right is also affected by the personnel and material qualification of code section 5122.27.

In some cases, a patient may allege that a physician or other medically trained person has not given treatment with the skill or care exercised by the average professional in like circumstances. In such a case, the qualifying language of section 5122.27 can have no application, since it is the quality of the individual, and not the state's collective material and personnel resources, that is being called into question. The court has applied the general common law standard of care to determine liability: "The question is what would a physician of ordinary skill, care, and diligence have done under similar conditions."[542] Interestingly, this same standard was applied in *Colnar v. Hawthornden State Hospital*,[543] where plaintiff asserted negligence on the part of the state in the maintenance of the physical surroundings of her room. She claimed that defendant negligently permitted her door to become locked, negligently failed to come to her aid when summoned, and negligently

[539] No. 75-0104, slip op. at 23. In order to carry this burden, the plaintiff must establish that the particular department of the state possessed sufficient funds to allow it to increase its staffing or facilities. Siegle v. Moritz, No. 77 AP-303, slip op. at 3 (Ohio 10th Dist. Ct. App. Dec. 14, 1977).

[540] No. 77 AP-303 (Ohio 10th Dist. Ct. App. Dec. 14, 1977).

[541] OHIO REV. CODE ANN. § 5122.29(A)(2) (Page Supp. 1978).

[542] Hale v. Portsmouth Receiving Hosp., No. 75-0104, slip op. at 8 (Ohio Ct. Cl. Dec. 29, 1976), *aff'd*, No. 76 AP-946 (Ohio 10th Dist. Ct. App. Apr. 28, 1977).

[543] No. 75-0410 (Ohio Ct. Cl. May 28, 1976).

permitted her window to open without providing bars or grates. The complaint was dismissed upon a finding that plaintiff had not met her burden of proof regarding the standard of care.

Cases also arise in this area of state activity when a patient released or escaped from a mental institution injures someone. Given the courts' decisions in the area of juvenile detention, the likely approach to these cases would be to consider the discretionary aspects of the decision to retain or release patients for the purpose of applying discretionary function immunity. That indeed has been the court of claims' method of decision, but the court of appeals has departed somewhat from the expected pattern.

In *Leverett v. State*,[544] the court of claims was presented with a wrongful death action against the state in which plaintiff alleged that the wrongful release of a dangerous mental patient resulted in the patient later killing her husband. Citing the *Adamov* and *Hahn* cases, the court dismissed plaintiff's claim. Plaintiff appealed, contending that the court had erroneously applied the liability clause of the Court of Claims Act since rules of law applicable to private parties could be found in this case.

The court of appeals agreed with plaintiff. This court distinguished the *Adamov* and *Hahn* decisions because those cases arose in the area of the state's duty to incarcerate criminal offenders, an activity that has no private counterpart. Here, the activity has a private sector counterpart because there are private hospitals for mental patients.[545] If a private mental patient care facility could be held liable for negligent release, said the court, so could the state pursuant to the liability clause of the Act.

Having reached that state of its analysis, the court encountered a snag: no Ohio case could be found which discussed the imposition of liability of a private hospital in the situation presented. At this point, the court of appeals made a significant move in the jurisprudence of the Court of Claims Act. It extended the common law regarding state liability into unmarked territory by concluding that the state's physicians and hospitals have a duty to act reasonably and in good faith in the release of dangerous mental patients. That duty is owed to persons who can establish that an injury by such a released patient "is proximately caused by the acts or omissions of the doctors or hospital."[546]

The court recognized that decisions to release involve the same sort of balancing of interests as the penal incarceration cases. It considered the difficulty in "balancing the interests of a patient who would benefit from permanent or periodic release, the interest of society in treating mental illness and returning the patient to a normal, productive life, and the interests of society in keeping a dangerous, mentally ill person off the streets"[547] to render the decision discretionary. Nonetheless, the court concluded that discretionary though these acts were, the intent of section 5122.34 of the Ohio Revised Code was that where a duty was imposed upon a private mental facility, a corresponding duty was imposed upon a state mental hospital.

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[544] No. 77-0202 (Ohio Ct. Cl. Jan. 31, 1978), *rev'd*, No. 78 AP-107 (Ohio 10th Dist. Ct. App. Oct. 27, 1978).

[545] No. 78 AP-107, slip op. at 6.

[546] *Id.* at 11.

[547] *Id.* at 8.

Two questions remain: what will constitute a breach of the duty, and why was state liability extended so far, given a close parallel to the incarceration cases? There can be no certain answer to the latter question. Perhaps the seriousness of the injury claimed as well as the court's assessment of the frequency with which such cases will be pressed persuaded it to take the additional step. It cannot be doubted that the presence of a private counterpart[548] was a strong factor in persuading the court to impose liability. There was, however, no common law upon the subject, and the court of appeals has become fond of pronouncing that in the absence of statutory or common law liability no duty will arise to support a cause of action in negligence.[549] Aside from the possible dilution of the *Adamov* adoption of the modern view of discretionary function immunity, the decision is a commendable example of a common law court establishing common law in matters of first impression.

The answer to what will constitute a breach of duty is strongly suggested in *Leverett*, and that answer may well provide as much protection as the discretionary function immunity concept. The court stated that liability would flow from negligent releases of dangerous mental patients "only when the hospital, in exercising medical judgment, knew or should have known that the patient, upon his release, would be very likely to cause harm to himself or others."[550] Furthermore, when the court reached the conclusion that the decisions to release were discretionary, it emphasized that those decisions would be "subject to rebuke only for the most flagrant, capricious, and arbitrary abuse."[551] In so doing, the court has supplanted discretionary function immunity with a privilege that conforms to the common law concept of privilege. The state is by no means made an insurer for injuries by released patients. It will not even be liable where ordinary negligence leads to the

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[548] It is interesting to note that in this setting, the private counterpart activity is more than "analogous;" it is the same activity as that being performed by the state.

[549] *See, e.g.*, Walker v. Department of Rehab. & Correction, No. 76 AP-970 (Ohio 10th Dist. Ct. App. Nov. 3, 1977). In *Walker*, the plaintiff alleged negligence by the department in paroling a prisoner who had been convicted of stabbing with intent to wound on two previous occasions and had been convicted of second degree murder while on parole from the second stabbing conviction. In addition, the parolee had been convicted of carrying a concealed weapon during his parole from the murder sentence but had not had his parole revoked by the department. Plaintiff, a police officer, was shot by the parolee and was paralyzed from the waist down as a result of the wound. The court of claims dismissed the complaint for failure to state a claim, and the court of appeals affirmed:

> Certainly the action brought herein is not one which could have been brought between private parties, inasmuch as private parties have no duty, as does the state, to incarcerate criminals and juvenile offenders. It must be remembered that the Court of Claims Act did not create new causes of action where none existed in the past.

Id., slip op. at 8 (*quoting* Hahn v. Brown, 51 Ohio App. 2d 177, 179, 367 N.E.2d 884, 886 (10th Dist. 1976)). *See also* City of Oregon v. Ferguson, 57 Ohio App. 2d 95, 385 N.E.2d 1084 (10th Dist. 1978), in which plaintiff alleged that negligent audits by defendant of its Clerk-Auditor office resulted in financial losses. The court of claims had dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed saying:

> [I]f indeed there be any private parties to have such duty, such duty is not created by statute but only by virtue of some other legal relationship and, hence, there is no law making a private party liable for a failure to perform such statutory duties which were enacted to protect the health, safety and welfare of all the citizens of Ohio.

Id. at 101-02, 385 N.E.2d at 1088.

[550] No. 78 AP-107, slip op. at 9. A dangerous mental patient is one who is very likely to cause harm to himself or others. *Id.*

[551] *Id.* at 8-9.

injury of a third person. State hospital functionaries are privileged to make determinations about release[552] without liability to those who may be injured by former patients so long as the privilege is not abused, and abuse occurs only with the most outrageous lapses of judgment.

G. *Care and Custody of Penal Institution Inmates*

That the state may be held liable for injuries occurring to prison inmates is clear,[553] but determining from court of claims decisions the standard of care to which the state will be held is not simple. In *Freeman v. Denton*[554] the court appeared to favor an approach akin to the discretionary function immunity concept. Plaintiffs alleged that their civil rights had been violated by failure of the Department of Rehabilitation and Correction to properly credit parole time toward their sentences. The court found that the language of the liability clause of the Court of Claims Act

> strongly suggests that the problems arising out of difficulties in the management of penal institutions and in the relations between the residente [sic] of those institutions and controlling authority are not within the jurisdiction of this Court because there is no applicable law to be found in the rules of law as respects suits between private parties.[555]

Clearly, if this notion were applied to all prisoners' injuries cases on the question of state liability, no inmate could pursue a claim against the state.[556]

More commonly the court of claims has referred to chapter 4113 of the Ohio Revised Code to establish the extent of liability of the state for prisoners' injuries. That chapter, "Miscellaneous Labor Provisions," imposes liability on an employer for injuries arising from acts of "fellow servants,"[557] renders assumption of the risk defenses unavailable to employers under certain

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[552] The court drew a crucial distinction between release and readmittance:

> In most instances, the doctor or hospital has only the assessment of lay people as to the condition of the "patient," as opposed to the opinions of medical experts after admitting, observing, and examining the patient. A duty as to readmission similar to the duty of care in discharging would in effect require the admission of *all* persons suspected by lay people to be dangerous. The dissimilarities of circumstances and pragmatic effect convinces us that mental hospitals and doctors are not generally under a legal duty to third parties as to decisions not to admit or readmit a patient.

Id. at 9 (emphasis in original).

Quaere: Is the court suggesting that in those instances where the physician has *more* than lay opinion to rely upon that a duty arises? If the answer is in the affirmative, would not that supply a basis for distinguishing a first-time admittance and a *re*admittance, since in the latter instance the physician has the benefit of the patient's history of observation and care while in the custody of professionals?

[553] *See, e.g.*, Pace v. Department of Rehab. & Correction, No. 75-0539 (Ohio Ct. Cl. June 21, 1976). *But see* Watson v. Department of Rehab. & Correction, No. 75-0204-SC (Ohio Ct. Cl. Mar. 16, 1976).

[554] No. 76-0463 (Ohio Ct. Cl. Oct. 20, 1976).

[555] *Id.*, slip op. at 4.

[556] The California waiver of immunity contains a provision which provides specifically that public entities (with few exceptions) are not liable for any injuries to prisoners. A public employee will, however, be liable for negligent acts and omissions even when the public entity is immune. In such situations the public entity may indemnify its employee, although it is not required to do so. CAL. GOV'T CODE § 844.6 (West 1966).

[557] OHIO REV. CODE ANN. § 4113.03 (Page 1973).

conditions,[558] and permits a rule of comparative rather than contributory negligence to be applied.[559]

This reliance on chapter 4113 has been disapproved by the Ohio Court of Appeals for the Tenth District. In *Fondern v. Department of Rehabilitation and Correction*,[560] an inmate of Columbus Correctional Medical Center sought recovery for injuries he sustained when caught in a steam clothes press in the laundry room of the institution. Although the clothes press was designed for two-handed operation for safety and its features included a dual-button system which required both buttons to be depressed simultaneously to make the machine operate, it was common practice for the inmates to jam or plug one button so that only one hand could be used, a practice prohibited by institution rules. The press operated by plaintiff at the time of the injury had one button jammed, and there was further evidence that the machine had malfunctioned for the week preceding the accident. The court of claims, finding that the "standard of care applicable from the State to an inmate working at a job within a penal institution would be that prescribed by R.C. 4113.03 to 4113.07,"[561] awarded plaintiff $1,800 for the injury to his arm. The state appealed on the grounds that chapter 4113 of the code was not applicable to cases of this nature and that the findings of negligence and absence of contributory negligence were contrary to the manifest weight of the evidence. While the court of appeals affirmed, it agreed with the state that the court of claims erred in its reliance upon chapter 4113.

Citing an earlier court of claims opinion which had actually run counter to the trend of that court's decisions by approving the defenses of assumption of the risk, contributory negligence, and the "fellow-servant rule,"[562] the court of appeals held that an inmate of a penal institution is not an employee of the state. The court of appeals then determined that a non-statutory standard of care had been breached by the state. The standard of care to be applied is ordinary negligence; "the injured prisoner must prove that the negligence of the responsible officials proximately caused the injuries complained of. Further, the State of Ohio may have available to it the common law defenses of contributory negligence and assumption of the risk, if applicable, in a given case."[563]

Where the prisoner is claiming to have been injured by a state employee, the court of claims' statements about required proof have been somewhat more explicit. The injured party must establish that an agent of the state attacked the plaintiff and caused the injury or that the state had actual or constructive notice that the plaintiff was in danger and failed to respond or did so inappropriately, and that the state is responsible in some way for the acts of its agent.[564] This is a particularly sensitive area for the court. Under general

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[558] *Id.* § 4113.06.

[559] *Id.* § 4113.07.

[560] 51 Ohio App. 2d 180, 367 N.E.2d 901 (10th Dist. 1977).

[561] *Id.* at 182, 367 N.E.2d at 902.

[562] Watson v. Department of Rehab. & Correction, No. 75-0204-SC (Ohio Ct. Cl. Mar. 16, 1976).

[563] 51 Ohio App. 2d at 184, 367 N.E.2d at 903.

[564] Fitzgerald v. State, No. 75-0271 AD (Ohio Ct. Cl. July 23, 1976).

principles of *respondeat superior* the existence of an agency relationship and proof that the agent was acting within the scope of employment is normally sufficient to impose liability upon the principal. However, in other areas the court of claims has subscribed to the view that intentional torts are *ultra vires* acts and therefore outside the scope of employment.[565]

The court of claims has heard a number of claims from prisoners concerning lost or stolen property.[566] Review of those cases shows that the state is held to a duty of reasonable care to protect and recover the personal property of the institutional residents.[567]

H. *Enactment of Legislation or Regulations*

A few residents of Ohio have taken the common exclamation "there ought to be a law" seriously and have sought to recover damages from the state for injury caused by the state's allegedly negligent failure to formulate legislative rules or administrative regulations. Such suits have not been successful, but the court of claims' handling of them is instructive.

In *El v. State*,[568] plaintiff asserted that the state was negligent in failing to enact a law which would have required the probate court to consider appointing a guardian over his estate during a period of involuntary confinement in a state hospital.[569] The court of claims dismissed the action for failure to state a claim. While the court doubted that the governor's office or the General Assembly were instrumentalities of the state as described by the definition section of the Court of Claims Act, it assumed that they were. It

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[565] *See* notes 399-400, 404-07 *supra* and accompanying text.

[566] *E.g.*, Ormsby v. Southern Ohio Correctional Facilities, No. 77-0247-AD (Ohio Ct. Cl. Jan. 5, 1978); Boone v. Marion Correctional Inst., No. 77-0469-AD (Ohio Ct. Cl. Oct. 26, 1977); Flint v. Engle, No. 77-0241-AD (Ohio Ct. Cl. Aug. 15, 1977); Anderson v. Department of Rehab. & Correction, No. 77-0321-AD (Ohio Ct. Cl. July 21, 1977); Moore v. Ohio Reformatory for Women, No. 76-0527-AD (Ohio Ct. Cl. Apr. 13, 1977); Mullett v. Department of Rehab. & Corrections, No. 76-0292-AD (Ohio Ct. Cl. Feb. 15, 1977) (on reconsideration).

[567] *E.g.*, Mullett v. Department of Rehab. & Corrections, No. 76-0292-AD, slip op. at 2 (Ohio Ct. Cl. Oct. 19, 1976) (Deputy Clerk's findings of law).

One such case is interesting for its facts. In Boone v. Marion Correctional Inst., No. 77-0469-AD (Ohio Ct. Cl. Oct. 26, 1977), claimant was permitted to attend a funeral during his term at the Institute. Claimant decided not to return after the funeral and remained at large for nine months. When he was returned to the Institute, he found that several items of personal property were missing. He sued to recover the value of the property. The clerk, quoting from Ellis v. Ohio State Reformatory, No. 76-0243-AD (Ohio Ct. Cl. July 19, 1977), said that an escape creates the rebuttable presumption that the prisoner intended to abandon the property. The opinion does not indicate what might be sufficient to rebut the presumption. No. 77-0469-AD, slip op. at 1.

Quaere: Which shall control, the *fact* of escape, the *intent* to *successfully* escape, or the *success* of the escape? Abandonment is a fairly well-developed concept of law. Should the court add complexity by indulging in rebuttable presumptions?

[568] No. 75-0354 (Ohio Ct. Cl. Sept. 3, 1975), *aff'd*, 48 Ohio App. 2d 290, 357 N.E.2d 61 (10th Dist. 1976). In 1969 Edward Martin El was arrested for resisting an attempt to evict him from his home. Following the arrest, he was held for psychiatric evaluation and was subsequently committed to the Lima State Hospital for treatment. Upon his release in 1973, Mr. El successfully fought the criminal charges which had prompted his four-year confinement. In the meantime, his estate had fallen upon bad times. Mr. El had requested an employee to look after his cleaning business during the period of confinement and made her a co-signatory of three bank accounts. When he returned in 1973 he found that the funds of the accounts had been withdrawn and the cleaning business bore the name of his former employee. He subsequently brought an action against the governor, the General Assembly, and the citizenry of Ohio to recover his losses.

[569] No. 75-0354, slip op. at 1-3.

found that the governor had no direct relation to the plaintiff's alleged injuries and therefore dismissed him as a defendant on that basis.[570] Addressing the General Assembly's liability, the court concluded that no duty to enact legislation had been imposed upon that body. The legislative power of the General Assembly comes from the Ohio Constitution, which imposes limitations upon legislative power but does not mandate that laws be passed for any particular purpose. The enactment of legislation, concluded the court, lay within the sound discretion of the General Assembly.[571] The court also dismissed the people of Ohio as parties-defendant on the basis that rules of law applicable to suits between private parties could not be used to resolve the merits of plaintiff's claim.[572]

Although the principle of discretionary function immunity would seem to have obvious application to the enactment of legislation, the concept was not discussed in *El.* Rather, the decision rests upon the finding of no duty, an approach consistent with the court's mixed concept of duty and immunity.[573]

El was affirmed on appeal. The court of appeals did discuss the concept of discretion in the context of the doctrine of separation of powers, saying that for the courts to award damages based upon the legislature's failure to act would necessarily involve an encroachment upon the General Assembly's inherent discretionary power.[574] The principle of discretionary function immunity was not fully and directly addressed, but the court of appeals' reasoning reflected the underlying purposes for the exception, and it would thus seem that the court would be receptive to direct treatment of the principle. Interestingly, however, the court of appeals decision indicates that lack of proximate cause, under ordinary negligence principles, was the determinative aspect of the case.[575]

In his concurring opinion, Judge Whiteside rejected the immunity concept, preferring to embrace the court of claims' finding of no duty. He observed that before one party may be required to respond in damages to another, a breach of duty owing to the other must be established. Any duty to enact legislation which had been imposed upon the General Assembly was owed to the public generally, not to any particular person. Thus, he concluded, the failure of that body to enact a law did not give rise to a claim against the state, not because the concepts of immunity or separation of powers precluded suit but because no duty owing specifically to plaintiff had been established.[576]

Regarding both courts' treatment of the issue of the General Assembly's liability, it is interesting to note their application of the liability clause of the Court of Claims Act. In both instances, the main rationale for dismissal was a finding that plaintiff had failed to establish an element essential for making out a *prima facie* case of negligence. In so doing, the courts applied rules of law

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[570] *Id.* at 4-5.

[571] *Id.* at 5-6.

[572] *Id.* at 6-7.

[573] *See* notes 411-28 *supra* and accompanying text.

[574] 48 Ohio App. 2d at 294, 357 N.E.2d at 63-64.

[575] *Id.* at 295, 357 N.E.2d at 64.

[576] *Id.* at 296, 357 N.E.2d at 64 (Whiteside, J., concurring).

applicable to suits between private parties. True, the courts did look to the Ohio Constitution to determine if that document had imposed a duty. But it is necessarily implicit in this approach that they also looked to the common law to find a duty. Such an approach means that the courts have already looked past the operation of discretionary function immunity to determine the question of liability. By so doing, the courts have engaged in needless effort. The courts should first consider the nature of the decision-making process being challenged and evaluate it in order to determine whether that process would be unduly influenced by the threat of private tort litigation or, if not, whether overall public policy should foreclose litigation for other compelling reasons. Only if this first inquiry has been resolved in favor of the complainant should the inquiry extend into whether the applicable tort principles are satisfied. Putting the cause of action "cart" before the "horse" of discretionary function immunity could, in a given case, cause the court some embarrassment if its first inquiry establishes the *prima facie* satisfaction of the elements of a cause of action and it then has to backtrack into principles of immunity to affirm the need for independence of legislative and executive decision-making. In such a case, the court will have actually transgressed the intended operation of discretionary function immunity through its first line of inquiry, inquiry which the concept is designed to foreclose.

Another case in this category illustrates the corollary to the *El* proposition that failure to enact a law will not give rise to liability on the part of the state. In *Whitlock v. McKenna*,[577] adoptive parents of a five year old child brought suit to obtain redress for their injuries arising out of the adoption. Prior to the adoption the child had been in the custody of the Butler County Welfare Department. Shortly after adoption the child became unruly and disturbed and eventually required confinement in a mental hospital.[578] Plaintiffs sued the County Welfare Department, alleging that employees of the department had negligently failed to discover and disclose the possible emotional or psychiatric problems of the child. The employees' negligence was further alleged to have been a result of the failure of the Ohio Department of Public Welfare to provide adequate guidelines to the county department in adoption procedures.[579] The court of claims held that liability would not arise under such circumstances.[580]

The applicability of the *El* proposition to the portion of the claim relating to the state welfare department's failure to provide guidelines, while important, is not the most significant point of the case. The interesting feature of the case is the court's treatment of the county department's liability. It was apparent to the court of claims that the county officials had acted not under the auspices of the state department, but in accordance with specific statutory command. Under then Ohio adoption law,[581] the county welfare agency was required to submit an investigation report evaluating the physical and mental health of the child, family background, and the reason for placement away

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[577] No. 75-0505 (Ohio Ct. Cl. Dec. 8, 1976).

[578] *Id.*, slip op. at 1-2.

[579] *Id.* at 2.

[580] *Id.* at 3-4.

[581] OHIO REV. CODE ANN. ch. 3107 (Page 1972) (amended 1977).

from the natural parents. The law requires that this report be made available for inspection only upon order of the probate court.[582] Hence, a disclosure of the information to plaintiffs would have amounted to a violation of the specific terms of the statute.

The principle that is involved in the court of claims' decision, and the corollary to the *El* proposition, is contained in the first section of the discretionary function exception to the Federal Tort Claims Act, excluding "[a]ny 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."[583] In *Whitlock*, the state had mandated specific action by a county agency in adoption proceedings. One secondary effect of a suit that attempts to attach liability to acts in execution of the statute is to challenge the validity or enactment of the statute in the first instance.[584] *El* held that the General Assembly may not be held liable in the exercise of its discretion whether to enact laws of the state. The concept of discretionary immunity thus extends to the acts of government officials in executing those laws.

But the possible dysfunction of the court of claims' mixed concept of duty and immunity is illustrated by a closer look at the federal provision. Even though government employees are able to take advantage of the immunity in executing federal law, that immunity is lost if the execution amounts to a failure to exercise due care. This low threshold of immunity is in stark contrast to the court of claims jurisprudence which will bar an action if the statute carries the authority to act with discretion. Under the federal law, the court of claims in *Whitlock* would not have been able to stop at its determination that the government employees were simply following a statutory mandate. It would have to look behind the satisfaction of mandated action to determine if the employees had done so with negligence.[585]

I. *"Orthodox" Tort Liability*

In *Adamov v. State*[586] Judge Troop interpreted the liability clause to mean that recovery from the state could be had only in actions which were of a type

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[582] The section prior to 1976 amendments of the chapter read:

> The reports of the investigation required divisions (B), (C) and (D) of this section, shall not be filed with the other papers in the adoption proceedings, but shall be filed separately and shall be available for inspection upon the personal direction of the probate judge.

OHIO REV. CODE ANN. § 3107.05 (Page 1972) (repealed 1977). As a result of the amendments the analogous new section now reads:

> The petition, the interlocutory order, the final decree of adoption, and other adoption proceedings shall be recorded in a book kept for such purposes and separately indexed, the book shall be a part of the records of the probate court, and all consents, affidavits, and other papers shall be properly filed. Such papers, records and books shall be available for inspection only upon the consent of the court.

OHIO REV. CODE ANN. § 3107.17(C) (Page Supp. 1977).

[583] 28 U.S.C. § 2680(a) (1976).

[584] *See* Dalehite v. United States, 346 U.S. 15 (1953); Powell v. United States, 233 F.2d 851 (10th Cir. 1956).

[585] *See* Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Smith v. United States, 155 F. Supp. 605 (D.C. Va. 1957).

[586] 46 Ohio Misc. 1, 345 N.E.2d 661 (Ct. Cl. 1975).

which could concern private parties, and "[p]rivate parties are involved in actions for breach of contract, orthodox tort liability and the commonly accepted equitable remedies."[587] In actions alleging negligence by the state, the court of claims has diligently applied Ohio tort law, much as a court of general jurisdiction would in a case involving only private parties.[588] Application of principles of that law to "orthodox tort" situations are of interest, if only for comparison to the situations in which the court has been unable to discover a duty of care. They are of further interest in the court's efforts to provide some meaning to the phrase "orthodox tort liability."

One common tort litigation situation is the slip-and-fall case. In a case between private parties, the plaintiff has the burden of showing that defendant created a hazardous condition on the premises or that it had actual or constructive notice of the condition.[589] That same burden is imposed upon plaintiffs seeking damages for slip-and-fall injuries against the state. For example, in *Wilcox v. Ohio Department of Transportation*,[590] plaintiff claimed she slipped on a piece of paper lying on an entrance ramp to a roadside rest area. The court of claims held that in order for plaintiff to recover, she must prove that the nature of the paper, or its accumulation, constituted a dangerous condition and that the state had created the condition.[591] In the alternative, plaintiff could show that the state had notice of the condition.[592]

The vague line that separates cases that impose liability upon the state under "orthodox tort liability" and those that find no liability because of no common law or statutory liability is illustrated by an alternative approach to the *Wilcox* case. The court could have, as it has done in many of the cases discussed previously, considered whether rules applicable to suits between private parties could be employed here. In answer to that question it could have determined that since private parties do not provide and maintain roadside rest areas for free use of the public, there is no analogous private counterpart and therefore no applicable common law rule.

Another illustration of this kind of case is supplied by *Sibert v. Bureau of Motor Vehicles*.[593] Plaintiff sought damages flowing from the bureau's alleged

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[587] *Id.* at 6, 345 N.E.2d at 664. *See also* Wilcox v. Ohio Dep't of Transp., No. 75-0316 AD, slip op. at 3 (Ohio Ct. Cl. June 1, 1976).

[588] As has already been pointed out, the determination of whether the state has a duty to any particular plaintiff is, however, merely a function of how narrowly the activity in which the state is engaged is defined. See text accompanying notes 590-92 *infra* for further illustration of this approach.

[589] Kokinos v. Ohio Greyhound, Inc., 153 Ohio St. 435, 92 N.E.2d 386 (1950).

[590] No. 75-0316 AD (Ohio Ct. Cl. June 1, 1976). *See also* Nationwide Mutual Ins. v. Bowling Green State Univ., No. 75-0599-AD (Ohio Ct. Cl. Dec. 13, 1976), where the court found the state liable for damage to an automobile when a rotten limb fell from a tree situated on land abutting a parking lot at a state-supported university and struck the automobile. The court applied Ohio common law, noting that a landowner with notice of a defective tree abutting a rural highway must use reasonable care to prevent injuries to persons on the highway. Because the state had actual notice of the condition of the tree limb, the court declined to inquire whether the university would have a duty to inspect trees abutting the highway (or, as in this case, a parking lot). *Id.*, slip op. at 3.

[591] No. 75-0316 AD, slip op. at 3.

[592] *Id.*

[593] No. 76-0569-AD (Ohio Ct. Cl. Dec. 30, 1977).

negligence which resulted in depriving plaintiff of his motor vehicle operator's license. The bureau had confused plaintiff with another person of the same name. In this administratively determined case, the court's awareness of the tension between the orthodox tort liability concept and the concept of no analogous private counterpart to the governmental activity giving rise to the claim was demonstrated. The clerk noted that the court had previously questioned whether this type of claim could pass scrutiny under the no analogous private counterpart concept,[594] but concluded that the precedent of *Sprouse v. Department of Highway Safety*,[595] which held the state can be liable for the failure to maintain accurate driving records, was dispositive. Therefore, "any modification of *Sprouse* would have to be made by a judge either in a subsequent case or a motion for review of this case."[596]

In some cases the court of claims decisions must be considered as either a modification of "orthodox tort liability" or possible misapplications of "orthodox tort liability" principles. Two cases will serve as illustrations. In *Neitz v. Department of Public Works*,[597] plaintiff claimed injuries resulting from a collision with a steel cable that the state had stretched across a toll path adjacent to a section of the Ohio Canal. Plaintiff was operating his motorcycle along the toll path and apparently did not see the cable. Plaintiff contended that the cable was not discernible to vehicle operators and thus constituted a "trap" to those who used the path. In its findings of fact, the court disagreed with the plaintiff and made some findings crucial to the application of ordinary tort principles to the circumstances of the case. The court found that the cable was not a trap, that the toll path, although utilized constantly by people as a recreation area, was in fact a dam to retain canal waters and was not an area to which the public was invited, and that plaintiff therefore was a trespasser and could not hold the state liable for his injuries. Upon such findings the court held that the defendant owed no duty to the plaintiff.[598]

It is likely that the court meant to say that defendant had not breached a duty owed to plaintiff. However, it said only that *no duty was owed* to the plaintiff. Taking the court to have intended the plain meaning of its words, the pronouncement may be contrary to Ohio common law specifically and

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[594] Ruffin v. Department of Highway Safety, No. 75-0350 (Ohio Ct. Cl. Sept. 29, 1975).

[595] No. 76-0622 (Ohio Ct. Cl. June 28, 1977).

[596] No. 76-0569-AD, slip op. at 1.

[597] No. 75-0342 (Ohio Ct. Cl. May 13, 1976).

[598] *Id.*, slip op. at 5. The court has applied established principles of law applicable between private parties to effect some interesting results. For example, in Bunnell v. Ohio Exposition Center, No. 75-0555 (Ohio Ct. Cl. Apr. 25, 1977), the plaintiff, while a patron of the Ohio State Fair, was forced off a pedestrian walkway by an ambulance operated by the state's agents. Plaintiff was startled by the ambulance's siren and in her confusion tripped over an electric cable near the walkway. The court found that there was no justification for the operation of the ambulance at that time and place and that the state's defense of assumption of the risk was inapplicable because the plaintiff's attention was distracted and she was in fear of her safety. Hence plaintiff was afforded the benefit of the emergency doctrine. The court's conclusion was that the state had violated its duty of maintaining the walkway "in a reasonably safe condition by controlling vehicular traffic." *Id.*, slip op. at 7.

The state has also benefitted by the application of "orthodox" tort rules. In Reiber v. Deercreek Lake Park, No. 75-0513-AD (Ohio Ct. Cl. July 30, 1976), the plaintiff, whose boat had engine trouble in the middle of a lake, was barred from recovering because he had signed a waiver releasing the state from liability for any injuries incurred while he was towed to shore.

"orthodox tort liability" generally. In Ohio, a landowner indeed owes a duty to trespassers. First, a duty is owed to all trespassers to refrain from willful or wanton wrongdoing.[599] Second, once a trespasser's position of peril has been discovered, the landowner owes a duty to exercise ordinary care to avoid injury to the trespasser.[600] Third, if the landowner makes a change in the condition of the land adjacent to a public highway in such a way that the safety of travellers who may, without fault on their part, accidentally stray upon the land, is endangered, ordinary care must be exercised.[601] The court of claims may have intended to say that none of these conditions were presented by the claim and that therefore no duty arose, but it is not clear from the *Neitz* opinion that none of these conditions existed.

Furthermore, in light of the court's finding of constant trespassing in the area, "orthodox tort liability" principles would raise a duty even though there is no case law in Ohio directly on point. When a landowner knows or should know about frequent trespassers on the property, a duty to warn of hazards arises if the landowner has reason to believe the trespassers will not discover the hazards.[602] The court's finding that the cable was readily discernible becomes crucial when the case is analyzed from this perspective. Given that finding, it cannot be said that the court's conclusion of no duty has application to this case.[603] It by no means can stand for the proposition that the state owes no duty to trespassers.

The other illustrative case denied liability in a claim by a mother seeking to recover for the alleged wrongful death of her nine-year-old son who had drowned in a lake at a state park. In *McCord v. Ohio Division of Parks and Recreation*,[604] plaintiff, decedent's administrator, contended that the lifeguard at the lake was negligent in her duties and that the state was negligent in training lifeguards and in providing inadequately trained lifeguards. The state moved for summary judgment on the basis of the Ohio "recreational user" statute which exempts landowners of recreational land from liability to users of the land who enter without payment of

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[599] *See* Wheeling & Lake Erie R.R. v. Harvey, 77 Ohio St. 235, 240, 83 N.E. 66, 68 (1907) ("trespassers, that is, persons entering without permission, assume the risk of injury from the condition of the premises and the duty of the occupier to them is only to be careful not to injure them by bringing force to bear upon them"); Hicks v. Village of Cortland, 123 Ohio St. 114, 117, 174 N.E. 241, 242 (1930) ("[i]t is doubtful whether . . . the relationship of [the plaintiff] . . . could rise above that of a trespasser . . . . Hence the duty of the municipality . . . was not higher than to abstain from intentionally or willfully injuring him, and to warn him of hidden dangers of which it knew.").

[600] Union News Co. v. Freeborn, 111 Ohio St. 105, 144 N.E. 595 (1924) (dictum); City Ice & Fuel Co. v. Center, 54 Ohio App. 116, 6 N.E.2d 580 (1st Dist. 1936); Maple v. Tennessee Gas Transmission Co., 30 Ohio Op. 2d 471, 201 N.E.2d 299 (7th Dist. Ct. App. 1963).

[601] Wheeling & Lake Erie R.R. v. Harvey, 77 Ohio St. 235, 240, 83 N.E. 66, 68 (1907).

[602] *See* J. PAGE, THE LAW OF PREMISES LIABILITY 10-11 (1976).

[603] In comparison, in Krevics v. Ayars, 141 N.J. Super. 511, 358 A.2d 844 (1976), a case involving strikingly similar facts as those in *Neitz*, plaintiff was permitted to proceed in his action despite the existence of a statute conferring immunity upon a landowner if the use was recreational in nature. The court said: "The hazardous condition was created by defendant. The erection of the cable was certainly a wilful act. In view of defendant's knowledge of the use of the motorbike trail, and considering the type of hazard erected, defendant's action may even be construed as malicious." *Id.* at 516, 358 A.2d at 846.

[604] No. 76-0351 (Ohio Ct. Cl. 1977), *rev'd*, No. 76AP-797 (Ohio 10th Dist. Ct. App. Apr. 1, 1977), *judgment of court of appeals rev'd*, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978).

consideration.[605] The statute provides that the landowner owes no duty to recreational users to keep the premises "safe for entry or use."[606] The court of claims granted the motion, and the decision was subsequently affirmed by the Ohio Supreme Court.[607]

The case, in its total development through the Ohio courts, involved a curious mixture of "orthodox tort liability" principles and other aspects of court of claims jurisprudence. In the first instance, it was clear from the complaint that the statute should not have barred the action, though the supreme court and apparently the court of claims believed it to be one of the rules applicable to suits between private parties and thereby operable. Plaintiff's complaint alleged a breach of duty in the training, provision, and execution of lifeguard services, not a duty to keep the premises safe for "entry and use." Sufficient facts were alleged in the complaint on that issue to have presented a material issue of the breach of the duty alleged and thereby escape an adverse ruling upon a motion for summary judgment. Furthermore, the issues of whether decedent was a recreational user or whether the recreational user statute was intended to operate against persons in decedent's position should not have been summarily treated by the courts. There is most assuredly an analogous private counterpart to the state activity, and although the courts cursorily handled the issue, a serious question of whether decedent's mother's status as a taxpayer, contributing to the creation and maintenance of public recreational areas, was sufficient to overcome the statutory immunity. In suits between private parties, the abrogation of duty in such cases is overcome by the payment of a fee or other consideration.[608] The court of claims and Ohio Supreme Court decisions preserved yet another "island of immunity" and may have seriously undermined the intended operation of the "orthodox tort liability" employed under the Ohio wrongful death statute.[609]

V. Conclusions

A. *The No Private Counterpart Test of State Liability*

The Ohio Court of Claims Act provides that liability of the state shall be determined in accordance with rules of law applicable to suits between private parties.[610] The court of claims has interpreted this provision to preclude liability when the state is involved in activity which is not normally carried out by private individuals. In regard to the regulation of certain

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[605] Ohio Rev. Code Ann. §§ 1533.181, 1533.18(B) (Page 1978).

[606] *Id.* § 1533.181(A)(2).

[607] 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978), *reinstating* No. 76-0351 (Ohio Ct. Cl. 1977). The court of appeals had reversed the trial court, holding the recreational user statute inapplicable, and that the foreseeability of injury arising from swimmers' reliance upon the state's voluntary representation of safety rendered the liability clause of the Court of Claims Act applicable. No. 76AP-797 (Ohio 10th Dist. Ct. App. Apr. 1, 1977).

[608] Ohio Rev. Code Ann. § 1533.18(B) (Page 1978).

[609] For a full discussion of the case and its ramifications, see Wilkins, *The Wrongful Death of Willie McCord—or—Beware of "Free" Public Parks—The Ghosts of Immunity and the Ohio Guest Statute Still Roam!*, 47 U. Cin. L. Rev. 591 (1978).

[610] Ohio Rev. Code Ann. § 2743.02(A) (Page Supp. 1978).

business activities and the custody and control of juvenile offenders, for example, the court has held that the absence of analogous activity prevents the application of the liability clause of the Act.

The Ohio courts have adhered to the no private counterpart test despite inconsistent applications of the concept which demonstrate its unworkability. For example, private parties are not responsible for the construction and maintenance of highways, the validation of certificates of incorporation, the conferral of motor vehicle operation licenses, or the custody and control of criminal offenders, and yet the Ohio courts have found governmental liability in each instance. To proclaim that certain activities are uniquely governmental is to state the obvious. All governmental activities are in one sense or another unique. The provision of the Court of Claims Act that state liability should be determined by reference to rules of law applicable in private lawsuits should not be viewed as a limitation upon the waiver of immunity, but rather as an opportunity by the Ohio courts to provide a remedy to persons injured by governmental activity within the controls traditionally imposed by principles of decision in our well-developed common law tort compensation system. The Ohio courts should abandon the no private counterpart test as an inaccurate and unwarranted interpretation of the Court of Claims Act.

B. *Discretionary Function Immunity*

In determinations of governmental immunity two related, but distinct, issues arise. The threshold issue is whether, despite the general governmental waiver of immunity, certain exceptions should be made to that waiver in the area of discretionary acts by government operatives. The principle of discretionary function immunity is intended to preserve the independence of legislative or executive decision-making in the formulation of public policy and requires judicial abstention when the evaluation of the propriety of governmental action in a given case would necessarily intrude upon the policy decisions of coordinate branches of government.[611]

In accordance with this view of discretionary function immunity, the federal courts have applied the concept only to decisions at the planning stage of governmental activity and have refused to apply it to those activities deemed to be operational in nature.[612] Recent federal decisions have reshaped this distinction to more closely address the underlying reasons for discretionary immunity, and what may be called the policy formulation test of liability has emerged.[613] Under the latter approach, the inquiry proceeds to determine if the judgments of government officers and employees are of the nature and quality that Congress, in the Federal Tort Claims Act, intended to put out of the reach of judicial scrutiny in private tort litigation.[614] It is not sufficient for the application of the exception that some judgment or discretion was exercised by governmental operatives, since the courts may impose the requirements of reasonable care to most cases without intrusion

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[611] *See* notes 331-34 *supra* and accompanying text.

[612] *See* notes 340-49 *supra* and accompanying text.

[613] *See* notes 352-57 *supra* and accompanying text.

[614] *See* note 335 *supra* and accompanying text.

upon policy decision-making. To qualify for immunity, governmental decisions must involve a balancing of competing interests in the formulation of fundamental public policy. In this sense, the discretionary function exception has no broader application than to the exercise of legislative or quasi-legislative function.[615]

The Ohio Court of Claims Act presently contains no provision analogous to the federal discretionary function exception, despite attempts to amend it to include one.[616] The exception has, instead, been read into the Act by judicial gloss in several court of claims decisions. Regrettably, the Ohio courts have yet to refine the exception to the same extent as have the federal courts. Broad language in *Devoe v. State*[617] suggested that discretionary immunity would be applied whenever the actions of state employees involved some degree of discretion. That language was apparently limited in the *Adamov v. State*[618] juvenile offender case, which set out a more precise definition of discretion. In the latter case, the court of claims stated that to qualify for immunity a decision must relate to basic governmental policy or objective and must be essential to the attainment of that objective. Further, the decision must have involved evaluation and judgment based upon expertise and be grounded in requisite statutory authority. The court's treatment of *Adamov* reflects the same considerations inherent in the policy formulation test of discretionary immunity employed by the federal courts, but the approach has not consistently been applied in court of claims cases.

If the threshold issue of discretionary function immunity is answered in favor of the claimant, he or she must then demonstrate a ground for recovery pursuant to ordinary principles of tort law. Such a requirement operates to prevent the state from becoming an insurer. Hence, the existence of duty arises as a secondary issue. The present confusion in Ohio Court of Claims Act jurisprudence may be the result of a failure to make this distinction between duty and immunity. The court of claims has repeatedly looked to the enabling legislation for a given governmental activity to determine if a duty has been imposed. When no statutory duty has been found to be expressed, two conclusions have followed: the court decides that no claim has been stated for negligent performance of the activity (sometimes also cursorily saying that no common law liability has been imposed, not a surprising conclusion at all given the long tradition of governmental immunity in Ohio), and since no duty has been imposed, the conduct is considered discretionary and subject to the discretionary function exception. Conversely, in some cases where the inspection of the statutes discloses a mandatory duty to act (where the starting point for the court has been the analogous private counterpart analysis sometimes even this is not necessary), the courts have decided that

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[615] Downs v. United States, 522 F.2d 990, 997 (6th Cir. 1955).

[616] After its first year of operation, the court of claims sent an informal report to the General Assembly discussing problems it had encountered during that period and suggesting possible changes in the statute. A proposed amendment, based upon those recommendations, included a provision closely parallel to the federal discretionary function exception. SUBSTITUTE H.B. 149, 12th Gen. Assem., Reg. Sess. (1977-78).

[617] No. 75-0216 (Ohio Ct. Cl. June 18, 1975), *aff'd*, 48 Ohio App. 2d 311, 357 N.E.2d 396 (10th Dist. 1975).

[618] 46 Ohio Misc. 1, 345 N.E.2d 661 (Ct. Cl. 1975).

discretionary function immunity did not apply, and the state would be liable upon proof of violation. In these latter cases, little more than passing consideration to the factors underlying discretionary function immunity have been given. While perhaps at this stage of Court of Claims Act jurisprudence some may argue that no great harm has been done in terms of the results in given cases, it is imperative that the court of claims refine its analysis to distinguish between the immunity and duty concepts to be assured of avoiding embarrassment in future cases.

After five years of operation, it may be fairly said that the Court of Claims Act has passed its "maiden run." While a cautious, conservative, perhaps even experimental approach may be a justifiable explanation for gaps and inconsistencies in judicial interpretations during this period, it is time for the courts of Ohio to apply themselves affirmatively to the task of refining the jurisprudential approaches to the Act in order to carry out fully its objective to provide a remedy for persons injured by wrongful governmental conduct.