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Municipal Torts: The Rule Is Liability—The Exception Is Immunity

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MUNICIPAL TORTS: THE RULE IS LIABILITY—THE EXCEPTION IS IMMUNITY—*Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*, 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

I. INTRODUCTION

In 1982, the Ohio Supreme Court signaled its intention to eliminate the traditional sovereign immunity doctrine which had long protected Ohio's municipal corporations from tort liability.[1] It was not until *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*,[2] however, that the court made it unmistakably clear that municipalities would no longer be shielded by immunity. In so doing, the court joined the majority of states[3] which have refused to blindly adhere to the common-law immunity doctrine. Boldly confronting the problem of stare decisis, the court overruled a long line of prior decisions to hold that "so far as municipal governmental responsibility for torts is concerned, the rule is liability—the exception is immunity."[4]

This note will briefly trace the development of the sovereign immunity doctrine and examine the standard adopted by the *Enghauser* court. It will also discuss the ramifications of *Enghauser* and the necessity of a comprehensive legislative response to the abrogation of sovereign immunity.

II. FACTS AND HOLDING

Enghauser Manufacturing Company of Lebanon, Ohio sued that city in 1978,[5] charging that the city had "negligently planned, designed, and constructed a new bridge and roadway which proximately resulted in the flooding of [Enghauser's] abutting industrial property."[6] A jury trial commenced in August, 1978, and resulted in a

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1. *See* Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982). *See also infra* notes 22–26 and accompanying text.

2. 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983).

3. For a listing of jurisdictions which have limited sovereign immunity by judicial decision, see Haas v. Hayslip, 51 Ohio St. 2d 135, 141 n.6, 364 N.E.2d 1376, 1380 n.6 (1977) (Brown, J., dissenting). For a listing of jurisdictions which will not confer immunity in the absence of a statute granting immunity, see 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02, at 108 n.4 (3d ed. 1977 & Supp. 1982).

4. 6 Ohio St. 3d at 33, 451 N.E.2d at 230. Identical language can be found in Holytz v. Milwaukee, 17 Wis. 2d 26, 39, 115 N.W.2d 618, 625 (1962).

5. Enghauser Mfg. Co. v. Eriksson Eng'g, Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (Eriksson Engineering, Ltd.—found not liable—and Carl Eriksson—dismissed as a party—were also named as defendants).

6. *Id.* at 32, 451 N.E.2d at 229.

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$91,000 judgment against the city.[7] Thereafter, acting on the city's motion, the trial court ordered that the verdict and judgment entry be set aside and that final judgment be entered for the city.[8] The court of appeals affirmed, holding that the erection of the bridge was governmental in nature and hence the city was protected by sovereign immunity.[9]

The Ohio Supreme Court reversed the decision of the court of appeals, stating that "immunity from tort liability heretofore judicially conferred upon local governmental units is hereby abrogated."[10] Consequently, the jury verdict awarding damages to Enghauser Manufacturing Company was reinstated.[11]

III. BACKGROUND

The doctrine of sovereign immunity developed from the English notion that the "king can do no wrong."[12] As applied in the United States, the doctrine "expanded to the point where the historical sovereignty of kings was relied upon to support a protective prerogative for municipalities."[13] Thus, the state and its subdivisions were permitted to escape liability for tortious acts.[14]

Because of the rule's harsh effect, courts began to assign a dual character to municipal corporations.[15] A municipality was not held liable for its tortious acts if found to be exercising a "governmental function" at the time of the act.[16] However, if it was found that the municipality was exercising a "proprietary function," its liability was

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7. *Id.* at 32, 451 N.E.2d at 229–30.

8. *Id.* at 32, 451 N.E.2d at 230. However, a finding of nuisance against the city was not set aside. *Id.*

9. Enghauser Mfg. Co. v. City of Lebanon, No. 474, slip op. at 8 (Ohio 12th Dist. Ct. App. Mar. 31, 1982) (on file with the University of Dayton Law Review). *See also infra* notes 15–17 and accompanying text.

10. 6 Ohio St. 3d at 32–33, 451 N.E.2d at 230.

11. *Id.* at 36, 451 N.E.2d at 233. Enghauser was also awarded $34,020 as interest from the date of the original judgment entry. Western Star, Aug. 10, 1983, at 1, col. 1.

12. 18 E. MCQUILLIN, *supra* note 3, § 53.02, at 104. It has also been suggested that the doctrine is based on the theory that "there can be no legal right against the authority that makes the law on which the right depends." Haas v. Hayslip, 51 Ohio St. 2d 135, 140 n.2, 364 N.E.2d 1376, 1379 n.2 (1977) (quoting Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907)).

13. 18 E. MCQUILLIN, *supra* note 3, § 53.02, at 104 (quoting Holytz v. Milwaukee, 17 Wis. 2d 26, 30, 115 N.W.2d 618, 620 (1962)).

14. 18 E. MCQUILLIN, *supra* note 3, § 53.02, at 104.

15. *Id.*

16. *Id.* at 104–05. As to the rationale for granting immunity for governmental functions, Chief Justice Marshall stated, "The nonliability 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." City of Wooster v. Arbenz, 116 Ohio St. 281, 283, 156 N.E. 210, 211 (1927).

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determined under the same tests applied to private persons and corporations.[17]

In 1854, the Ohio Supreme Court adopted this governmental/proprietary distinction to decide questions of municipal tort liability.[18] But the distinction was to cause absurd results in many of the cases which followed.[19] Thus, a gamut of services—ranging from hospital operation to garbage collection—have at different times been classified as both governmental and proprietary.[20]

Although there had been many signs of discontent with the sovereign immunity doctrine among the justices of the Ohio Supreme Court,[21] the first major step in abrogating the doctrine came with the 1982 *Haverlack* decision.[22] In *Haverlack*, the court observed that the governmental/proprietary distinction had caused confusion and unpredictability in the law.[23] The court held that a municipal corporation, unless immune by statute, would be liable for negligence in the performance of its acts.[24] Due to the wording of the syllabus of the court,[25] however, there was some confusion as to whether the *Haverlack* decision might be fact-specific and limited to the negligent operation of a sewage plant.[26] Therefore, it was not until *Enghauser* that the court clearly articulated its intention for the abrogation of sovereign immu-

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17. 18 E. MCQUILLIN, *supra* note 3, § 53.02, at 105. Proprietary functions were defined as those "in pursuit of private and corporate duties, for the particular benefit of the corporation and its inhabitants, as distinguished from those things in which the whole state has an interest." *Arbenz*, 116 Ohio St. at 284, 156 N.E. at 211.

18. *See* City of Dayton v. Pease, 4 Ohio St. 80, 99–100 (1854).

19. It has been said that "the nebulous distinction between governmental and proprietary functions is about as stable as a gull on a wave and that the 'rules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs.' " Comment, *Recent Important Tort Cases against Governmental Units*, 32 AM. TRIAL LAW. L.J. 284, 289 (1968) (quoting Weeks v. City of Newark, 62 N.J. Super. 166, 178, 162 A.2d 314, 321 (App. Div. 1960), *aff'd*, 34 N.J. 250, 168 A.2d 11 (1961)).

20. For a listing of Ohio cases which demonstrate the inconsistencies which have plagued the courts in their attempts to apply the governmental/proprietary distinction, see Hack v. City of Salem, 174 Ohio St. 383, 400 n.2, 189 N.E.2d 857, 865 n.2 (1963) (Gibson, J., concurring).

21. *See id.* at 397, 189 N.E.2d at 868 (Gibson, J., concurring); *Haas*, 51 Ohio St. 2d at 145, 364 N.E.2d at 1382 (Brown, J., dissenting); Eversole v. City of Columbus, 169 Ohio St. 205, 208, 158 N.E.2d 515, 518 (1959).

22. Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

23. *Id.* at 29, 442 N.E.2d at 752.

24. *Id.* at 30, 442 N.E.2d at 752.

25. The syllabus reads, "The defense of sovereign immunity is not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the *negligent operation of a sewage treatment plant*." *Id.* at 26, 442 N.E.2d at 749 (emphasis added).

26. *See* Gotherman, *Ohio Supreme Court Abolishes Sovereign Immunity of Ohio's Municipalities*, OHIO CITIES & VILLAGES, Mar. 1983, at 4, 4–5. Gotherman reasoned that the *Haverlack* decision was not meant to be limited to the operation of sewage plants because it overruled the *Haas* decision, which involved circumstances of a police shooting. *Id.*

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nity to have wide-sweeping significance.

IV. ANALYSIS

A. *Judicial Abrogation of Sovereign Immunity*

1. The Need to Abolish the Doctrine

In *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*, Justice William B. Brown, writing for the majority, stated that since the sovereign immunity doctrine had been judicially created, it could be judicially abolished.[27] He stressed that the court had not only the power, but the duty to evaluate the doctrine "in light of reason, logic, and the actions, functions and duties of a municipality in the twentieth century."[28] The *Enghauser* court advanced two reasons for abolishing the doctrine of sovereign immunity. The first reason was that an individual should be afforded a legal remedy if he is injured due to the negligence of agents of municipal corporations.[29] Wisely rejecting the notion which originated in eighteenth century England that it is better for an individual to sustain an injury than for the public to be inconvenienced,[30] the court embraced the basic tort law concept that liability follows negligence.[31] The second reason advanced by the court was that the availability of insurance and other modern funding methods would provide the revenue from which judgments could be paid.[32] Brown

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27. 6 Ohio St. 3d 31, 33, 451 N.E.2d 228, 230 (1983). In dissenting opinions, Justice Brown had previously taken the stance that the doctrine could be judicially abolished. *See* Haas v. Hayslip, 51 Ohio St. 2d 135, 142, 364 N.E.2d 1376, 1380 (1977) (Brown, J., dissenting); Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 67, 298 N.E.2d 542, 552 (1973). The same notion of judicial abrogation has also been expressed by other Ohio justices. *See* Schenkolewski v. Cleveland Metroparks Sys., 67 Ohio St. 2d 31, 35–36, 426 N.E.2d 784, 787 (1981); Sears v. City of Cincinnati, 31 Ohio St. 2d 157, 161–62, 285 N.E.2d 732, 735 (1972); Hack v. City of Salem, 174 Ohio St. 383, 396, 189 N.E.2d 857, 868 (1963) (Gibson, J., concurring). Several other jurisdictions have found judicial abrogation of the doctrine to be proper. *See, e.g.*, Holytz v. Milwaukee, 17 Wis. 2d 26, 37, 115 N.W.2d 618, 623 (1962); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218, 359 P.2d 457, 461, 11 Cal. Rptr. 89, 93 (1961).

28. 6 Ohio St. 3d at 33, 451 N.E.2d at 231.

29. *Id.* at 34, 451 N.E.2d at 231.

30. *See* Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (K.B. 1788).

31. 6 Ohio St. 3d at 34, 451 N.E.2d at 231. See also the Comment, *supra* note 19, wherein the author stated:

> [T]oday cities and states are active and virile creatures capable of inflicting great harm, and their civil liability should be co-extensive. Even though a governmental entity does not profit from its projects, the taxpaying public nevertheless does, and it is the taxpaying public which should pay for governmental maladministration. If the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim.

Id. at 288.

32. 6 Ohio St. 3d at 34, 451 N.E.2d at 231. *But cf.* NATIONAL LEAGUE OF CITIES, THE

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noted, without further elaboration, that there was no empirical data to support the fear that governmental functions would necessarily be curtailed if municipalities were forced to pay judgments rendered against them.[33]

After suggesting reasons why sovereign immunity should be abolished, the court next had to tackle the difficult question of whether more than a century of Ohio case law could properly be overruled.

2. The Problem of Stare Decisis

Although it has been stated that the "sovereign immunity rule is so firmly entrenched in Ohio jurisprudence that it is too much to hope that the Ohio Supreme Court will overrule the multitude of cases that has accumulated,"[34] that is exactly what the court did in *Enghauser*. The court, while conceding the importance of stare decisis as a means to preserve the wisdom and morality of past ages, stressed that a rule that has "outlived its usefulness" should be changed.[35] Employing a memorable expression which he had used in a prior opinion,[36] Justice Brown wrote that when a judge-made rule of law no longer serves a useful purpose, the court should not "perpetuate it until petrification."[37] Thus, the court correctly reasoned that retention of the sovereign immunity rule was not justified, even though a part of the common law for hundreds of years.[38]

3. Prospective versus Retroactive Abrogation

Although the court did not address the issue of whether the elimi-

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NEW WORLD OF MUNICIPAL LIABILITY 4–6 (1978) (suggesting that municipalities may encounter difficulty in attempting to obtain insurance coverage primarily because they have not been viewed as good liability risks by insurance companies).

33. 6 Ohio St. 3d at 34, 451 N.E.2d at 231. *Accord* Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK U.L. REV. 521, 533 (1976). Ironically, after the judgment against the city of Lebanon was rendered in *Enghauser*, Lebanon's city manager stated that one side effect of the $91,000 judgment would be a reduction in the city's street improvement program. Western Star, Aug. 10, 1983, at 1, col. 1.

34. Comment, *Ohio Sovereign Immunity: Long Lives the King*, 28 OHIO ST. L.J. 75, 91 (1967).

35. 6 Ohio St. 3d at 34, 451 N.E.2d at 231.

36. *Thacker*, 35 Ohio St. 2d at 70, 298 N.E.2d at 554 (Brown, J., dissenting). In *Thacker*, Justice Brown quoted Oliver Wendell Holmes to support his view that a rule should not persist simply from "blind imitation of the past." *Id.* (quoting O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920)).

37. 6 Ohio St. 3d at 34, 451 N.E.2d at 231. It is interesting to note that criticism of the sovereign immunity doctrine has spurred the creation of several memorable expressions. Governmental immunity has been called "the most Gothic and granitic of all the immunities" which has lingered, "like the festering foot of Philoctetes, despite its offensiveness to the sensibilities of passing jurists and generations." Comment, *supra* note 19, at 286–87.

38. 6 Ohio St. 3d at 34, 451 N.E.2d at 231.

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nation of sovereign immunity was to be prospective or retroactive,[39] Justice Holmes, in dissent, strongly urged that if sovereign immunity had to be abrogated, the abrogation should be prospective.[40] He stated that abolishing the doctrine retroactively "would deny municipalities that have relied upon it the opportunity to make arrangements to meet the new liability to which they are subject."[41] They would face liability without having had the chance to obtain insurance.[42] In addition, Justice Holmes stressed that prospective abrogation would give the general assembly an opportunity to act on the majority's decision for, in his opinion, it is the legislature "which is best equipped to balance competing considerations of public policy."[43]

Surely, it would have been more logical to apply the *Enghauser* decision prospectively.[44] As Justice Holmes noted, a prospective application has been adopted by the overwhelming number of jurisdictions which have chosen to abolish the doctrine.[45] Nevertheless, cases decided after *Enghauser* have indicated that the decision to abrogate immunity is to be applied retroactively in Ohio.[46] Consequently, munici-

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39. For a discussion of the constitutional aspects of the retroactive abrogation of sovereign immunity, see Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163, 229–53 (1963). Professor Van Alstyne suggested that making governmental tort liability retroactive to causes of action which accrued prior to legislative abrogation of sovereign immunity might survive constitutional challenges, while a retroactive *elimination* of tort liability might not. *Id.* at 229–34. He wrote:

> Private persons, it must be borne in mind, are within the protection of constitutional limitations which do not apply to public entities, and hence may be in a position to challenge impairments of their tort claims against public entities even though such entities may have no reciprocal basis for challenging enlargements of their tort liabilities.

Id. at 234.

40. 6 Ohio St. 3d at 37, 451 N.E.2d at 233 (Holmes, J., dissenting).

41. *Id.*

42. *Id.*

43. *Id.* at 37, 451 N.E.2d at 234.

44. Common sense demanded, however, that the decision be applied to the plaintiff, Enghauser Manufacturing Company. As the Supreme Court of New Hampshire indicated in its decision to abrogate sovereign immunity, simply announcing the new rule without applying it in the decision could result in the announcement being considered mere dictum—depriving the plaintiffs of any benefit they had earned from their efforts and expense. Merrill v. City of Manchester, 114 N.H. 722, 730–31, 332 A.2d 378, 384 (1974).

45. 6 Ohio St. 3d at 37, 451 N.E.2d at 234 (Holmes, J., dissenting). It should be observed, though, that the California Supreme Court's decision to abrogate sovereign immunity in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), was made retroactive by statute. *See* 1963 CAL. STAT. § 45(a). For a discussion of the *Muskopf* decision, see *infra* text accompanying notes 59–61.

46. *See* Carbone v. Overfield, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983) (holding a board of education liable for the negligence of its employees); Strohofer v. City of Cincinnati, 6 Ohio St. 3d 118, 451 N.E.2d 787 (1983) (holding municipality liable for the tortious design and placement of traffic control devices); Dickerhoof v. City of Canton, 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983) (holding municipality liable for failing to keep the shoulder of a highway in repair and free from nuisance).

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palities which may have been uninsured or underinsured may now be held liable for torts which occurred at a time when they believed themselves to be shielded by immunity. Municipalities will not be faced with liability in every case, however. The court carved some vital exceptions out of the general rule of municipal tort liability.

B. Guidelines to Liability

The *Enghauser* court specified three exceptions to the general rule that a municipality will be liable for all harm which results from its activities. First, the general rule of liability is to apply only to tort claims.[47] Secondly, a municipality will not be subject to liability where a statute provides immunity.[48] Finally, immunity will be retained for certain acts which go to the "essence of governing."[49] Justice Brown wrote that the "*appropriate dividing line*[50] falls between those functions which rest on the exercise of judgment and discretion and represent planning and policy-making[51] and those functions which involve the implementation and execution of such governmental policy or planning."[52] By way of clarification, Justice Brown stated that municipalities will be immune from tort liability for those acts involving the exercise of a legislative function, judicial function, or executive or planning function concerning the making of a basic policy decision.[53] To qualify for immunity, this policy decision should be one "characterized by the

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47. Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 35, 451 N.E.2d 228, 232 (1983).

48. *Id.* For example, Ohio already has a statute which provides immunity to municipalities for harm caused by police and fire department vehicular accidents occurring during emergency runs. OHIO REV. CODE ANN. § 701.02 (Page 1976).

49. 6 Ohio St. 3d at 35, 451 N.E.2d at 232.

50. It is interesting to observe that in 1854, the court adopted a "dividing line" to mitigate the harsh effect of the sovereign immunity rule on that harmed individual. *See supra* notes 15–18 and accompanying text. The present "dividing line," on the other hand, was adopted to mitigate the harsh result on a municipality of holding it wholly liable for all its tortious conduct.

51. McQuillin explains the rationale for the "dividing line" chosen by Justice Brown:

> Lawfully authorized planning by governmental bodies is said to have a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability, so that while it is proper and necessary to hold municipalities liable for injuries arising out of the ordinary day-to-day operations of government, to accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the governmental body has seen fit to entrust to experts.

18 E. MCQUILLIN, *supra* note 3, § 53.04a, at 123.

52. 6 Ohio St. 3d at 35, 451 N.E.2d at 232 (emphasis added). Other jurisdictions which have recognized similar "dividing lines" are Arizona, Arkansas, the District of Columbia, Florida, Kentucky, New Hampshire, New Jersey, New York, North Dakota, Oregon, Washington, and Wisconsin. 18 E. MCQUILLIN, *supra* note 3, § 53.04a, at 125 nn.3–4.

53. 6 Ohio St. 3d at 36, 451 N.E.2d at 232.

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exercise of a high degree of official judgment or discretion."[54] However, municipalities are to be governed by the same liability standards applicable to persons and private corporations for acts involving the carrying out of previously established policies.[55]

In his dissenting opinion, Justice Holmes expressed concern that the "dividing line" proposed by Justice Brown was vague and ambiguous.[56] Although he was technically correct when he stated that "[l]ittle practical guidance is given to bench and bar by the adoption of such a nebulous standard,"[57] it must be remembered that it would be impossible for the court to phrase a standard which would automatically provide a "dividing line" for every conceivable municipal activity in every conceivable situation. However, by adopting the above standard, the court has made it clear that immunity will no longer be afforded to Ohio's municipalities merely on the premise that a municipal corporation, being an agent of the sovereign state, may not be sued without the sovereign's consent. Instead, the new standard offers a rational basis for immunity in certain situations. Allowing immunity for municipal functions which require a high degree of official judgment or discretion permits "the creative exercise of political discretion" without "the inhibiting influence of potential legal liability asserted with the advantage of hindsight."[58]

It would be greatly beneficial if the *Enghauser* decision sparks the kind of legislative response in Ohio which the *Muskopf*[59] decision triggered in California. In *Muskopf*, the California Supreme Court judicially abrogated governmental immunity. Employing a standard much like the one announced by Justice Brown in *Enghauser*, Justice Traynor in *Muskopf* stated that, although "when there is negligence, the rule is liability,"[60] exceptions would exist for government officials performing discretionary acts within the scope of their authority.[61]

After the *Muskopf* decision, the California Legislature enacted a two-year moratorium in order to study the situation and pass comprehensive legislation.[62] As a result, a detailed statute delineating areas of

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54. *Id.*

55. *Id.*

56. *Id.* at 38, 451 N.E.2d at 234.

57. *Id.*

58. *Id.* at 35, 451 N.E.2d at 232 (quoting Spencer v. General Hosp., 425 F.2d 479, 488 (D.C. Cir. 1969) (Wright, J., concurring)).

59. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

60. *Id.* at 219, 359 P.2d at 462, 11 Cal. Rptr. at 94.

61. *Id.* at 220, 359 P.2d at 462, 11 Cal. Rptr. at 94.

62. *See* Corning Hosp. Dist. v. Superior Court, 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962); C. GREGORY, H. KALVEN, JR. & R. EPSTEIN, CASES AND MATERIALS ON TORTS 753

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immunity and liability was enacted.[63] Thus, in California, the court and the legislature joined together in the effective abrogation of sovereign immunity—the court providing the general standard and the legislature providing the practical guidelines to make the standard workable. Professor Arvo Van Alstyne, who prepared a study for the California Law Revision Commission during the moratorium period, wrote:

> It is entirely probable, in the long view, that the principal significance of the *Muskopf* decision will prove to be its role as a stimulus to detailed appraisal of the problem by the legislature, with consequent statutory formulation of a new body of law to replace the chaotic and inconsistent rules (both legislatively and judicially formulated) previously in effect.[64]

Because the California Legislature succeeded in making the basic teachings of *Muskopf* workable, Justice Holmes in his *Enghauser* dissent was certainly correct when he stated that the court's decision cries out for a legislative response.[65]

V. LEGISLATIVE RESPONSE TO THE ABROGATION OF SOVEREIGN IMMUNITY

A house bill has been introduced into the Ohio General Assembly,[66] the stated purpose of which is "to restore the sovereign immunity of political subdivisions and to specify areas of liability of political subdivisions."[67] Consistent with *Enghauser*, the bill would create a code section to provide that, if the act which gives rise to liability occurs while a municipality's employee is engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, quasi-legislative, policy-making or planning function, the municipality and employee would be immune from liability.[68]

(3d ed. 1977).

63. *See* CAL. GOV'T CODE §§ 810–996.6 (West 1980).

64. Van Alstyne, *supra* note 39, at 163.

65. 6 Ohio St. 3d at 38, 451 N.E.2d at 234 (Holmes, J., dissenting). Justice Brown would no doubt agree, for in *Thacker* he called for the general assembly to "spell out the types of governmental acts where immunity is provided in a logical scheme" in order to "remedy the inconsistencies and the lack of predictability that could result from the piecemeal abolition." Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 78, 298 N.E.2d 542, 559 (1973) (Brown, J., dissenting).

66. H. 482, 115th Ohio General Assembly, Reg. Sess. (1983) (introduced July 28, 1983).

67. *Id.* at 1.

68. *Id.* at 13. At least one section of the bill appears to have been drafted prior to the *Enghauser* decision, for it attempts to define and list "governmental functions" which presumably would confer immunity on municipalities. *Id.* at 10–12. This section is undoubtedly a response to Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982), because it refers to governmental functions as "those activities and functions of political subdivisions determined to be governmental functions pursuant to the principles of the common law of this state as of December

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The practical value of the bill lies in its attempt to set procedural and monetary limits on claims against municipal corporations. A statute of limitations has been proposed which would specify the time period during which claims against municipalities could be filed.[69] The bill also seeks to eliminate prejudgment interest, punitive damages,[70] and damages for pain and suffering.[71] Moreover, except in wrongful death actions, damages would be confined to specified dollar amounts of liability per person and per occurrence.[72] Finally, the bill proposes to enact statutes by which municipalities would be able to protect themselves. These statutes would authorize municipalities to use public funds to secure insurance and to engage in self-insurance or pooled insurance programs if they so desire.[73] Municipalities would also be authorized to hire consultants and employees for the establishment and operation of risk management programs.[74]

VI. CONCLUSION

In *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*, the Ohio Supreme Court made it clear that municipalities will no longer be shielded from liability for their tortious acts based on the antiquated notion that the "king can do no wrong." Instead, municipalities will be immune from liability only for planning functions which involve the exercise of judgment and discretion, or in situations where immunity is expressly conferred by statute.

Since the court has now set a rational standard for the application

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14, 1982." *Id.* at 10. *Haverlack* was decided on Dec. 15, 1982. For a discussion of the *Haverlack* decision, see *supra* notes 22–26 and accompanying text.

69. *Id.* at 14. Proposed OHIO REV. CODE ANN. § 2744.05(B) reads, "A written claim with respect to an injury to person, damage to property, or for death shall be presented to a political subdivision *within one hundred eighty days* after the personal injury, property damage, or death giving rise to the alleged cause of action occurred . . . ." *Id.* (emphasis added).

70. In denying claimants punitive damages against municipal corporations, many courts have reasoned that "while the public is benefited by the exaction of such damages against a malicious, willful or reckless wrongdoer, the benefit does not follow when the public itself is penalized for the acts of its agents over which it is able to exercise but little direct control." 18 E. MCQUILLIN, *supra* note 3, § 53.18a, at 161.

71. H. 482, 115th Ohio General Assembly, Reg. Sess. 16 (1983).

72. *Id.* at 17. The proposed ceiling for damages is $250,000 in favor of any one person and $500,000 in the aggregate. *Id.* For limitations on damages which have been proposed in other jurisdictions, see NATIONAL LEAGUE OF CITIES, *supra* note 32, at 20–49.

73. H. 482, 115th Ohio General Assembly, Reg. Sess. 19–20 (1983). *See* NATIONAL LEAGUE OF CITIES, *supra* note 32, at 13–14 (wherein it is indicated that self-insurance or pooling may be the only way for municipalities to obtain comprehensive liability insurance protection).

74. H. 482, 115th Ohio General Assembly, Reg. Sess. 19 (1983). One commentator has aptly stated that "[p]ublic safety becomes a matter of real concern to the city fathers when the city is liable for its torts: repair programs are stimulated in the areas of municipal activities where liability attaches; safety education for both officers and the general public is likely to result." Comment, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 460 (1941).

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of sovereign immunity, the Ohio General Assembly, like the California Legislature, must provide practical guidelines to make the standard workable. Legislation should include statutes which confer immunity in specific situations as well as statutes which set procedures for the filing and disposition of claims, and set limits on amounts recoverable. House Bill 482 proposes to accomplish some of these objectives.

The court's abrogation of sovereign immunity in *Enghauser* will have the highly desirable effect of allowing harmed individuals to seek redress against municipal corporations. Moreover, as municipalities take a hard look at ways in which they can decrease their risks, employees who have consistently performed in a negligent manner will not be retained.[75] This, too, will be in the public interest. Balanced against the benefit to the public, however, is the cost to municipalities of having their liability expanded. Thus, necessary legislation conferring immunity in appropriate situations and setting limits on amounts recoverable will ensure that deserving individuals receive fair compensation for their injuries and will allow municipal corporations to remain solvent.

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75. *See* Gotherman, *supra* note 26, at 6.

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