COMMENT

THE NEW JERSEY TORT CLAIMS ACT: A STEP FORWARD?

INTRODUCTION

The New Jersey Tort Claims Act,[1] a comprehensive statutory scheme for selectively abolishing governmental immunity in tort, became effective on July 1, 1972. During its relatively short existence, the Tort Claims Act has generated much criticism from both the bar[2] and the bench[3] with regard to several important provisions. This comment will analyze the potential impact of the Tort Claims Act and propose recommendations designed to alleviate constitutional, procedural, and administrative problems inherent in the structure of the Act. In order to place the present Act in the proper perspective, a brief review of New Jersey case law relating to sovereign immunity prior to the passage of the Act is necessary.

I. HISTORICAL PERSPECTIVE

State Immunity

The doctrine of sovereign immunity evolved from English feudal society. It was initially premised on the theory that to allow a suit against the king was inconsistent with the concept of his sovereignty.[4]

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1 N.J. STAT. ANN. § 59:1-1 *et seq.* (Supp. 1973-74).

2 Considerable criticism of the Tort Claims Act has come from all sectors of the New Jersey Bar. *See, e.g.*, Letter from Warren W. Faulk, Esq., to author, July 20, 1973, on file at the *Seton Hall Law Review*; Letter from Middlesex County Trial Lawyers Association to Editor, May 17, 1973, in 96 N.J.L.J. 605 (1973), in which the Association's Legislative Committee presented a scathing attack against the $1,000 threshold requirement for pain and suffering recovery under the Act (N.J. STAT. ANN. § 59:9-2d (Supp. 1973-74)). Written text of the Tort Claims Act Review Meeting (sponsored by the New Jersey Branch of the Association of Trial Lawyers of America [hereinafter referred to as ATLA]), held on June 2, 1972 at Cherry Hill, New Jersey [hereinafter referred to as the Cherry Hill Review Meeting]. The text is in preparation at this time and will be distributed by ATLA. Conversations with Herbert E. Greenstone, President of the New Jersey Branch of ATLA, July 16, 1973; Richard J. Levinson of the Trial Lawyers Association of Middlesex County, June 28, 1973; Warren W. Faulk, Esq., of Camden, Sept. 5, 1973.

3 Conversations with the Honorable Sonia Morgan, Judge of the Essex County Court, June 21, 1973. See Judge Morgan's comments on the written text of the Cherry Hill Review Meeting.

4 3 W. BLACKSTONE, COMMENTARIES *255; *see generally* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 515 (2d ed. 1898); W. PROSSER, THE LAW OF TORTS § 131, at

At a later time, this theory merged with the concept that the king was above reproach:

> The rule . . . [is] expressed by the phrase 'The king can do no wrong' . . . . That you can neither sue nor prosecute the king is a simple fact . . . . The king can do no wrong; he can break the law; he is below the law, though he is below no man and below no court of law.[5]

However, this was a qualified exemption, since some minister was always held responsible for every act of the king.[6]

New Jersey has traditionally adhered to the concept of the sovereign's immunity as exemplified in *Lodor v. Baker, Arnold & Co.*,[7] in which a New Jersey supreme court asserted that the state

> enjoys this immunity as one of the essential attributes of sovereignty, it being an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts without its consent.[8]

Nonetheless, there has been a gradual judicial erosion of the cloak of immunity in selected areas. The doctrine was held to bar neither suits in mandamus to enforce a state official to perform a ministerial duty,[9] nor actions for injunctions to prevent a state agency from taking unconstitutional action.[10] The state could thus be sued to compel condemnation of private property which had been effectively taken for the public use,[11] or for payment of local real estate taxes on property which had been condemned for public use.[12]

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970 (4th ed. 1971); Borchard, *Governmental Liability in Tort*, 36 YALE L.J. 1, 129, 229 (1926); Borchard, *Governmental Responsibility in Tort* (pts. 5 & 6), 36 YALE L.J. 757, 1039 (1926-27).

5 1 F. POLLOCK & F. MAITLAND, *supra* note 4, at 515-16.

6 W. PROSSER, *supra* note 4, at 971.

7 39 N.J.L. 49 (Sup. Ct. 1876).

8 *Id.* at 50.

9 Jersey City v. Zink, 133 N.J.L. 437, 44 A.2d 825 (Ct. Err. & App. 1945), *cert. denied*, 326 U.S. 797 (1946), where the court stated:

> It is the essence of a prerogative writ, such as *mandamus*, that it is an appeal to the crown or sovereign state to remedy whatever may be amiss in the conduct of its public affairs, because the administration thereof is not chargeable to the crown personally or the state, but is chargeable to the ministers or officers who are accountable to the people.
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> . . . The action on *mandamus*, therefore, instead of being a suit against the state, is against its servants to compel them to do that duty, which by accepting office, they agreed to perform . . . .

133 N.J.L. at 440, 44 A.2d at 827.

10 Abelson's, Inc. v. State Bd. of Optometrists, 5 N.J. 412, 417-18, 75 A.2d 867, 869 (1950).

11 Haycock v. Jannarone, 99 N.J.L. 183, 185, 122 A. 805, 806 (Ct. Err. & App. 1923).

12 *See, e.g.*, East Orange v. Palmer, 47 N.J. 307, 220 A.2d 679 (1966). *See* REPORT OF

In addition to these judicially established exceptions to sovereign immunity, the New Jersey legislature has created various governmental agencies and local entities which can sue or be sued.[13] The Supreme Court of New Jersey, in *Taylor v. New Jersey Highway Authority*,[14] construed this grant of power to sue or be sued as legislative consent to actions in tort against the specific state agency or local body.[15]

In 1970, two landmark cases which foreshadowed the present legislation, *P, T & L Construction Co. v. Commissioner, Department of Transportation*,[16] and *Willis v. Department of Conservation & Economic Development*,[17] were decided by the New Jersey supreme court. The court's holdings in these cases severely limited the application of the sovereign immunity doctrine in New Jersey both in contract and tort actions.

P, T & L Construction Co. involved an action brought against the state on a public construction contract in which the state, by way of answer, alleged delay in job completion.[18] The court asserted that the judiciary should entertain actions against the state on contracts the latter had authorized, despite the court's inability to enforce a judgment against the state, on the theory that the state would recognize its obligation to honor an adverse judgment.[19] Soon after the *P, T & L Con-*

THE ATTORNEY GENERAL'S TASK FORCE ON SOVEREIGN IMMUNITY 31 (1972) [hereinafter cited as TASK FORCE REPORT].

13 TASK FORCE REPORT at 31-34 (listing those agencies and local entities which have been permitted to sue and be sued together with the pertinent statutory citations).

14 22 N.J. 454, 126 A.2d 313 (1956).

15 *Id.* at 468, 126 A.2d at 320. The case involved an action brought by a guest of a tenant against the New Jersey Highway Authority for injuries suffered in a fall in a common stairway of a multi-family dwelling. *Id.* at 457, 126 A.2d at 314. The supreme court asserted that the doctrine of sovereign immunity did not apply to a state agency authorized to sue or be sued:

> [O]ur courts have indicated that a statutory provision empowering an independent Authority of the State to sue and be sued will be construed as a waiver of the State's immunity.

Id. at 468, 126 A.2d at 320.

16 55 N.J. 341, 262 A.2d 195 (1970).

17 55 N.J. 534, 264 A.2d 34 (1970).

18 55 N.J. at 342, 262 A.2d at 196.

19 *Id.* at 345-46, 262 A.2d at 198. The court went on to state that:

> If our coordinate branches made it plain that they would be indifferent to our judgments in such matters, we would indeed be loath to be party to the spectacle such a conflict of wills would create. But there is no reason to suppose that our efforts will be ignored. The immunity concept is judge-made. Its roots are hard to find . . . . [T]he judiciary ought not to withhold its hand on a mere assumption that its coordinate branches would want it that way.

Id. at 346, 262 A.2d at 198.

Subsequent to this decision, the legislature enacted the New Jersey Contractual Liability Act, N.J. STAT. ANN. § 59:13-1 *et seq.* (Supp. 1973-74), which expressly waives sovereign

struction Co. decision, the supreme court made its second major pronouncement in the area of sovereign immunity. In *Willis*, the court held that an infant could recover damages against the state in tort for injuries suffered while feeding a caged bear at a state-run recreational facility.[20] The court, however, cautioned that the state would not be liable for decisions requiring the exercise of official judgment or discretion, thereby invoking the same limitation utilized by the courts in determining municipal liability.[21]

Municipal Immunity

The basic concept of municipal immunity dates back to the English case of *Russell v. The Men of Devon.*[22] In this case a suit brought against an unincorporated county for negligence in failing to repair a bridge was dismissed[23] primarily on a public policy basis that the aggrieved individual rather than "the public should suffer an inconvenience."[24] A municipal entity's immunity from suit was enunciated at an early date by the Supreme Court of New Jersey in *Freeholders of Sussex v. Strader,*[25] in which Chief Justice Hornblower in a concurring opinion asserted that:

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immunity arising out of either an express contract or one implied in fact. Punitive or consequential damages are not permitted. Further, claims based upon implied warranties or implied in law contracts are disallowed. *Id.* § 59:13-3. Agencies which are statutorily authorized to sue or be sued are exempted from the provisions of the Act. *Id.* § 59:13-2.

20 55 N.J. at 535-36, 264 A.2d at 34-35. While declaring that "[i]t is time for the judiciary to accept a like responsibility and adjudicate the tort liability of the State itself," the court cautioned that no exact set of guiding principles would be enunciated; rather, such principles would evolve on a case-by-case basis. *Id.* at 540, 264 A.2d at 37.

21 *Id.* at 540-41, 264 A.2d at 37.

22 100 Eng. Rep. 359 (K.B. 1788).

23 *Id.* at 359-60, 363.

24 *Id.* at 362. The court also considered the fact that there had been no remedy in tort against the inhabitants of a township in the past, that Devon was not an incorporated entity, and that even if it were, there was no fund from which to pay the claim. *Id.*

At early English law, municipalities were unincorporated entities with few political rights. By the fifteenth century, the municipalities began to incorporate and by the sixteenth century, borough corporations were well established and fully recognized. Comment, *A Survey of Municipal Immunity in New Jersey*, 3 SETON HALL L. REV. 416, 417 n.8 (1972). *See also* 19 ENCYCLOPEDIA AMERICANA, MUNICIPALITIES 589, 590 (1956); 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *Municipal Corporation* 86, 87 (1933).

For a basic survey of the development of municipal immunity, see D. JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS § 16 (1892); Borchard, *Government Liability in Tort*, 34 YALE L.J. 129 (1924); Weintraub & Conford, *Tort Liability of Municipalities in New Jersey*, 3 MERCER BEASLEY L. REV. 142 (1934); Note, *Municipal Tort Liability: An Emerging Standard in New Jersey*, 1 RUTGERS-CAMDEN L.J. 69 (1969).

25 18 N.J.L. 108 (Sup. Ct. 1840).

> [I]f such corporation, owe a duty to the *public*, and neglect to perform it, although every individual comprising that public, *is* thereby injured, some more, and some less, yet they can have no private remedy, at the common law.[26]

The *Strader* rationale was gradually modified in favor of increased municipal liability in later judicial rulings.[27] As an aid to the courts in determining the extent of immunity from suit to be accorded a municipal entity, an attempt was made to distinguish the activities performed by the entity on the basis of whether they were governmental or proprietary in nature. In general, when a determination was made that the entity was performing a governmental function, it was deemed to be an agent of the state and, as such, would be protected to the same degree as the state under the latter's sovereign immunity.[28] On the other hand, when the entity was determined to be acting in its proprietary or corporate capacity, it could be sued as any other private individual who is accused of tortious conduct.[29]

Unfortunately, the distinction between proprietary and governmental functions has not been well-defined, resulting in the evolution of rather ambiguous guidelines which have constituted more of a

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26 *Id.* at 121 (Hornblower, C.J., concurring) (emphasis in original).

27 *See* Karpenski v. Borough of South River, 83 N.J.L. 149, 83 A. 639 (Sup. Ct. 1912) (governmental-proprietary test established for determining municipal immunity from liability); Hart v. Board of Chosen Freeholders, 57 N.J.L. 90, 29 A. 490 (Sup. Ct. 1894) (action permitted against a municipality for injury inflicted on plantiff resulting from its active wrongdoing); Bergen v. Koppenal, 97 N.J. Super. 265, 235 A.2d 30 (App. Div. 1967), *aff'd as modified*, 52 N.J. 478, 246 A.2d 442 (1968) (where a duty is imposed on a municipality to act, and its failure to act results in injury to a private party, an action exists against the municipality if its judgment was palpably unreasonable).

28 The New Jersey supreme court first enunciated this distinction as dictum in Tomlin v. Hildreth, 65 N.J.L. 438, 441-42, 47 A. 649, 650 (Sup. Ct. 1900), and later based the holding in Karpenski v. Borough of South River, 83 N.J.L. 149, 151, 83 A. 639, 641 (Sup. Ct. 1912) on this premise. In Fahey v. Jersey City, 52 N.J. 103, 244 A.2d 97 (1968), the court, while expressing dissatisfaction with the distinction, nonetheless indicated various criteria useful in determining whether a given municipal function is governmental:

> [T]he fact that an activity was historically engaged in by local government; that it is uniformly so furnished today; that it could not be performed as well by a private corporation; that it is not undertaken for profit or for revenue; and, most significantly, that it is within the imperative public duties imposed on a municipality as agent of the State.

Id. at 108-09, 244 A.2d at 100. *See also* Comment, *supra* note 24, at 423-24.

29 Caporossi v. Atlantic City, 220 F. Supp. 508, 523 (D.N.J. 1963), *aff'd per curiam*, 328 F.2d 620 (3d Cir.), *cert. denied*, 379 U.S. 825 (1964). In *Caporossi*, Judge Cohen gives an excellent review of the development of this dichotomy in New Jersey. *See also* Cloyes v. Township of Delaware, 23 N.J. 324, 332-34, 129 A.2d 1, 5-7 (1957); Weeks v. City of Newark, 62 N.J. Super. 166, 174, 162 A.2d 314, 319 (App. Div. 1960), *aff'd per curiam*, 34 N.J. 250, 168 A.2d 11 (1961).

hindrance than an aid to the courts.[30] To further confuse the matter, an additional exception to municipal entity immunity was developed whereby a municipality, although performing a governmental function, could still be held liable for acts constituting active wrongdoing.[31] This concept rendered a municipality liable for an overt act in the causation chain leading directly to the injury as contrasted with its mere inaction or nonfeasance.[32] Some rather interesting aspects of this test manifested themselves in *Hayden v. Curley*.[33] In this decision, New Jersey's supreme court ruled that the affirmative act could occur prior to a non-active negligent act and need not be of a tortious nature, so long as the totality of the acts constituted active wrongdoing.[34]

Recently, the validity of the above standards as indicia of municipal liability has been severely questioned,[35] and a somewhat more viable approach has been adopted in their place. The modern test looks to whether the act is discretionary or ministerial in nature; that is, whether the act involves either a basic policy decision or the actual

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30 *See, e.g.*, B.W. King, Inc. v. Town of West New York, 49 N.J. 318, 230 A.2d 133 (1967), where the court asserted:

> Rather than to base liability upon a finding that the municipality's function . . . was either proprietary or governmental and to compound the confusion, we prefer . . . . [Not to] add to the perpetuation of the controversial dichotomy.

Id. at 326, 230 A.2d at 137.

31 Hart v. Board of Chosen Freeholders, 57 N.J.L. 90, 92-93, 29 A. 490, 491 (Sup. Ct. 1894).

32 Hoy v. Capelli, 48 N.J. 81, 84-86, 222 A.2d 649, 650-51 (1966).

33 34 N.J. 420, 169 A.2d 809 (1961).

34 Justice Proctor, writing for the court, voiced support for the active wrongdoing doctrine:

> It is the omission which transmutes the condition created by the prior affirmative act from a lawful obstruction into a nuisance. The affirmative act of creation and the accompanying or subsequent omission form a sequence of events leading up to and causing injury to the traveler. Our courts have held that an affirmative act in the causative sequence resulting in injury is sufficient to sustain municipal liability. The last event in the sequence may be non-action, but the total sequence constitutes active wrongdoing.

Id. at 425-26, 169 A.2d at 812. For a discussion of the apparent demise of this rule, see notes 178-82 *infra* and accompanying text.

35 *See, e.g.*, B.W. King, Inc. v. Town of West New York, 49 N.J. 318, 324-25, 230 A.2d 133, 136-37 (1967), wherein the court asserted:

> Municipal immunity from tort liability and the proprietary-governmental test have fallen into considerable disrepute. . . .
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> The difficulty with the articulation of a substitutionary rule lies in the ascertainment and expression of a perimeter for liability. It is most difficult if not impossible to academically visualize all the possible sets of circumstances which could give rise to a claimed municipal liability. There results an inability to state in advance a positive standard for that purpose. . . . The problem should be approached by the court on a gradual case by case basis . . . .

implementation of such a decision.[36] As asserted by Chief Justice Weintraub in *Fitzgerald v. Palmer*:[37]

> [T]here is a political discretion as to what ought to be done, as to priorities, and as to how much should be raised by taxes or borrowed to that end. If government does act, then, when it acts in a manner short of ordinary prudence, liability could be judged as in the case of a private party.... [As to a discretionary act] the question is whether a judge or jury could review the policy or political decisions involved without in effect taking over the responsibility and power of those other branches.[38]

The rationale behind the ministerial-discretionary dichotomy was probably best enunciated in *Amelchenko v. Borough of Freehold*.[39] Justice

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[36] *See, e.g.*, Fitzgerald v. Palmer, 47 N.J. 106, 109-10, 219 A.2d 512, 514 (1966); Amelchenko v. Borough of Freehold, 42 N.J. 541, 549-50, 201 A.2d 726, 730-31 (1964).

The ministerial-discretionary dichotomy developed from court interpretation and analysis of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970). Key cases in the evolution of the distinction are Indian Towing Co. v. United States, 350 U.S. 61 (1955), and Dalehite v. United States, 346 U.S. 15 (1953). Professor Davis has attempted to extract guiding principles from these cases in applying the test:

> 1. The government probably is not liable for negligence in planning "at a planning rather than operational level."
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> 2. The statutory concept of "a discretionary function," with respect to which the government is not liable whether or not the discretion involved be abused, probably is limited to the planning level and probably does not include functions at the operational level even if those functions involve discretion.
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> 3. The location of the line between the planning and operational levels is yet to be worked out, but the government is probably immune from liability for negligence in "a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department."
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> 4. The line between the planning and operational levels may depend not merely upon the position of the actor in the government hierarchy but may depend in part on whether the negligence is "in policy decisions of a regulatory or governmental nature" or whether the negligence relates to "actions akin to those of a private manufacturer, contractor, or shipper."
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> 5. "When an official exerts governmental authority in a manner which legally binds one or many," the government probably is not liable.
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> 6. The test of government liability does not depend upon the governmental-proprietary distinction. The government may be liable for negligence at the operational level, even if the function performed is governmental.
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> 7. Negligence in regulating or in failing to regulate through resort to legislative power probably does not subject the government to liability.
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> 8. Absolute liability without fault does not arise even if the government handles an inherently dangerous commodity or engages in an-extra-hazardous activity.
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> 9. The government may be liable for negligence in performing a function even if the function has no counterpart in the activities of private persons.
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> 10. The government may be liable for negligence in performing a service which neither the government nor the agency nor the officers have an obligation to undertake.

3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.10, at 479-82 (1958) (footnotes omitted).

[37] 47 N.J. 106, 219 A.2d 512 (1966).

[38] *Id.* at 109-10, 219 A.2d at 514.

[39] 42 N.J. 541, 201 A.2d 726 (1964).

Francis, writing for the court, asserted that acts requiring judgment or discretion on the part of the public entity or employee should not be the subject of review in a tort action because public officials must be free to govern "without fear of liability either for themselves or for the public entity they represent. It cannot be a tort for government to govern."[40]

The need for the legislature to enter the field and establish uniform guidelines upon which to predicate both state and local liability was recognized by the court in *Willis*.[41] The court, however, also spoke of the difficulty inherent in structuring such legislation.

> [T]he subject so defies precise statement that inevitably the controlling concepts must be developed case by case even if the Legislature does speak.[42]

Spurred by these decisions and the recommendations of the State Attorney General's Task Force on Sovereign Immunity, the legislature enacted the present Tort Claims Act. Whether the Act represents a step forward in providing a rational solution to the problems existing in this area of the law or merely confirms the court's caveat that the problem defies a precise solution can best be ascertained by scrutinizing the Act itself.

II. NON-PROBLEM AREAS OF INTEREST

Approach

The Act, in essence, reestablishes the immunity of all public entities in New Jersey to actions sounding in tort,[43] subject to specific exceptions[44] which have generally been adopted from prior New Jersey case law.[45] In this respect the legislative approach to sovereign im-

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40 *Id.* at 550, 201 A.2d at 730-31.

41 55 N.J. at 538-39, 264 A.2d at 36.

42 *Id.* at 539, 264 A.2d at 37.

43 N.J. STAT. ANN. § 59:2-1a, Comment (Supp. 1973-74). *See* Harris v. State, 61 N.J. 585, 297 A.2d 561 (1972), in which the New Jersey supreme court stated in dictum that "[t]he recently enacted New Jersey Tort Claims Act continues this [sovereign] immunity in its pertinent aspects." *Id.* at 589, 297 A.2d at 563. As for the Act's effect on municipal liability, see Barney's Furniture Warehouse v. City of Newark, 62 N.J. 456, 303 A.2d 76 (1973), in which the supreme court again stated by way of dictum that "[t]he act seems intended to codify existing case law in the area of exercise of governmental discretion by municipalities." *Id.* at 470 n.4, 303 A.2d at 83.

44 N.J. STAT. ANN. § 59:2-1 (Supp. 1973-74) and accompanying comment.

45 *Compare id.* § 59:2-3d and accompanying comment *with* Bergen v. Koppenal, 52 N.J. 478, 246 A.2d 442 (1968), *and* Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966). *Compare* N.J. STAT. ANN. § 59:4-2 (Supp. 1973-74) and accompanying comment *with*

munity differs from that suggested by the New Jersey supreme court in *B. W. King, Inc. v. Town of West New York*,[46] in which the court questioned "whether there is any reason why [immunity] should apply."[47] The more restrictive approach to sovereign immunity favored by the framers of the Act was apparently the result of a public policy decision to insure that a basis existed for estimating the amount of funds to be budgeted each year for such actions.[48]

Vicarious Liability—N.J. Stat. Ann. § 59:2-2

The Act applies the principle of vicarious liability[49] to all public entities for injury, including property damage as well as bodily injury, proximately caused by an act or omission of a public employee falling within the scope of his employment.[50] However, public entities are expressly exempted from liability for injuries resulting from acts or omissions of a public employee when he is not liable,[51] when his conduct is outside the scope of his employment,[52] or when the act or omission is criminal, fraudulent, malicious or willful in nature.[53]

Ministerial-Discretionary Dichotomy—N.J. Stat. Ann. § 59:2-3

The Act adopts the ministerial-discretionary dichotomy[54] in exempting certain discretionary activities. These statutory exemptions include: "legislative or judicial action or inaction, or administrative

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B.W. King, Inc. v. Town of West New York, 49 N.J. 318, 230 A.2d 133 (1967), *and* Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966), *and* Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964).

46 49 N.J. 318, 230 A.2d 133 (1967).

47 *Id.* at 325, 230 A.2d at 137.

48 *See* TASK FORCE REPORT, *supra* note 12, at 10; N.J. STAT. ANN. § 59:2-1, Comment (Supp. 1973-74).

49 This concept has been basically derived from the New Jersey supreme court's pronouncement in McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960), that local governments should be responsible for the tortious acts of its employees under certain circumstances on a theory of *respondeat superior*. *Id.* at 196, 162 A.2d at 833.

50 N.J. STAT. ANN. § 59:2-2a (Supp. 1973-74) and accompanying comment.

51 N.J. STAT. ANN. § 59:2-2b (Supp. 1973-74).

52 *Id.* § 59:2-2a.

53 *Id.* § 59:2-10. This position adheres to previous New Jersey case law. *See, e.g.*, O'Connor v. Harms, 111 N.J. Super. 22, 26, 266 A.2d 605, 607 (App. Div. 1970) where the court stated that

> an artificial legal entity created by law to perform limited governmental functions, cannot entertain malice, as a public corporation.

See N.J. STAT. ANN. § 59:2-10, Comment (Supp. 1973-74).

54 See notes 36-40 *supra* and accompanying text for a discussion of the nebulous distinction made between ministerial and discretionary functions.

action or inaction of a legislative or judicial nature";[55] the determination of whether or not to seek or provide resources necessary for the provision of adequate governmental services and facilities;[56] the decision of whether or not to adopt or enforce a law;[57] the determination of whether or not to issue, deny, suspend, or revoke permits or licenses;[58] and the decision to terminate or reduce benefits under a public assistance program.[59] The Act, however, under certain circumstances, permits limited judicial review of discretionary acts

> when, in the face of competing demands, [a public entity] determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel . . . [and such] determination . . . was palpably unreasonable.[60]

Under these conditions, liability may be assessed against the public entity or public employee for injuries resulting from such a determination.[61] These statutory examples, however, fall far short of clear guidelines for determining when conduct is ministerial or discretionary in nature. They suggest a recognition on the part of the Task Force and the legislature of the difficulty inherent in defining these concepts.

Conditions of Public Property—N.J. Stat. Ann. §§ 59:4-8, -9

Under the Act, a public entity or a public employee is expressly immunized from liability "for an injury caused by a condition of any unimproved public property."[62] This immunity is premised on the theory that it is virtually impossible to supervise or monitor the physical condition of all the vast acreage set aside for recreation and enjoyment.[63]

On the other hand, immunity from liability with respect to improved public property is limited by the caveat that where a dangerous

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55 N.J. STAT. ANN. § 59:2-3b (Supp. 1973-74).

56 *Id.* § 59:2-3c.

57 *Id.* § 59:2-4.

58 *Id.* § 59:2-5.

59 *Id.* § 59:2-8.

60 *Id.* § 59:2-3d.

61 *Id.* Prior to the Act, in Bergen v. Koppenal, 52 N.J. 478, 246 A.2d 442 (1968), the court was confronted with the question of whether Wall Township was under a duty to take over traffic control when its police officer had learned of a misdirected traffic light. The *Koppenal* court promulgated a similar standard upon which to base liability:

> [T]he municipality may prove the police did not act because of competing demands upon the police force. . . . [T]he jury may not disagree with the police deployment judgment *unless it is palpably unreasonable.*

Id. at 480, 246 A.2d at 444 (emphasis added).

62 N.J. STAT. ANN. § 59:4-8 (Supp. 1973-74). *See also id.* § 59:4-9.

63 *See id.* §§ 59:4-8, -9, Comment.

condition[64] exists on the property, liability may attach.[65] Specific guidelines are set forth in the Act from which a determination of liability can be made. Thus, liability may attach if a claimant can prove: (1) that the property was in a dangerous condition when he was injured; (2) that the injury was proximately caused by this condition; (3) that the condition created a foreseeable risk on the type of injury incurred; and (4) that either a negligent or wrongful act or omission on the part of an employee of a public entity acting within the scope of his employment created the dangerous condition, or the public entity had actual or constructive notice of this condition within a reasonable time prior to the injury to require it to take measures to eliminate the dangerous condition. Even if the plaintiff establishes the above elements, however, he may still fall short of proving his case if he does not demonstrate that the action taken by the entity was "palpably unreasonable."[66]

Comparative Negligence—N.J. Stat. Ann. § 59:9-4

Under the Act, contributory negligence is no longer a bar to recovery. Instead, the court, or at the discretion of the court, a jury, determines the amount of damages incurred by each party irrespective of his negligence and the percentage of negligence attributable to each. The court then diminishes the award in proportion to the amount of negligence attributable to the injured party and enters a judgment.[67]

The Act applies the "pure form" of comparative negligence (presently the law in Mississippi), under which an injured plaintiff is not barred from recovery despite his contributory negligence so long as he is not the sole proximate cause of his own injury.[68] Other forms of comparative negligence, while considered by the legislature, were ultimately abandoned in favor of the present "pure form," apparently on the basis that the former were not consistent with the general tenor of the Act "which is intended to increase settlement and to reasonably and fairly increase the compensation of injured persons."[69]

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64 "Dangerous condition" is defined in *id.* § 59:4-1a as

> a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

65 *Id.* § 59:4-2.

66 *Id.*

67 *Id.* § 59:9-4.

68 *Id.*, Comment.

69 *Id.* Subsequent to the passage of this Act, the New Jersey legislature enacted the Comparative Negligence Act, ch. 146, 2 N.J. Sess. Law Serv. 239 (1973), which pertains to civil actions between *private* parties, and provides in pertinent part:

> 1. Contributory negligence shall not bar recovery *in an action* by any person

III. Analysis of the Problem Areas of the New Jersey Tort Claims Act

The following discussion will focus upon and analyze some of the problems endemic to the Act, together with some suggested solutions.

Collateral Source Setoff—N.J. Stat. Ann. § 59:9-2e

Under this provision, a damages award is reduced by the claimant's collateral sources.[70] Thus, for example, benefits from a private insurance plan, such as Blue Cross-Blue Shield, would be deducted from a jury damages award, the net award being given to the claimant.

This provision is contrary to the common law collateral source rule[71] which provides:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer.[72]

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or his legal representative to recover damages for negligence resulting in death or injury to person or property, *if such negligence was not greater than the negligence of the person against whom recovery is sought*, but any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

2. In all negligence actions in which the question of liability is in dispute, the trier of fact shall make the following as findings of fact:

a. The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence, that is, the full value of the injured party's damages;

b. The extent, in the form of a percentage, of each parties' [*sic*] negligence. The percentage of negligence of each party shall be based on 100% and the total of all percentages of negligence of all the parties to a suit shall be 100%.

(Emphasis added). Thus, this law conflicts with section 59:9-4 in that a private plaintiff can recover damages only when his negligence is not greater than that of the defendant.

70 N.J. Stat. Ann. § 59:9-2e (Supp. 1973-74) provides in pertinent part:

> If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy.

71 2 F. Harper & F. James, The Law of Torts § 25.22, at 1343-44 (1956). *See also* Restatement (Second) of Torts § 920 A (Tent. Draft No. 19, 1973) [hereinafter cited as Tent. Draft No. 19].

72 Anheuser-Busch, Inc. v. Starley, 28 Cal. 2d 347, 349, 170 P.2d 448, 450 (1946).

The "collateral source" doctrine was recognized very early in New Jersey in Weber v. Morris & Essex R.R., 36 N.J.L. 213, 215 (Sup. Ct. 1873). The rule was defined as prohibiting a tortfeasor from claiming any benefits which the victim might have received as a result of the latter's contractual coverage with an insurance carrier. *See also* Patusco v. Prince

The wisdom of this common law rule has been the subject of much discussion.[73] The collateral source rule has been supported on the theory that a damages award is, in a sense, a punitive assessment against a tortfeasor for the harm he has caused another. Thus, to allow a setoff of a collateral source recovery against a damages award would permit a windfall savings to the tortfeasor, thereby diminishing the judgment's punitive impact.[74] The rationale for this position is similar to the deterrence theory in tort law which asserts "that civil liability is an effective incentive to care"[75] and "that people will be more careful in their behavior if they know they will be held accountable for the damages of their misbehavior."[76] Advocates of the common law rule contend that diminution of a tort recovery should not be allowed since the effect would be to dissipate the plaintiff's accumulated benefits to which he otherwise would be entitled under a given plan.[77]

Opponents of the collateral source rule assert that the purpose of tort law is to compensate the injured party, not to punish the tortfeasor.[78]

> It may be said that defendant *deserves* being made to pay in full because of the moral quality of his act. Now there can be no question here of who should fairly bear a loss, as between an innocent and a guilty party, for by hypothesis the innocent man's

Macaroni, Inc., 50 N.J. 365, 368, 235 A.2d 465, 466 (1967); Jacobs v. Jacobs, 99 N.J. Super. 84, 89, 238 A.2d 512, 515 (Ch.), *aff'd as modified*, 102 N.J. Super. 430, 246 A.2d 135 (App. Div. 1968).

[73] *See, e.g.*, 2 F. HARPER & F. JAMES, *supra* note 71, at § 25.22; Tent. Draft No. 19, *supra* note 71, at § 920 A; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966); Maxwell, *Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

[74] Note, *Collateral Source Rule Is Not Applicable to Governmental Agencies Since It Is Punitive in Nature*, 7 SAN DIEGO L. REV. 341, 345-47 (1970). *See also* Tent. Draft No. 19, *supra* note 71, § 920 A.

[75] 2 F. HARPER & F. JAMES, *supra* note 71, § 25.22, at 1347. Harper and James go on to assert that while a deterrence effect may in fact exist, nonetheless, it does not justify maintaining the collateral source rule:

> The choice here is not between liability and non-liability for the defendant, but simply whether his damages shall be diminished by what plaintiff gets from another source. And if that other source is a scheme of social insurance, the amount it provides is likely to be only a fraction of the damages recoverable at common law—perhaps a third, a quarter, or less. Altogether it seems unlikely indeed that anticipation of such an abatement from the flexible and indeterminate damages in a tort action will materially dilute whatever admonitory value there is in civil liability.

Id. (footnotes omitted).

[76] Note, *supra* note 74, at 346 (footnote omitted).

[77] *Id.* at 346-47.

[78] *See id.* at 347.

> loss has been made whole and we are discussing a further payment beyond that. There may be mixed with this feeling of desert a desire to deter dangerous conduct, but that merits separate treatment. What is left under this head, then, springs from a feeling of indignation or resentment and a desire to punish as such. Surely there is no place for such a notion in any philosophy of social insurance. It has no acknowledged place even in tort liability based on fault, for the theory of damages here is purely compensatory.[79]

Application of the common law collateral source rule requires that the tortfeasor suffer a detriment, while permitting the plaintiff to gain a double recovery first, from the collateral source and second, from the tortfeasor. The net result is punitive in nature, and therefore counter to the spirit if not the letter of tort law.[80] Thus, the rule is also contrary to the intent of the Act. Section 59:9-2c prohibits punitive or exemplary damages against a governmental entity,[81] while section 59:9-2e expressly provides for collateral source setoff.[82] Hence, the present Act effectively precludes application of the rule.

While abrogation of the rule may be more in keeping with the non-punitive spirit of the Act, it has been suggested that the net effect of this posture constitutes an infringement of the claimant's right to substantive due process. Thus, by way of analogy, in the context of a no-fault motor vehicle insurance plan providing for collateral benefits setoff, it has been argued that if a vested property interest exists in the collateral benefits, then setoff would constitute an unlawful taking.

> It is submitted that the diminution of the value of collateral sources by denying benefits of insurance, which one is required to pur-

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79 2 F. HARPER & F. JAMES, *supra* note 71, § 25.22, at 1345 (footnote omitted) (emphasis in original).

80 *Id.* § 25.22, at 1345-46.

81 N.J. STAT. ANN. § 59:9-2c (Supp. 1973-74). In California, the collateral source rule was held applicable to governmental agencies in Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970).

It should be recognized that the rule is still generally accepted in the United States. *Id.* at 6, 465 P.2d at 63, 84 Cal. Rptr. at 175. The *Restatement* has proposed the adoption of the rule:

> § 920 A. *Payments Made To Injured Party*
>
> . . . .
>
> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Tent. Draft No. 19, *supra* note 71, § 920 A, at 167.

82 N.J. STAT. ANN. § 59:9-2e (Supp. 1973-74) and accompanying comment. The comment notes that subrogation is not permitted, so as to limit the public entities' exposure to liability. The underlying rationale for this prohibition is based on the belief that the insurance companies are more able to withstand losses they contract for than the public entities.

> chase, until such collateral sources are exhausted, is a violation of the fifth and fourteenth amendments. Not only is it a taking of a vested property interest, but it is also unduly harsh on the innocent victim who through prudent negotiation and industry has secured for himself a full line of collateral benefits. Often, collateral sources are part of employee benefits taken in lieu of higher wages. It would be an economic burden on an employee who has given up a certain wage to give up reparation of injury as well.[83]

In considering the constitutional ramifications of the Act's rejection of the collateral source rule, an initial determination must be made as to whether the claimant has a vested interest in that portion of the award subject to setoff. Unlike the no-fault case, it is not clear that such a vested interest exists.[84]

In analyzing the nature of the claimant's interest in the damages award, the judiciary would probably consider the underlying rationale of the Act. The primary purpose is to provide an injured claimant with redress for his present as well as his projected economic loss.[85] However, a secondary purpose was to prohibit the receipt of duplicate benefits or punitive or exemplary damages which could otherwise threaten the public treasury with excessive exposure to liability.[86] Con-

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[83] Note, *No-Fault Motor Vehicle Insurance: A Constitutional Perspective*, 46 ST. JOHN'S L. REV. 104, 117 (1971).

Proponents of the collateral source rule have posited a constitutional argument against collateral benefits setoff, regarding a no-fault motor vehicle insurance plan. *See, e.g.*, Comment, *No-Fault Automobile Insurance in New Jersey: Constitutional Problems*, 3 SETON HALL L. REV. 386, 402-03 (1972); Note, *supra* at 117. This position was taken by the trial court in Belcher v. Richardson, 317 F. Supp. 1294 (S.D.W. Va. 1970), *rev'd*, 404 U.S. 78 (1971). The district court held that section 224 of the Social Security Act which required the diminution of social security disability awards by the amount of workmen's compensation benefits received, to be in violation of the fifth and fourteenth amendments. 317 F. Supp. at 1295-99. The due process argument proffered by the court was that social security benefits were vested property rights which could not be setoff by collateral benefits. *Id.* at 1297. This due process argument was predicated on the Supreme Court's ruling in Goldberg v. Kelly, 397 U.S. 254, 262 (1970), which the *Belcher* court thought implicitly accorded welfare benefits the status of a vested property right. 317 F. Supp. at 1297.

The entire argument was severely undermined by the Supreme Court's recent ruling holding that section 224 is valid, inferring a misapplication of the holding in *Goldberg*. 404 U.S. at 81.

[84] Even assuming, *arguendo*, that claimant's right may be *vested*, such would not necessarily preclude the governmental entity from using any part of the benefits as a setoff against the damages award so long as the claimant receives just compensation for his injuries. *See generally* Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972); Pinnick v. Cleary, — Mass. —, 271 N.E.2d 592 (1971). The fifth amendment permits the taking of property if such a taking comports with notions of due process encompassing justice and fundamental fairness. Such a standard is met where there is just compensation for the taking. *See* U.S. CONST. amend. V.

[85] N.J. STAT. ANN. § 59:9-5, Comment (Supp. 1973-74).

[86] *Id.* §§ 59:9-2c, e and accompanying comment.

sideration of the above rationale reinforces the conclusion that awards under the Act were designed to be purely compensatory in nature; hence, there is no vested interest in that portion of the award subject to collateral source setoff.

In addition to the due process question, an equal protection argument may exist in the Act's treatment of collateral source benefits. Under the Act, two classes of injured claimants are recognized: claimants not supported by collateral sources and claimants receiving collateral compensation. The net effect to an individual claimant, however, remains the same; he receives compensation only for his actual out-of-pocket expenses, either by court award, in the absence of collateral compensation, or by a diminished award, if he obtains a partial collateral recovery for his injuries. This approach is reasonable on its face since it is rationally related to the purpose of the Act, *i.e.*, compensation for the individual's out-of-pocket expenses. Therefore, it would appear that the Act should be able to withstand an equal protection attack brought upon these grounds.[87]

An alternative award procedure has been postulated which might be acceptable to both sides of the collateral source controversy—if the statutory scheme were amended to permit the right to indemnification by the collateral source.[88]

> Broadly, it may take one of three possible forms: first, by conferring on the collateral source a right to indemnification, whether by subrogation, assignment or an independent claim against the tortfeasor; second, by the latter returning the benefit to his benefactor, as in the not infrequent case of conditional loans or gifts

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87 To survive this constitutional test, the government need only demonstrate that the provision is rationally related to the purpose of the Act—as long as the plan is not deemed arbitrary or capricious. The particular equal protection test to be applied is determined, in part, by the nature of the classification. Where the classification is considered suspect, the state must show a compelling interest for creating it. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967). Here, however, the classification is not based upon a suspect category. Hence, the state must show that the legislation is rationally related to a legitimate legislative purpose. McGowan v. Maryland, 366 U.S. 420, 425-28 (1961).

In a statutory scheme, analogous to collateral source treatment under the Act, the constitutionality of the Unsatisfied Claim and Judgment Fund Law, N.J. STAT. ANN. § 39:6-60 *et seq.* (1973) was upheld. Prior to its 1958 amendment, this statute allowed insurance policy benefits and settlement payments to be setoff from Fund recovery. Holmberg v. Aten, 68 N.J. Super. 73, 81-85, 171 A.2d 667, 671-73 (App. Div. 1961); Fasano v. Gassert, 49 N.J. Super. 52, 55-56, 138 A.2d 752, 754-55 (L. Div. 1958).

88 Note, *supra* note 74, at 348. The Act in its current form expressly prohibits the right of subrogation. N.J. STAT. ANN. § 59:9-2e (Supp. 1973-74) states in pertinent part:

> No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee.

See id., Comment.

> reverting to the lendor or donor; and third, in the case of otherwise continuing benefits, like periodic payments, by terminating these as soon as tort damages assure full indemnity for the future.[89]

As a result of the utilization of this indemnification theory, the initial responsibility would be placed upon the tortfeasor. This would eliminate any possibility of a double recovery by a plaintiff or partial avoidance of liability by a defendant. An additional benefit would be that any potential reliance on the plaintiff's collateral source will be unaffected.[90] This approach appears to be a rational solution which the legislature should consider.

Trial Without a Jury—N.J. Stat. Ann. § 59:9-1

The Act provides that the tort liability of a governmental entity or employee shall be determined by a judge sitting without a jury.[91] The decision to eliminate the judicial mechanism of trial by jury merits analysis from a constitutional standpoint. In addition, an assessment of the utility of the jury trial under present-day theories of the administration of justice must be considered.

The concept of trial by jury evolved from common law.[92] The need for this judicial mechanism in civil matters, was recognized at an early date in this country, as is evidenced by the seventh amendment to the United States Constitution.[93] New Jersey has incorporated this right into its own state constitution,[94] but it is guaranteed only in those cases where it existed at common law, the common law being defined as the time preceding this country's Declaration of Independence.[95]

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89 Note, *supra* note 74, at 348 (quoting from Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1484 (1966)).

90 Note, *supra* note 74, at 348.

91 N.J. STAT. ANN. § 59:9-1 (Supp. 1973-74). *See also* note 129 *infra*.

92 In the twelfth century under Henry II, the jury, consisting of twelve people, first began to resolve factual disputes. By the thirteenth century, the jury became the normal procedure employed in both civil and criminal actions. Augelli, *Six-Member Juries in Civil Actions in the Federal Judicial System*, 3 SETON HALL L. REV. 281, 283 (1972).

93 Specifically, the seventh amendment provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

94 N.J. CONST. art. 1, ¶ 9 provides in pertinent part: "The right of trial by jury shall remain inviolate . . . ."

95 Town of Montclair v. Stanoyevich, 6 N.J. 479, 484-85, 79 A.2d 288, 290-91 (1951); Howe v. Treasurer of Plainfield, 37 N.J.L. 145, 147 (Sup. Ct. 1874).

In *Town of Montclair*, the court noted that the right to a jury trial in non-petty criminal cases was established in New Jersey even before it became a state. 6 N.J. at 490,

Therefore, a threshold consideration of the constitutional validity of this provision's denial of a jury trial requires a determination as to whether the cause of action against the sovereign existed at common law. Historically, while the king and feudal society gave way to the nation-state, the idea of sovereign immunity survived, generally founded on a theory that to permit a suit against the state without its consent was not consistent with the concept of "supreme executive power."[96] Thus, a cause of action did not lie against the *state*, or its equivalent governmental form, at common law. Therefore, it would appear that the legislature was well within its constitutional powers to dictate the mode of trial, *i.e.*, in this instance, the Act's provision for a non-jury trial.

On the other hand, a different conclusion may be reached with regard to the local governmental entity such as the municipality. Most writers in discussing local public entity immunity cite *Russell v. The Men of Devon*[97] as the first case to hold a local entity immune from suit. However, that case pertained only to an unincorporated municipality and, as properly read, stands for the limited proposition that an injured party cannot sue the public at large, where there is no specific entity to sue and no fund from which to pay a damages award.[98] While *Russell* was decided in 1788, and therefore too late to be controlling in the instant analysis, it is nonetheless important, for it suggests that the rule of law prior to 1788 might have allowed the attachment of liability to the tortious acts of an incorporated local entity which possessed a sufficient treasury.

After extensively analyzing common law cases involving municipalities, Jones, in his treatise on municipal tort liability,[99] has affirmatively taken the position that:

> An examination of the common law leaves little doubt that from the earliest times an action on the case could be brought against

79 A.2d at 294. As for the right to a jury trial in civil actions, in *Howe* the court noted that in cases cognizable in equity courts, such a right did not exist. 37 N.J.L. at 148. In Scudder v. Trenton Delaware Falls Co., 1 N.J.Eq. 694 (Ch. 1832), the court maintained that New Jersey's first constitution preserved the right to trial by jury in civil actions only for "all trials of right in suits at common law." *Id.* at 726.

96 W. PROSSER, *supra* note 4 at 971.

As cogently stated by Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907):

> A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

97 100 Eng. Rep. 359 (K.B. 1788). *See* W. PROSSER, *supra* note 4, § 131, at 978.

98 *See* notes 3 and 4 *supra* and accompanying text.

99 D. JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS (1892).

> a municipal corporation for its negligent discharge of a *corporate* duty by which damage was inflicted.[100]

In a more modern context, the New Jersey supreme court in *Cloyes v. Township of Delaware*[101] stated:

> The doctrine of municipal immunity originated in judicial decisions *since* the separation of the Colonies from England. The immunity is confined to those activities which the municipality undertakes as the agent of the State as distinguished from those which it pursues in its corporate or proprietary capacity.[102]

While there is by no means a unanimous judicial consensus regarding a local incorporated entity's liability in civil actions at common law,[103] the authorities quoted suggest that such liability may have existed at common law, thus mandating the legislature to reconsider the *exclusion of local incorporated entities* from the broad sweep of section 59:9-1.

Significantly, New York has provided a court of claims to hear all actions against the state,[104] but has excluded local entities from its purview. Actions against local entities are, instead, within the jurisdiction of the civil court system, where the right to jury trial is preserved. Although no express legislative authority sanctions this bifurcated scheme, it suggests a recognition of possible constitutional infirmities that might otherwise arise.[105]

Assuming for the moment that the legislature has the constitutional right to abolish the jury trial in actions against both state and local public entities, practically speaking, it is questionable whether

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100 *Id.* at 22 (emphasis added).

101 23 N.J. 324, 129 A.2d 1 (1957) (action for wrongful death of infant who drowned in open sedimentations tank of defendant municipality).

102 *Id.* at 327, 129 A.2d at 2 (emphasis added) (citations omitted).

103 *See, e.g.*, Mower v. The Inhabitants of Leicester, 9 Mass. 247 (1812), where the court in considering the liability of an incorporated municipality held that "it is well settled that the common law gives no such action." *Id.* at 249. *See also* Board of Chosen Freeholders v. Strader, 18 N.J.L. 108 (Sup. Ct. 1840), where the court in construing the tort liability of the Freeholders of Sussex County, asserted that

> not a solitary case is on record, of such public officer having been held liable for damages to individuals by reason of a neglect of his public duties.

Id. at 118. However, one writer has noted that such officers were frequently held responsible for other tortious conduct. *See generally* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9-16 (1963).

104 N.Y. CONST. art. VI, § 9; N.Y. PUB. AUTH. LAW §§ 163-a, 212-a, 358.2, 469-a, 1607 (McKinney 1970). *See generally* McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1 (1965).

105 Conversation with Saul L. Cohen, Assistant Corporation Counsel, Law Department, Tort Division, City of New York, Dec. 14, 1973.

such a policy benefits the judicial process. Therefore an inquiry into the merits of discarding the jury mechanism by New Jersey's Act is appropriate.

From its genesis at early common law, to the present, the effectiveness of the jury system has increasingly become the focal point of much criticism.[106] The most frequently expressed objections to the jury trial are: (a) that it is an important cause of court delay and calendar congestion due to its "inherent slowness;" (b) that it results in high administration costs; and (c) that the jury is ineffective as a fact-finder, dispensing non-uniform awards on the basis of emotional as opposed to logical considerations.[107]

The *Attorney General's Task Force Report,* in adopting this position recommended,[108] and the legislature ultimately accepted, the non-jury trial approach in ascertaining sovereign liability. Yet, there have been many writers who strongly defend the jury system.[109] One proponent of the jury system explains that the cause of calendar congestion may be rooted in the failure to provide enough juries rather than the jury system itself.[110] With respect to the fact-finding ability of juries, the *University of Chicago Jury Project* points out that in some 4,000 cases studied, the jury verdict agreed with the opinion of the presiding judge nearly 80 per cent of the time.[111] Furthermore, it has been

106 *See generally* Augelli, *supra* note 92; Corbin, *The Jury On Trial,* 14 A.B.A.J. 507 (1928); Duane, *Civil Jury Should be Abolished,* 12 J. AM. JUD. SOC'Y 137 (1929); Peck, *Do Juries Delay Justice?,* 18 F.R.D. 455 (1956).

107 Augelli, *supra* note 92, at 287-88.

With regard to the first objection, it is recognized that serious problems exist in the facile disposition of criminal and civil cases in our courts. Although no direct data has been obtained comparing the time differential between cases tried before a judge and those tried before a jury, it has been asserted that a 40 per cent time differential in favor of non-jury trials exists in connection with personal injury cases. It is also maintained that the time spent on voir dire, opening statements, closing arguments and attorney rhetoric designed to impress the jury, adds to the lethargic pace of the jury trials. *Id.* at 288.

As evidence of the high cost factor of a jury trial, critics point to the per diem and mileage payments to the juror, the subsistence allowance if the juror cannot return home during the trial, and the salaries of court personnel required "in connection with the handling of the jury." It is further argued that lack of knowledge of the law on the part of the juror, as well as inexperience, constitute inherent deficiencies in the jury mechanism which can best be cured by abolishing the system. *Id.* at 287-88.

108 TASK FORCE REPORT, *supra* note 12, at 15.

109 Botter, *Jury Bias in Hudson and Bergen Counties: A View from the Bench,* 4 SETON HALL L. REV. 1, 14 (1972).

110 McKenzie, *What Is Truth? A Defense of the Jury System,* 44 A.B.A.J. 51, 52 (1958). This rationale suggests an awareness that the "congestion is corrected not by curtailment of the rights of the people, but by expansion of the court system." Comment, *supra* note 83, at 407.

111 H. KALVEN & H. ZEISEL, THE AMERICAN JURY 63-64 (1966).

asserted that the rate of appeal from non-jury chancery decisions is substantially the same as that from jury trials, suggesting that judges are no less prone to error than juries.[112]

The high damage awards in tort actions have been rationalized in the context of escalating medical expenses and the cost of living.[113] In the *Chicago Study*, jury awards were compared with the presiding judge's separate and advance estimate of the award. The study indicates that such awards are generally consistent, predictable and generally in line with the judge's estimate where the defendant was an individual.[114]

As to the question of the cost of administering a jury system, one writer has contrasted a state workmen's compensation system which provides for hearings by arbitration, the use of impartial experts to fix the nature and extent of injury and a fixed schedule of benefits, with the Federal Employers' Liability Act (F.E.L.A.) provision for liability and damages determination through the regular jury trial mechanism. Surprisingly, this comparison indicated that the cost of running the workmen's compensation program was greater than the corresponding F.E.L.A. costs.[115]

It is generally agreed that the role of the jury is fact-finding in nature. The jury's function in tort actions is to resolve conflicting questions of fact by evaluation of conduct pursuant to the "reasonable man" standard. This task is particularly well suited to the layman, who brings with him the community standards and values necessary for this determination.[116] Thus, the jury apparatus operates upon the premise that one need not be a lawyer to understand guiding principles and to make factual judgments in light of them. To eliminate this system would be to destroy the very foundation of our civil jurisprudential system.[117]

Against this backdrop of uncertainty regarding the place of the jury in civil trials, criticism of the legislature's decision to exclude juries from determining public entity or employee liability would appear even more justified in multi-party actions where a public entity or employee is sued as a co-defendant with one or more private parties. In such a situation, where a private party defendant has demanded his

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112 McKenzie, *supra* note 110, at 52.

113 *Id.* at 53.

114 Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964).

115 McKenzie, *supra* note 110, at 54.

116 *See generally* W. PROSSER, *supra* note 4, at 289-90.

117 *Cf.* Botter, *supra* note 109, at 14.

constitutional right to a jury trial,[118] the rationalization for excluding the jury from determining public entity or employee liability is indefensible. The resulting bifurcation of liability between judge, in the case of the state, and jury, in the case of a private party defendant,[119] could result in a costly, inefficient, inconsistent, and duplicative decision-making procedure. These consequences would defeat the very purposes relied upon by the legislature to dispense with the jury trial.[120]

Individuals from both the bar and the bench, recognizing this difficulty, have suggested that in multi-party actions where a demand for a jury trial has been made, all aspects of the case should be tried before a jury, with the court treating the jury's verdict, *vis-à-vis* the governmental body, as advisory. The judge could then either accept the verdict or if found to be unreasonable, reject it.[121]

It should be pointed out that the California legislature decided that questions of governmental tort liability should be tried before a jury whose verdict is definitive rather than advisory.[122] Some ten years have passed since the California Tort Claims Act was enacted, and none of the difficulties supposedly associated with a jury trial have materialized.[123] With respect to the provision of a jury trial, therefore, it would appear, at least upon a cursory examination, to be an appropriate model upon which to base our own Act. New Jersey's legislature, however, rejected the California approach and instead followed the non-jury format adopted by the federal government.

The Federal Tort Claims Act[124] provides for a hearing of all claims against the United States by the district court sitting without a jury.[125] However, in *Poston v. United States*,[126] the non-jury provision was interpreted not to exclude the use of an advisory jury in determining the liability of the United States in cases where a jury was already present to hear issues relating to the liability of private party defend-

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118 N.J. CONST. art. 1, ¶ 9.

119 This procedure is necessitated by a clash between the right of the private party defendant and the defendant-sovereign's guarantee of a non-jury trial.

120 TASK FORCE REPORT, *supra* note 12, at 15.

121 See Judge Morgan's comment on this bifurcation procedure in the written text of the Cherry Hill Review Meeting, *supra* note 3.

122 While there is no provision in California's Tort Claims Act that specifically grants a claimant the right to a jury trial, CAL. GOV'T CODE § 945.2 (West 1966) implies such a right in providing: "Except as otherwise provided by law, the rules of practice in civil actions apply to actions brought against public entities."

123 TASK FORCE REPORT, *supra* note 12, at 131.

124 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1970).

125 *Id.* §§ 1346(b), 2402.

126 262 F. Supp. 22 (D. Hawaii 1966), *cert. denied*, 393 U.S. 946 (1968).

ants.[127] The Court cautioned, however, that it "would be reluctant to use an advisory jury . . . if a trial jury were not already trying the case as to other defendants."[128]

Although the Federal Tort Claims Act is without an express provision for an advisory jury, the statute was judicially construed in *Poston*, by way of reference to the federal rules of civil procedure, to permit such a device in multi-defendant litigation. Since New Jersey's legislature has adopted the approach favored in the federal act, the state's judiciary could make the same analogy to its own rules of procedure, which also permit advisory juries in similar situations.[129]

Time for Presentation of Claims—N.J. Stat. Ann. §§ 59:8-8, -9

A claimant must notify a public entity of his claim for damages or injury within 90 days of the accrual of the cause of action.[130] If notice is not given within the 90 day period, then the claimant must, within one year of the accrual of the action, apply to the superior court upon motion for leave to file a late claim. Such motion will not be granted unless sufficient reasons for the tardiness are provided to the court, along with a showing that there has been no substantial prejudice to the public entity as a result of the late notice. The court is given the further discretion to extend the late filing period up to a full two years from the time of the accrual of the claim. If the motion is denied, the claimant is effectively barred from instituting further action.[131]

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127 262 F. Supp. at 24.

128 *Id.*

129 *Compare* N.J.R. 4:35-2, which provides:

> The court on motion or its own initiative may try with an advisory jury, any issue not triable of right by a jury, or it may, with the consent of all parties appearing at the trial, order a trial of any such issue with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

with FED. R. CIV. P. 39(c), which states:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

In addition to the possibility of having an advisory jury, the Act also provides that where comparative negligence is in issue, a jury may be employed to return a two-fold verdict. The first part is limited to damages "incurred by each party irrespective of his negligence." N.J. STAT. ANN. § 59:9-4b(1). The second part of the verdict considers the percentage of negligence of each party which is fractionally calculated against the total damage award. The appropriate judgment is then entered. *Id.* § 59:9-4b(2).

130 N.J. STAT. ANN. § 59:8-8 (Supp. 1973-74). This section provides for a settlement period of six months from the date of presentation of the claim, and if there is no settlement, then the claimant may file a suit in an appropriate court.

131 *Id.* § 59:8-9. The only case to date construing these provisions is Lutz v. Semcer,

Due to the enactment of sections 59:8-8 and 59:8-9, New Jersey now has two statutes of limitations for tort actions—one of 90 days pertaining to an action brought against a public entity or employee,[132] and another of two years applying exclusively to private parties.[133] This dichotomy appears to raise an equal protection question which has already been resolved in several jurisdictions. An examination of the resolution of this question in the jurisdictions which have been confronted with the problem reveals its complex nature.

Michigan's sovereign immunity statute, which had provided for a 60-day notice requirement,[134] was invalidated by that state's highest court in *Reich v. State Highway Department*[135] as being violative of the equal protection guarantees of the United States and Michigan Constitutions.[136] The court asserted that such a notice requirement

> arbitrarily split the natural class, *i.e.*, all tortfeasors, into two differently treated subclasses: private tortfeasors to whom no notice of claim is owed and governmental tortfeasors to whom notice is owed.
>
> . . . .
>
> . . . [T]he notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence . . . . Such arbitrary treatment clearly violates the equal protection guarantees of our state and Federal Constitutions.[137]

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126 N.J. Super. 288, 314 A.2d 86 (L. Div. 1974), where the court strictly applied section 59:8-8's 90-day notice requirement. The court found that "[m]ere ignorance of the law is not a sufficient basis to excuse compliance with the requirements of this remedial statute." *Id.* at 297, 314 A.2d at 91. The court maintained that plaintiff's inability to ascertain the full extent of his injuries would not toll the running of the notice requirement. Thus, a claim must be asserted within ninety days after the liability-engendering conduct regardless of when all internal injuries can be diagnosed. *Id.* at 298, 314 A.2d at 92.

Yet the plaintiff was not completely barred from asserting his claim due to a possible oversight of the drafters of the Act. The plaintiff maintained that the late claims provision applied only to public entities and not public employees, and thus, his claim against the defendant police officers was not precluded. The court agreed with plaintiff, noting that section 59:8-8 makes reference only to public entities and not employees. Thus, plaintiff's failure to file within the ninety-day limit as set out in section 59:8-8 only barred his claim against the town and not against its police officers. *Id.* at 300, 314 A.2d at 93. The omission of public employees from section 59:8-8 appears to be an oversight on the part of the drafters since N.J. STAT. ANN. § 59:10-1 (Supp. 1973-74) provides specifically for indemnification of public employees by the appropriate public entity.

132 N.J. STAT. ANN. § 59:8-8a (Supp. 1973-74).

133 *Id.* § 2A:14-2 (1952).

134 MICH. COMP. LAWS ANN. § 691.1404 (1968), *as amended*, MICH. COMP. LAWS ANN. § 691.1404 (Supp. 1973-74).

135 386 Mich. 617, 194 N.W.2d 700 (1972).

136 *Id.* at 623-24, 194 N.W.2d at 702.

137 *Id.*

It should be emphasized that Michigan's statute did not provide a late claim procedure, while New Jersey's Act clearly embodies such a provision.

In *Turner v. Staggs*,[138] a recent decision by the Nevada supreme court, the claimant's suit was dismissed by the trial court for failure to present the sovereign with notice within six months of the accrual of the cause of action[139] as mandated by Nevada's County Government Act.[140] The supreme court reversed, maintaining that to enforce this statute of limitations would preclude the claimants "from enforcing a liability created by statute for their benefit."[141] *Turner* relied heavily on *Reich* for its reasoning, finding that the express purpose of the Act was to accord equal status to the plaintiff in suits against both private and public defendants.[142] Since New Jersey's Tort Claims Act was *not* intended to eliminate all distinctions between the two classes of claimants,[143] the reasoning utilized by the *Turner* court could not be employed in a constitutional attack on sections 59:8-8 and 59:8-9.

The Illinois supreme court, in *Housewright v. City of LaHarpe*,[144] refused to find a constitutional infirmity in that state's tort claims act,[145] asserting by way of dictum that its six month notice requirement did not violate either the equal protection or due process clauses of the fourteenth amendment.[146] In recognizing that " '[t]he question of this notice is entirely within legislative control,' "[147] the *Housewright* court

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138 — Nev. —, 510 P.2d 879 (1973).

139 Plaintiff did not file notice of claim until thirteen months after accrual of the action. *Id.* at —, 510 P.2d at 881.

140 NEV. REV. STAT. § 244.250 (1971) provides in pertinent part:

> 1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.
>
> 2. No claim or account against any county shall be audited, allowed or paid . . . unless the provisions of subsection 1 are strictly complied with.

141 — Nev. at —, 510 P.2d at 882. The court further stated that such a dismissal amounted to an "invidious discrimination." *Id.*

142 *Id.* at —, 510 P.2d at 882. The court also found the statute to be violative of state equal protection guarantees. *Id.* at —, 510 P.2d at 883. *See* NEV. CONST. art. I § 2.

143 N.J. STAT. ANN. § 59:2-1a (Supp. 1973-74) and accompanying comment.

144 51 Ill. 2d 357, 282 N.E.2d 437 (1972).

145 ILL. ANN. STAT. ch. 85, § 8-102 (Smith-Hurd 1966), *as amended*, ILL. ANN. STAT. ch. 85, § 8-102 (Smith-Hurd Supp. 1973-74).

146 51 Ill. 2d at 361, 282 N.E.2d at 440.

147 *Id.* at 364, 282 N.E.2d at 441 (quoting from Ouimette v. City of Chicago, 242 Ill. 501, 507, 90 N.E. 300, 302 (1909)). In accord with *Housewright* is the dissenting opinion of Chief Justice Thompson in *Turner*. Chief Justice Thompson argued that equal protection did not mandate equal treatment of the two classes of claimants. — Nev. at —, 510 P.2d at 886 (Thompson, C.J., dissenting). This opinion might well have been based on Justice Frankfurter's famous statement that:

concluded that failure to provide proper notice in a suit brought under the act would properly result in its final dismissal.[148]

An earlier version of California's Tort Claims Act contained a late claims provision[149] substantially similar to sections 59:8-8 and 59:8-9 of the New Jersey Act. In *Tammen v. County of San Diego*,[150] the California supreme court held that the trial court did not abuse its discretion in denying a claimant the right to file a late claim.[151] The court, in rejecting claimant's due process and equal protection arguments,[152] relied on its earlier holding in *Dias v. Eden Township Hospital District*,[153] in which it maintained that " '[p]ublic agencies, generally speaking, afford a proper subject for legislative classification.' "[154]

Review of these decisions would appear to indicate that New Jersey's notice sections are constitutional in light of the Act's late claim provision and the legislature's inherent right to classify. It should be stressed, however, that the legislature's right to classify is not absolute, but is always subject to the "rational basis" test.[155] The Act's notice provisions, though providing a more restrictive approach to the filing of claims than in an ordinary civil action, would probably encounter little difficulty in passing a constitutional challenge since its provisions are rationally related to its underlying purposes. These objectives are: (a) to provide for prompt notification of claims with a view to arrange for investigation, locating witnesses, preserving evidence and the like; (b) to process claims administratively, thereby avoiding overburdening

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> Classification is inherent in legislation; the Equal Protection Clause has not forbidden it.

Morey v. Doud, 354 U.S. 457, 472 (1957) (Frankfurter, J., dissenting).

148 51 Ill. 2d at 365, 282 N.E.2d at 442. *See* ILL. ANN. STAT. ch. 85, § 8-103 (Smith-Hurd 1966).

149 Cal. Tort Claims Act § 912(b), ch. 1715, § 1, 1963 Stats. 3372 (1963), *as amended*, CAL. GOV'T CODE § 946.6 (West Supp. 1973) provided that the superior court grant leave to file a late claim if the court found that the notice to the state board was made within a reasonable period not exceeding one year after the accrual of the cause of action and that:

> (1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect unless the public entity . . . establishes that it would be prejudiced if leave to present the claim were granted . . . .

150 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967).

151 *Id.* at 474, 426 P.2d at 757, 58 Cal. Rptr. at 253.

152 *Id.* at 481, 426 P.2d at 761, 58 Cal. Rptr. at 257.

153 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962).

154 66 Cal. 2d at 481, 426 P.2d at 761, 58 Cal. Rptr. at 257 (quoting from 57 Cal. 2d at 504, 370 P.2d at 335, 20 Cal. Rptr. at 631).

155 *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), in which the Supreme Court listed the criteria for testing a discriminatory classification.

the courts; and (c) to screen out claims that are specifically excluded by the Act.[156]

Another question raised by the notice section concerns the provision for filing a late claim at the discretion of the superior court.[157] This procedure necessitates the preparation of a suitable motion and the presentation of the same before the court. Such a motion could necessitate the appearance of the appropriate governmental entity before the court if that entity alleged that substantial prejudice would result if the late claim were permitted to be filed. This requirement appears to be contrary to one of the underlying rationales of the Act—to prevent undue court calendar congestion while providing prompt redress to private individuals for injuries suffered as a consequence of the tortious acts of the sovereign.[158] As presently structured, this provision could increase the already crowded court calendar.

The California approach appears to afford a reasonable solution for increasing administrative efficiency. Pursuant to this scheme, a claimant wishing to bring an action against the local public entity is initially permitted to file a late claim application with the public entity itself, which then may or may not consider the claim.[159] Only after the public entity has rejected claimant's application to present a late claim must the late claimant seek the aid of the courts.[160] This procedure, if adopted in New Jersey, would in many cases permit a prompt and efficient resolution of a late claim question without vitiating the objectives of the Act.

Plan or Design Immunity—N.J. Stat. Ann. § 59:4-6

The Act is intended to grant complete immunity to a public entity or a public employee for injuries flowing from a plan or design of an original construction of, or improvement to, public property. Such plan or design must have been given either prior official approval by an authorized body such as the legislature, a local governing body, or a public employee exercising discretionary authority, or it must have been

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156 Conversations with New Jersey Deputy Attorney General John Fitzpatrick, Chief of Tort and Contract Unit of Claims Section, Dec. 11, 1973. Claims specifically excluded in the Act are found in N.J. STAT. ANN. §§ 59:4-5 to 4-9 (Supp. 1973-74).

157 N.J. STAT. ANN. § 59:8-9 (Supp. 1973-74).

158 TASK FORCE REPORT, *supra* note 12, at 15.

159 CAL. GOV'T CODE § 915(a) (West 1966).

160 CAL. GOV'T CODE § 946.6 (West 1966) and accompanying comment. Section 946.6 appears to apply only in actions against local public entities, while an application for leave to file a late claim against the state must be presented first to the State Board of Control and not directly to the state. CAL. GOV'T CODE § 915(b) (West 1966).

prepared in conformity with standards previously approved.[161] According to the official comment to this section, this immunity was premised on the theory that approval of a plan or design constitutes a discretionary function of government that cannot be subject to the threat of civil liability.[162]

Despite the clear language in this provision, explanation of its operation in the accompanying comment reveals certain ambiguities as to the actual breadth of the intended scope of immunity. The comment states that the immunity is "similar" to that recognized in *Weiss v. Fote*[163] by the New York court of appeals. The standard adopted in *Weiss* provides that immunity will attach to a plan or design, unless "due care was not exercised in the preparation of the design or . . . no reasonable official could have adopted it."[164] New Jersey's section 59:4-6, however, makes no reference to reasonableness or due care of the official as a requirement for establishing immunity for a plan or design.[165]

This potential conflict between section 59:4-6 and its accompanying comment might allow the judiciary to read a reasonableness prerequisite into the provision. Such a construction would serve to ameliorate the often harsh results generated when sovereign immunity attaches.[166] Since the courts will probably first consider prior New Jersey case law in determining whether a reasonableness standard is implicit in the provision,[167] an examination of these decisions may indicate the

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161 N.J. STAT. ANN. § 59:4-6 (Supp. 1973-74) states:

> a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

162 N.J. STAT. ANN. § 59:4-6, Comment (Supp. 1973-74).

163 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

164 *Id.* at 586, 167 N.E.2d at 66, 200 N.Y.S.2d at 413.

165 N.J. STAT. ANN. § 59:4-6 (Supp. 1973-74). For the text of this statute, see note 161 *supra*.

166 Chief Justice Weintraub, writing in Willis v. Department of Conserv. & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970), commented on the inequitable result of providing for complete immunity. "It is plainly unjust to refuse relief to persons injured by the wrongful conduct of the State." *Id.* at 537, 264 A.2d at 36. *See also* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 921.

167 In Barney's Furniture Warehouse v. City of Newark, 62 N.J. 456, 303 A.2d 76 (1973), it was recently noted that the Tort Claims Act, for the most part, is a codification of the prior case law. This statement was made in the context of an assault on a municipality's plan or design immunity on the basis of case law antedating adoption of the Act. *Id.* at 470 n.4, 303 A.2d at 83.

possibility of the judiciary supplementing the express language of section 59:4-6.

The accompanying comment to this section cites two New Jersey cases, *Fitzgerald v. Palmer*[168] and *Hughes v. County of Burlington*,[169] for the general principle that the approval of plans or designs is purely a discretionary function of the sovereign, whose judgment should not be subjected to tort liability.[170] These two cases at first blush appear only to add to the confusion. While *Hughes* supports the position of complete immunity granted in section 59:4-6, *Fitzgerald* proposes a reasonableness standard in some measure similar to that adopted by New York in the *Weiss* decision.

In *Fitzgerald*, a concrete slab that killed plaintiff's decedent was dropped by an unknown person from an overhead crossing constructed by the state highway department.[171] Plaintiff argued that the accident could have been prevented by construction of a wire fence on the overpass.[172] The court rejected the plaintiff's claim upon the state's assertion of sovereign immunity. However, by way of dictum, the court stated that if the sovereign did act "in a manner short of ordinary prudence," then the government could indeed be subjected to liability.[173]

Such a standard of "ordinary prudence" might be applied against the government if a road were "constructed of a design imperiling the user."[174] The *Fitzgerald* court, however, felt constrained not to extend this standard to a governmental act manifesting an exercise of discretion. Moreover, those matters the court referred to as involving discretion are typical of those actions sought to be granted continued immunity from liability under the Act.[175] Thus, the area of governmental

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168 47 N.J. 106, 219 A.2d 512 (1966).

169 99 N.J. Super. 405, 240 A.2d 177 (App. Div. 1968).

170 N.J. STAT. ANN. § 59:4-6, Comment (Supp. 1973-74).

171 47 N.J. at 107, 219 A.2d at 513.

172 *Id.* at 108, 219 A.2d at 513.

173 *Id.* at 109, 219 A.2d at 514. This was merely dictum, since the assertion of sovereign immunity resulted in the dismissal of the complaint for failure to state a cause of action.

174 *Id.*

175 The court in *Fitzgerald* noted that certain governmental decisions as to allocation of revenue, are wholly within the discretion of the legislative and executive branches and are thus immune from the bench's second-guessing. These decisions include

> whether a road should have four or six or eight lanes, or there should be dividers, or circles or jughandles for turns, or traffic lights, or traffic policemen, or a speed limit of 50 or 60 miles per hour . . . .

Id. at 109-10, 219 A.2d at 514. Compare with N.J. STAT. ANN. § 59:2-3c (Supp. 1973-74), which provides that the public entity will not be liable for its discretion in deciding whether to seek or furnish resources necessary for maintenance or construction of facilities,

action that *Fitzgerald* sought to subject to judicial review against a standard of ordinary prudence will be limited to those actions of a ministerial nature, as is recognized by the Act.[176]

Extension of the "ordinary prudence" standard into the area of discretionary action was rejected by the *Hughes* court when confronted with a claim that plaintiff's injury resulted from the county's failure to construct conventional road shoulders when it designed a highway.[177] The court found no merit in plaintiff's contention that the governmental action was within the ambit of scrutiny under *Fitzgerald's* ordinary prudence standard. Instead, it concluded that the exercise of governmental authority in the instant case was one of considered judgment and discretion which the *Fitzgerald* court had recognized as beyond the scope of judicial review.[178]

The Act provides complete immunity for a public entity's discretion when it decides how to utilize or apply available resources in the face of competing demands, *unless* such a governmental decision can be deemed "palpably unreasonable."[179] Thus, certain discretionary decisions now can be subjected to a limited judicial review.[180] Whether a policy decision can be subjected to judicial review under the Act probably will turn on what level that policy was conceived.[181]

If the courts continue to follow the trend of limiting sovereign immunity[182] as it had been developing before the Tort Claims Act was

purchase of equipment, hiring of personnel, and the general supply of sufficient governmental services. The accompanying comment clearly states that this section immunizes "high-level policy decisions" from tort liability. N.J. STAT. ANN. § 59:2-3c, Comment (Supp. 1973-74).

176 N.J. STAT. ANN. § 59:2-3d states in pertinent part:

> Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.

See acompanying comment.

177 99 N.J. Super. at 414, 240 A.2d at 181-82.

178 *Id.* at 414, 240 A.2d at 181.

179 N.J. STAT. ANN. § 59:2-3d (Supp. 1973-74).

180 *Id.*

181 N.J. STAT. ANN. § 59:2-3d, Comment (Supp. 1973-74). The comment alludes to Bergen v. Koppenal, 52 N.J. 478, 246 A.2d 442 (1968) for support. In *Koppenal,* the question was whether a town was obligated to take over traffic control when its police had learned that an overhead traffic light had broken loose. The court decided that a town's determination of how to deploy its police in light of competing demands would not subject the public entity to liability unless such a determination was found to be "palpably unreasonable." *Id.* at 480, 246 A.2d at 444. The court narrowed its holding by stating that a high-level policy decision as distinguished from a lower-level one would continue to be exempt from judicial review. *Id.* As previously stated in note 175 *supra,* high-level policy decisions are still afforded complete immunity under the Act.

182 *See* Willis v. Department of Conserv. & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970), which abolished the doctrine of sovereign immunity for all governmental acts except those

adopted, it appears likely that immunity will be determined on the basis of the discretionary-ministerial dichotomy.[183] In addition to *Fitzgerald* and *Hughes*, movement toward this view was recently evidenced in *Catto v. Schnepp*.[184] There, an appellate court held that the township's design and reconstruction of a road was a manifestation of its discretionary judgment, and thus not subject to judicial review.[185] Section 59:4-6 sanctions the continued application of the ministerial-discretionary dichotomy, in mandating immunity from liability for actions of the latter variety.[186]

However, the legislature's recognition of this nebulous standard[187] appears likely to become an exercise in futility when applied by the judiciary. A simpler approach that would better serve the function of mitigating the severity of absolute plan or design immunity would be for the courts to construe section 59:4-6 in light of New York's *Weiss* reasonableness standard.[188] One writer has suggested that

> the New Jersey courts would be well within the permissible bounds of statutory construction in adopting the reasonableness standard expressed in *Weiss*; that is, liability for injury resulting from the plan or design of public property may be predicated on proof that the plan or design was either evolved without adequate study or lacked reasonable basis.[189]

"calling for the exercise of official judgment or discretion." *Id.* at 540, 264 A.2d at 37. Chief Justice Weintraub noted the "steady movement away from immunity." *Id.* at 538, 264 A.2d at 36.

183 See notes 36-40 *supra* and accompanying text for an extended discussion of the ministerial-discretionary dichotomy.

184 121 N.J. Super. 506, 298 A.2d 74 (App. Div. 1972).

185 *Id.* at 510, 298 A.2d at 76.

186 N.J. STAT. ANN. § 59:4-6 (Supp. 1973-74), and accompanying comment. *See also* N.J. STAT. ANN. § 59:2-3d (Supp. 1973-74).

187 For a useful discussion of the overlapping between the ministerial-discretionary functions, see Note, *Discretionary Immunity Doctrine in California*, 19 HASTINGS L.J. 561, 568 (1968). The New Jersey Tort Claims Act only gives by way of example what activities are deemed discretionary. *See* notes 54-59 *supra* and accompanying text.

188 *See* text accompanying note 164 *supra*. Such an interpretation could be premised on the official comment's recognition that "[t]his immunity is similar to the immunity provided by . . . [*Weiss*] and by leglislation in the State of California." N.J. STAT. ANN. § 59:4-6, Comment (Supp. 1973-74). The California statute alluded to by the comment is very similar to section 59:4-6 except that immunity will attach only if

> (a) a *reasonable* public employee could have adopted the plan or design . . . or
> (b) a *reasonable* legislative body or other body or employee could have approved the plan or design . . . .

CAL. GOV'T CODE § 830.6 (West 1966) (emphasis added).

Significantly, both require that the sovereign demonstrate that the design or plan was evolved on some reasonable basis before immunity can attach. See text accompanying note 164 *supra* for the *Weiss* standard.

189 Note, *The New Jersey Tort Claims Act, Section 59:4-6—Public Property Plan or Design Immunity*, 26 RUTGERS L. REV. 838, 851 (1973) (footnote omitted).

While the bench may have a role in determining the parameters of a reasonableness standard as it relates to plan or design immunity, only the legislature is in a position to reconsider whether immunity should be perpetual, even when changing conditions make the plan or design dangerous. While section 59:4-6 specifically omits mention of perpetuation,[190] the official comment expressly states that plan or design immunity is to be perpetual despite any change of conditions which would render the existing plan or design dangerous to the public.[191] Therefore, once the immunity attaches, it will be of a permanent nature unless the legislature reconsiders its position in light of one of the approaches adopted by California or New York.

The comment rejected the California approach as articulated in *Baldwin v. State*,[192] which held that a design or plan originally approved as being safe did not enjoy perpetual immunity when the actual operation of the plan or design became dangerous under changed physical conditions.[193] Yet the comment did not discuss the more temperate position espoused in New York by way of dictum in *Weiss*. The New York court of appeals stated that a public entity is under a continuing duty to review its plan or design of public property, and where, because of changed circumstances a dangerous condition exists which is the proximate cause of the injury, then the entity will be liable.[194] Yet, unlike California, the entity will only be subject to liability if its response or failure to respond to the changed condition "was evolved without adequate study or lacked reasonable basis."[195]

Another device which could be utilized by the courts in avoiding the harshness of plan or design immunity would involve construing the response by the public entity or the failure to respond to a subsequent dangerous condition as a breach of a ministerial duty which, under the Act, is clearly liability-engendering.[196] As such, there would be no need to consider the danger of judicial intrusion into the legislature's or

190 N.J. STAT. ANN. § 59:4-6 (Supp. 1973-74). For text of this statute, see note 161 *supra*.

191 *See* N.J. STAT. ANN. § 59:4-6, Comment (Supp. 1973-74).

192 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972). The comment expressly dismissed California's view

> as unrealistic and inconsistent with the thesis of discretionary immunity—that a coordinate branch of government should not be second-guessed by the judiciary for high level policy decisions.

N.J. STAT. ANN. § 59:4-6, Comment (Supp. 1973-74).

193 6 Cal. 3d at 429-30, 491 P.2d at 1123, 99 Cal. Rptr. at 147.

194 7 N.Y.2d at 588, 167 N.E.2d at 67-68, 200 N.Y.S.2d at 415.

195 *Id.* at 589, 167 N.E.2d at 68, 200 N.Y.S.2d at 416.

196 N.J. STAT. ANN. § 59:3-2d states in pertinent part: "Nothing in this section shall exonerate a public employee for negligence arising out of his acts or omissions in carry [*sic*] out his ministerial functions."

executive's domain, since notice of a dangerous condition would call for immediate corrective action (ministerial), rather than a balancing of fiscal priorities (discretionary). The fear expressed by the legislature, of possible intrusion into the planning functions of the public entity, would then be unwarranted.

This analysis may be nothing more than semantic legerdemain, for in many instances the distinction between discretionary and ministerial functions is more form than substance.[197] Rather than relying on the vagaries of judicial interpretation, it is hoped that the legislature will take positive action to amend the provision to conform with the more equitable approach adopted in New York. A public entity should not be permitted "ostrich-like, [to] hide its head in the blueprints, blithely ignoring the actual operation of the plan."[198]

Damages for Pain and Suffering—N.J. Stat. Ann. § 59:9-2d

One provision of the Act, which has been the subject of strong attack on the part of the trial lawyers' segment of the bar, relates to the threshold provision concerning recovery of damages for pain and suffering. The Act necessitates a showing by the plaintiff of both medical treatment expenses in excess of $1,000 and permanent loss of a bodily function or permanent disfigurement or dismemberment, as a precondition to recovery of damages for pain and suffering.[199]

This provision is grounded on the strong public policy that damages for pain and suffering should be granted only when the loss is substantial, due to the public entities' existing "economic burdens."[200] The validity of this public policy rationale was questioned by the Middlesex County Trial Lawyers Association, which condemned the provision as "so overly protective against imagined abuses [relating to so-called nuisance claims] by the few that it emasculates the rights of many with legitimate claims."[201] This provision represents a regressive recovery formulation which is inconsistent with the original purposes of the Act of correcting inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity.[202] By requiring both an excessive dollar threshold

197 *See* notes 33-36 *supra* and accompanying text.

198 6 Cal. 3d at 434, 491 P.2d at 1127, 99 Cal. Rptr. at 151.

199 N.J. STAT. ANN. § 59:9-2d (Supp. 1973-74).

200 *Id.* § 59:9-2d, Comment.

201 Letter from Middlesex County Trial Lawyers Association to Editor, May 17, 1973, in 96 N.J.L.J. 605, 620 (1973).

202 *Id.* at 605.

and permanent injury, the provision fails to properly compensate an otherwise deserving plaintiff.[203]

Proposed solutions to the problem have ranged from removing the threshold and permanent injury requirements, on the rationale that they arbitrarily deprive a claimant of a right to a remedy, to an approach similar to that adopted by the legislature in the automobile no-fault legislation. If the latter approach were adopted, recovery of damages for pain and suffering would be permitted where: (1) the value of medical expenses is greater than $200 and the injuries solely confined to the soft tissue; (2) a permanent injury is incurred by the plaintiff or; (3) the injury is other than a permanent injury and is not confined to the soft tissue, *e.g.*, broken bones, etc.[204] Under this approach, the monetary threshold would only be determinative in the context of soft tissue injury.[205] In the event that any excessive recovery is awarded, the state has the option to protect its treasury by purchasing catastrophe or risk insurance.[206]

Attorneys' Fees—N.J. Stat. Ann. § 59:9-5

Reasonable attorneys' fees may be awarded a successful claimant, at the discretion of the court, where there is no recovery for pain and suffering. On the other hand, a claimant who recovers for pain and suffering will not be awarded such fees.[207]

A constitutional difficulty arises under this provision since pursuant to the court rules, R. 4:42-9,[208] the awarding of attorneys' fees is permitted only under certain circumstances, apparently not encom-

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203 Consider, for example, the injured party who suffers only a soft tissue injury which, however, is extremely painful and disabling and treatment of which entails medical expenses over $1000—yet there is no recovery for pain and suffering. *Id.* at 620.

204 *Id. See* New Jersey Automobile Reparations Reform Act, N.J. STAT. ANN. § 39:6A-1 *et seq.* (Supp. 1973-74).

205 N.J. STAT. ANN. § 39:6A-8 (Supp. 1973-74).

206 *See* M. Lenz, Jr., RISK MANAGEMENT MANUAL § 3, at 19 (1973) and J. Duff, FIRE CASUALTY & SURETY BULLETINS, Pf-1 (Dec. 3, 1973), for a good discussion of how catastrophe or risk insurance can insulate public entities from excessive liability.

In fact, the state has provided an extensive program of insurance to cover liability exposures. The present catastrophe limit is $5,000,000 per occurrence/$10,000,000 aggregate, subject to $500,000 deductible, excluding only medical malpractice at the New Jersey Medical College (separately insured at $3,000,000 limit) and aircraft (separately insured at $5,000,000 limit). In addition, an extensive underlying program of insurance covering the $500,000 deductible provides for automobile liability, comprehensive general liability, medical malpractice at state institutions and lawyers' professional liability. Information furnished by the State of New Jersey Department of Insurance, February 13, 1974.

207 N.J. STAT. ANN. § 59:9-5 (Supp. 1973-74).

208 N.J.R. 4:42-9.

passing the present situation under the Act. Furthermore, the case law in New Jersey has consistently viewed the question of attorneys' fees as a matter of procedure, subject only to regulation and control by the judiciary and not amenable to legislative review.[209] As such, section 59:9-5 of the Tort Claims Act may be deemed as an unauthorized incursion upon the rule-making powers of the judiciary and, hence, invalid and unenforceable.

CONCLUSION

Analysis of New Jersey's Tort Claims Act discloses problem areas in several of the Act's procedural and administrative provisions. Possible constitutional infirmities inherent in the Act's structure could render key sections inoperative. In addressing themselves to these difficulties, both the legislature and the judiciary must undertake the necessary tasks of revision and interpretation. The Act's underlying policy considerations should serve as the proper guidance for these bodies during the ensuing reformation process.

By its very nature, interpretation of the Act requires an appreciation of its important separation of powers implications. At the heart of this problem is the recognition that the legislative hold on the state's purse strings cannot be controlled by the judiciary. The desire of the legislature to adequately compensate an individual injured by a tortious act of the state, has been counterbalanced by that body's determination to protect the public treasury from excessive claims. Thus, any further exposure of the state to liability through the continued abrogation of its immunity should originate within the legislative branch rather than at the initiative of the judiciary. It is the judiciary's responsibility, however, to administer and interpret the Act, and the courts must therefore construe any existing areas of ambiguity and inconsistency which might otherwise inhibit its proper application. The bench may also be expected to soon consider some of the potential constitutional issues presented by the Act. Judicial scrutiny of this intricate problem should not, in this regard, be impeded by the separation of powers considerations which must weigh so heavily in its other deliberations.

In enacting the New Jersey Tort Claims Act the legislature recognized "the inherently unfair and inequitable results which occur in the

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209 Lynch, *The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy?*, 4 SETON HALL L. REV. 19, 26 (1972). *See, e.g.*, DeBow v. Lakewood Hotel & Land Ass'n, 52 N.J. Super. 288, 145 A.2d 493 (App. Div. 1958).

strict application of the traditional doctrine of sovereign immunity."[210] At the same time, as a matter of public policy, that body declared that liability be limited to the areas acknowledged by the Act "in accordance with [its] fair and uniform principles."[211] This state's legislature and judiciary must move ahead towards effectuating this goal.

Arnold D. Litt

210 N.J. STAT. ANN. § 59:1-2 (Supp. 1973-74).
211 *Id.*