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An Insurance Program to Effectuate Waiver of Soveriegn Tort Immunity

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accidents between domesticated animals and vehicles should be filled by appropriate legislation. The Florida Legislature should enact a provision similar to that of New Jersey,[117] imposing a duty on one who injures a domestic animal to ascertain and report the injury. Such statutory regulation may be justified on two counts. First, it would be consistent with the more general statutes concerning the reporting of accidents. Second, and more important, it is only humane to insure that the dog, if not killed, receives immediate veterinary care, or if treatment is impossible that the animal be quickly and painlessly destroyed.

S. JOSEPH PIAZZA

AN INSURANCE PROGRAM TO EFFECTUATE WAIVER OF SOVEREIGN TORT IMMUNITY

> [I]t is always quite difficult, if not impossible to give a satisfactory reason for holding a city immune from liability when through its own negligence or the carelessness or inefficiency of its agents and employees it violates a right of a citizen to his injury, especially when one considers that provision of the Bill of Rights which declares that – "All courts in this state shall be open so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial, or delay."[1]

The present Florida constitution contains the same guarantee of remedy for injury incurred.[2] Nevertheless, a tort victim may be deprived of life, liberty, or property without recompense[3] if the state, a county, or a municipality is the tortfeasor. An increasing number of states have recognized the injustice of the doctrine of sovereign tort immunity as well as the lack of administrative or fiscal reasons for its retention.[4] Furthermore, the historical factors involved

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117. N.J. STAT. §4:22-25.1 (1973).

1. Kaufman v. City of Tallahassee, 84 Fla. 634, 638, 94 So. 697, 699 (1922).

2. FLA. CONST. art. I, §21.

3. *E.g.*, FLA. CONST. art. X, §13; State *ex rel.* Davis v. Love, 99 Fla. 333, 352, 126 So. 374, 380 (1930) (state); Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372 (1916) (county); Steinhardt v. North Bay Village, 132 So. 2d 764 (3d D.C.A. Fla. 1961) (municipality – loss of property).

4. *E.g.*, Louisiana Bd. of Comm'rs v. Splendour Shipping & Enterprises Co., 273 So. 2d 19 (La. 1973); ALASKA STAT. §§09.50.250-.300 (1962); CAL. GOV'T CODE §§810-996.6 (West 1966); CAL. VEHICLE CODE §17001-004 (West 1972); CONN. GEN. STAT. ANN. §7-465 (1972) (municipalities); HAWAII REV. STAT. §§662-1 to -15 (1968) (as amended by Hawaii Laws 1972, ch. 164, §§2, 4; ILL. ANN. STAT. ch. 85, §§1-101 to 9-107 (Smith-Hurd 1966) (Supp. 1965); MICH. STAT. ANN. §§3.996(101)-(115) (Supp. 1965); MINN. STAT. ANN. §§466.01-.15 (1972) (municipalities only); NEV. REV. STAT. §§41.031-.039 (1971); N.J. STAT. ANN. §52.4A-1 (1972); N.Y. CT. CL. ACT §8 (McKinney 1972); ORE. REV. STAT. §§30.260-.300 (1971); UTAH CODE ANN. §§63-30-1, -3, -7, -9, -11 to -14, -16 to -34 (1967); UTAH CODE ANN. §§63-30-2, -3, -10, -15 (Supp. 1971); VT. STAT. ANN. tit. 12, §§5601-05; tit. 24, §1092, tit. 29, §§1401-06 (1971).

in the creation of the doctrine are antagonistic to the principles of a democratic state.

Although thirteenth century English citizens were required to have the consent of the King as a prerequisite to bringing suit against him, the vested rights of the citizen could not be extinguished without due process of law.[5] The maxim stating that the King shall do no wrong originally meant that he was not privileged to do wrong.[6] As the ideas of divine right and absolute sovereignty merged in the sixteenth century the King abandoned responsibility for his torts.[7] The process by which this doctrine of sovereign tort immunity came to be applied in a democratic nation is an enigma.[8] That the doctrine is today incompatible with the increasing tendency of the Florida courts[9] and legislature[10] to adopt a "social-spreading-of-the-risk" approach to tort law characterizes it further as an historic anomaly.

Fears that abolition of sovereign tort immunity will bring about overwhelming claims and administrative costs in excess of the government's ability to pay are unfounded. As an example, California, which has abrogated the doctrine statutorily, has maintained an effective insurance plan since 1963 for approximately $1,198,000 per year, including administrative costs.[11] Minnesota

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5. Borchard, *Govermental Responsibility in Tort,* 36 YALE L.J. 1, 18 (1926).

6. Enforcement of individual rights against the King was strengthened by Bracton, a 13th century English legal authority, who recognized the King as vicar of God, *in temporalibus.* If the King, relying upon his physical power, abused his legal privileges he became a servant of the devil and his acts were held to lack authority. Borchard, *supra* note 5, at 21-22. *See also* Note, *A Statutory Approach to Governmental Liability in Florida,* 18 U. FLA. L. REV. 653 (1966).

7. Borchard, *supra* note 5, at 31.

8. *Id.* at 31; Note, *supra* note 6, at 654. Sovereign tort immunity is incompatible with the entire legal system of common law nations. Such nations, unlike countries with civil law traditions, do not have a body of public law. Common law nations, in theory, do not distinguish between private citizens and government under law. *See generally* Levinson, *Toward Principles of Public Law,* 19 J. PUB. L. 327 (1970).

9. *See generally* Ausness, *From "Caveat Emptor" To Strict Liability: A Review of Products Liability in Florida,* 24 U. FLA. L. REV. 410 (1972).

10. FLA. STAT. §§627.730-.741 (1971) (Florida Automobile Reparations Reform Act).

11. Letter from Victor A. Bradshaw, Jr., Ass't Insurance Officer, Dep't of General Services, California, to Judith G. Korchin, March 2, 1973, at 2-3, on file with University of Florida Law Review. Under the California plan all tort claims justified by statute may be recovered against the state. The state self-insures the first $2 million of liability. A fund of approximately $1 million must be maintained to satisfy this liability. Insurance policies cover state liability from $2 million to $50 million. Premiums for this excess liability coverage cost $198,000 per year. Finally, liability for claims in excess of $50 million is again accepted by the state. No insurance provision is made for these claims, and if a claim within this range arose a legislative act would have to be passed to fulfill it.

This coverage provides for all California agencies except the University of California, Dep't of Water Resources, Dep't of Employment, Highway Patrol, and Dep't of Motor Vehicles. California BUDGET BILL 95 (1973-1974). Letter from Jack L. Burrows, Claims Coordinator, Office of Att'y Gen. of Cal., to Judith G. Korchin, April 12, 1973, on file with University of Florida Law Review.

The California plan, when compared with the Florida claims bill system, does require a greater expenditure of funds; however, it provides protection for a larger number of people.

municipalities have also been liable for the torts of their employees for ten years[12] and none of these governmental entities has become bankrupt due to excessive tort claims.[13] Hawaii's recent waiver of sovereign tort immunity[14] resulted in liability for claims totaling only $120,453.90 in 1972.[15] If the doctrine of sovereign tort immunity were abolished, the fiscal stability of governmental services would not be disrupted by the diversion of government funds to unexpected claims, since the cost of insurance could be figured into the budget.

Finally, the remedy presently available against the state of Florida is inadequate.[16] Claims must be brought before the legislature in bill form[17] and approved by a majority of both houses in order for recovery to be granted.[18] This system is time consuming and diverts attention from general legislation. Further, not only can no recovery be obtained until the legislature assembles, but the over-all volume of legislative business also often means that some claims remain in the claims committee awaiting recommendations when the legislature adjourns.[19] Citizens presenting tort claims against municipalities

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In 1971 the Florida Legislature passed claims bills for eleven individuals for a total of $90,367.80 and in 1972 another eleven tort victims received $216,217.50. The Florida claims bills figures, unlike the California plan, represent only the amounts awarded to the claimants and contain no administrative costs. Report on Activities of the Claims Committee, 1972 Session from James L. Redman, Chairman Claims Committee, to Richard A. Pettigrew, Speaker of the Florida House of Representatives.

12. MINN. STAT. ANN. §§446.01-.15 (1963).

13. Letter from Stanley G. Peskar, Ass't Counsel, League of Minnesota Municipalities, to Judith G. Korchin, April 2, 1973, filed with the University of Florida Law Review. "In those states where municipal tort immunity has been abolished by the courts, the cities have found that the increased cost of liability insurance is negligible." Minnesota Governmental Interim Comm'n, Report (1965), citing National League of Cities Information Memo on Effects on Municipal Insurance from Governmental Immunity Changes, Feb. 25, 1965. It should be noted that Minnesota has qualified the acceptance of governmental tort liability by maximum recovery limitations. This may help keep the cost of insurance down. MINN. STAT. ANN. §466.04 (1963).

14. HAWAII REV. STAT. §§462-1 to -15 (1963) (state only).

15. HAWAII REV. STAT. ch. 662 (1972), *as amended by* Hawaii Laws 1972, ch. 164, §§2, 4 (claims over $2,000), Letter from George Pai, Att'y Gen. of Hawaii to Seventh State Legislature, 1973 General Session, Dec. 27, 1972, filed with University of Florida Law Review.

16. Note, *supra* note 6, at 660-62.

17. FLA. STAT. §215.524 (1971). Presently, sovereign tort immunity is waived in a few limited areas, and a claims bill is not needed in cases arising in these areas. *E.g.*, FLA. STAT. §455.06 (1971) (authorizes, but does not require, state agencies and counties to purchase motor vehicle, aircraft, and watercraft insurance; purchase of insurance waives immunity to the extent of coverage); §232.43 (permits school athletic associations or state schools to insure students engaged in athletics; again liability is assumed to the extent of coverage); §234.03 (requires liability insurance to be carried on school buses and permits coverage on other motor vehicles that transport students to or from school and school activities. Its waiver permits recovery on claims to a maximum of $10,000 per person for bodily injury or death, except in a catastrophe where there is a limit of $5,000 multiplied by the seating capacity of the bus. The state also authorizes property damage insurance and insurance for victims other than students).

18. FLA. CONST. art. XII, §10; OP. ATT'Y GEN. FLA. 072-99 (1972).

19. In 1971, 22 out of 55 claims remained in committee. In 1972, 32 out of 47 claims did

fare no better due to the confusing state of judicial precedent delineating tort immunity.[20]

The analysis of existing state and municipal tort law to be presented here will hopefully demonstrate the need for an explicit legislative response to these problems. An insurance program that should aid in making a statutory waiver of sovereign immunity administratively possible and financially practicable will likewise be presented.

PRESENT STATUS OF GOVERNMENTAL LIABILITY IN FLORIDA

Municipal Tort Immunity

For many years municipalities in Florida have been liable for torts resulting from proprietary services[21] — services that could be provided by a private corporation and from which the municipal corporation ordinarily collects revenue.[22] Municipalities have, however, traditionally been immune from liability for the negligent performance of governmental functions[23] — those services that can be provided adequately only by the government.[24] Nevertheless, distinctions made by courts applying these labels have bordered on the ridiculous. Maintenance of streets[25] and sidewalks,[26] for example, although classed as proprietary functions, could no more be provided by private corporations than could fire protection, a governmental function.[27] Realizing that these distinctions lacked a logical foundation, the courts gradually pruned immunity for governmental services by the doctrines of implied contract,[28] nuisance,[29] and dangerous instrumentality.[30]

The governmental-proprietary distinction was then purportedly eliminated by the Florida supreme court in *Hargrove v. Town of Cocoa Beach*.[31] Florida municipalities were there held to be immune from liability only for torts committed by employees performing legislative, quasi-legislative, judicial, or

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not reach the House floor for consideration due to delay. Report on Activities of the Claims Committee, *supra* note 11, at 6.

20. *See* text accompanying notes 21-56 *infra*.

21. *E.g.*, Ballard v. City of Tampa, 124 Fla. 457, 461, 168 So. 654, 656 (1936).

22. W. PROSSER, LAW OF TORTS §131, at 980 (4th ed. 1971).

23. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 131 (Fla. 1957).

24. W. PROSSER, *supra* note 22, at 979.

25. Ballard v. City of Tampa, 124 Fla. 457, 460, 168 So. 654, 656 (1936).

26. City of St. Petersburg v. Roach, 148 Fla. 316, 317, 4 So. 2d 367, 368 (1941).

27. Steinhardt v. North Bay Village, 132 So. 2d 764 (3d D.C.A. Fla. 1961). *See generally* Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250, 258-69 (1937).

28. *E.g.*, Doyle v. City of Coral Gables, 159 Fla. 802, 804, 33 So. 2d 41, 42 (1947).

29. *E.g.*, City of Lakeland v. Douglas, 143 Fla. 771, 777, 197 So. 467, 469 (1940); Maxwell v. Miami, 87 Fla. 107, 100 So. 147 (1924); City of Tallahassee v. Fortune, 3 Fla. 19, 25 (1850).

30. City of Tampa v. Easton, 145 Fla. 188, 193, 198 So. 753, 755 (1940).

31. 96 So. 2d 130, 133 (Fla. 1957).

quasi-judicial functions.[32] Thus, a city was to be liable under the doctrine of *respondeat superior* if an employee in the performance of an executive function acted negligently within the scope of his employment, thereby proximately causing direct personal injury[33] not common to the community.[34] A year later this new municipal liability was extended to include intentional torts committed in the performance of an executive or administrative function.[35] At that time the supreme court also took the opportunity to reiterate that *Hargrove* had eliminated the governmental-proprietary distinction.[36]

In the wake of *Hargrove,* confusion arose among the lower courts[37] regarding the definitions of judicial,[38] legislative,[39] and executive[40] functions. The Florida supreme court responded in *Modlin v. City of Miami Beach*[41] with an attempt to define more clearly the reserved area of municipal tort immunity. The court compared the municipality's liability for executive functions with its immunity for legislative and judicial functions, stating that because private persons and corporations do not exercise legislative or judicial functions the tort liability of municipal corporations could be equated with that of private companies.[42]

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32. *Id.*

33. *Id.* at 133-34.

34. *Id.* at 134. This apparently means that the municipality will be liable unless a tort causes community wide damage.

35. City of Miami v. Simpson, 172 So. 2d 435 (Fla. 1965). Arguably, intentional torts are not within the scope of employment and therefore liability should not be imposed under *respondeat superior.* An alternate rationale for the imposition of liability for intentional torts could be predicated on the premise that it is better to spread the expense among many taxpayers than for one taxpayer to bear the burden. This is, of course, a social-spreading-of-risk theory.

Although the court in *Simpson* imposed liability for intentional torts, punitive damages were not allowed against the municipality. The court in Fisher v. City of Miami, 160 So. 2d 57 (3d D.C.A. Fla. 1964), reasoned that punitive damages are intended to act as a deterrent and protect the citizen. If punitive damages were authorized in municipal tort cases the same citizens for whose protection punitive damages were imposed would bear the financial burden of paying the damages through taxes. Further, punitive damages are rendered according to financial status and municipal liability would be almost limitless.

36. City of Miami v. Simpson, 172 So. 2d 435, 437 (Fla. 1965) ("leveling liability on the doctrine of *respondeat superior* . . . . [w]ith the governmental proprietary distinction eliminated").

37. Modlin v. City of Miami Beach, 201 So. 2d 70, 73 (Fla. 1967). "[I]n an effort to correct our error [the incorrect citing of a case] and the resulting confusion, we deem it advisable to attempt to define more clearly the boundary of remaining municipal tort immunity."

38. *Id.* at 73-74. Judicial action applies a general rule to specific situations and notice and hearing are required. Action is based on the hearing.

39. *Id.* at 73. Legislative action prescribes a general rule for future operation.

40. *Id.* at 73-74. Executive action applies a general rule to specific situations and power is exercised based on personal judgment.

41. 201 So. 2d 70 (Fla. 1967).

42. *Id.* at 73. This analogy was, however, unfortunate, since even among the executive or administrative functions of a municipal corporation some services are provided that private corporations do not offer. Thus, standing alone, the court's statement would suggest that the municipal corporation will be liable for torts committed during executive

The *Modlin* court, while apparently intending to reaffirm *Hargrove,* actually narrowed the *Hargrove* ruling. Rather than imposing liability on the municipality for all torts performed during an executive function, the court limited municipal tort liability to those instances in which the public employee committing the tort owes a greater duty to the victim than to the public generally.[43]

This special duty test, inconsistent with the *Hargrove* rationale,[44] restored municipal tort immunity for some executive services provided by city government, such as the building inspection at issue in *Modlin.* Nevertheless, the court did not declare which of two alternative interpretations was intended by the special duty test. Conceivably, the court may have intended to establish a new differentiation between the liability of a private corporation and that of a municipality, independent of the traditional governmental-proprietary distinction. If so, the special duty test is applicable to those executive functions classified as both governmental and proprietary under pre-*Hargrove* law. On the other hand, the *Modlin* court may have intended the special duty qualification to apply only to those governmental functions cloaked with immunity under the pre-*Hargrove* proprietary-governmental distinction. Thus, under this alternative interpretation, a municipality would be immune for the torts of its employees only where the function in which such employees were engaged was first determined to be governmental in nature and its performance then deemed to be devoid of any special duty to the injured individual. This interpretation of the special duty test is supported by the fact that the cases cited by the *Modlin* court as examples of the test's application all involved executive governmental functions, as opposed to proprietary functions, under pre-*Hargrove* law.[45]

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proprietary functions but not for executive governmental functions not provided by private corporations.

Under the New York Court of Claims Act the state is liable in accordance with the rule of law applicable to "individuals or corporations." Runkel v. City of New York, 282 App. Div. 173, 178, 123 N.Y.S.2d 485, 491 (2d Dep't 1953). Herzog, *Liability of the State of New York for Purely Governmental Functions,* 10 SYRACUSE L. REV. 30, 31 (1959).

43. 201 So. 2d 70, 76 (Fla. 1967). A special duty requirement is distinguishable from the *Hargrove* requirement that the injury be one uncommon to the community. The *Modlin* special duty requirement relates to the conduct of the employee while the injury test involves the consequences to the victim.

44. *Id.* at 75. The *Modlin* court noted that its case related to the tort liability of public officers while *Hargrove* had dealt only with the liability of municipal corporations. This distinction is illusory, since both cases arrive at municipal liability through the doctrine of *respondeat superior.*

45. *Id.* at 75-76. *Compare* the *Modlin* example, Hewitt v. Venable, 109 So. 2d 185 (3d D.C.A. Fla. 1959) (manual operation of a railroad crossing signal), *with* pre-*Hargrove,* Avery v. City of West Palm Beach, 152 Fla. 717, 12 So. 2d 881 (1943) (operation of a traffic light). *Compare* the *Modlin* examples, Evanoff v. City of St. Petersburg, 186 So. 2d 68 (2d D.C.A. Fla. 1966), City of Hialeah v. Hutchins, 166 So. 2d 607 (3d D.C.A. Fla. 1964), Fisher v. City of Miami, 160 So. 2d 57 (3d D.C.A. Fla. 1964), Shipp v. City of Miami, 172 So. 2d 613 (3d D.C.A. Fla. 1963), Simpson v. City of Miami, 155 So. 2d 829 (3d D.C.A. Fla. 1963), Thompson v. City of Jacksonville, 130 So. 2d 105 (1st D.C.A. Fla. 1963) (all involving police action), *with* pre-*Hargrove* cases, City of Miami v. Bethel, 65 So. 2d 34 (Fla. 1953), Brown v. City of

For unstated reasons lower courts have subsequently adopted the limited applicability interpretation of the special duty test.[46] The result is a reinstatement of the pre-*Hargrove* proprietary-governmental distinction. Unlike under pre-*Hargrove* law, however,[47] lower courts have not given municipalities complete immunity for governmental functions. Rather, liability has been imposed for executive governmental functions where the public employee owes the tort victim a special duty not owed to the public generally. Nevertheless, there is still unrestricted liability in cases involving executive proprietary functions.

The lower courts appeared to experience no difficulty in determining to which function the special duty requirement applied. They did, however, experience difficulty in delineating the elements of the special duty requirement.[48] In *City of Tampa v. Davis*[49] the Second District Court of Appeal arrived at a workable rule based on the factual similarities among those cases cited by the *Modlin* court as examples in which a special duty existed. The *Davis* court held that a special duty arises when the city's agents and the injured party are involved in a direct transaction or are in privity.[50]

While recognizing the factual similarities among the cases involving a special duty as set forth in *Modlin,* the district court of appeal failed to mention the existence of a policy reason for imposing liability. In the *Modlin* court's examples the victim's injury resulted because of detrimental reliance on municipal action[51] or willful and reckless negligence[52] or an actual inten-

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Eustis, 92 Fla. 931, 40 So. 873 (1926) (holding police actions are governmental).

46. Town of Largo v. L & S. Bait Co., Inc., 256 So. 2d 412 (2d D.C.A. Fla. 1972); City of Tampa v. Davis, 226 So. 2d 450 (2d D.C.A. Fla. 1969); Shealor v. Ruud, 221 So. 2d 765, 768-69 (4th D.C.A. Fla. 1969), stated that since *Hargrove* the governmental-proprietary distinction had been eliminated. If this is true one wonders why the court further stated: "Whether or not its [the city's] acts and omission in that regard were in the exercise of a governmental function or a proprietary function must be decided." *Id.* at 768.

47. *See* City of Miami v. Oates, 152 Fla. 21, 10 So. 2d 721 (1942).

48. *E.g.,* City of Tampa v. Davis, 226 So. 2d 450 (2d D.C.A. Fla. 1969).

49. *Id.; cf.* Schmauss v. Snoll, 245 So. 2d 112, 114 (3d D.C.A. Fla.), *cert. denied,* 248 So. 2d 172 (Fla. 1971).

50. 226 So. 2d 450, 454 (2d D.C.A. Fla. 1969); Town of Largo v. L & S Bait Co., Inc., 256 So. 2d 412 (2d D.C.A. Fla. 1972). In arriving at this rule the *Davis* court found that Evanoff v. City of St. Petersburg, 186 So. 2d 68 (2d D.C.A. Fla. 1960), was incorrectly cited by the court in *Modlin* as a case in which a special duty existed, since the case involved neither a direct transaction or privity between the injured party and the public employee.

The lack of a significant policy reason for the direct transaction test set forth in *Davis* is exemplified by the court's own example. It would hold a municipality liable for injury resulting from negligent manual operation of a railroad signal where the employee and tort victim were involved in a direct transaction but not for injury resulting from negligent repair of an automatic signal. 226 So. 2d 450, 453 (2d D.C.A. Fla. 1969).

51. A special duty exists when a municipality undertakes the manual operation of a railroad crossing signal. Modlin v. City of Miami Beach, 201 So. 2d 70, 76 (Fla. 1967), *citing* Hewitt v. Venable, 109 So. 2d 185 (3d D.C.A. Fla. 1959). If the signal were not at the tracks a motorist would check for approaching trains; however, once the signal is provided the motorist assumes it will warn him and abandons reliance on his senses.

52. Wanton and reckless negligence might have been considered to exist when police broke into and searched a citizen's home, disregarding the citizen's right of privacy, 201 So. 2d 70, 76 (Fla. 1967), *citing* Thompson v. City of Jacksonville, 130 So. 2d 105 (1st D.C.A. Fla.

tional tort by a public employee.[53] Perhaps, in order to protect the muncipality from tremendous exposure to risk, the supreme court intended to limit liability to cases involving aggravated negligence. The determination of aggravated negligence could have been intentionally left for case-by-case determination in an effort to insure just results by providing flexibility.

Modlin, the origin of the special duty requirement, is easily explained under this theory. Although the employee of the municipality negligently inspected a building, there was no wanton and reckless negligence, and had the municipality taken no government action the situation would still have existed. Mrs. Modlin did not enter the building because she believed it safe after municipal building inspection. Thus, a special duty did not arise because the city's negligence did not aggravate the existing condition — poor construction — and the tort victim's injury did not result because she detrimentally relied on municipal action.

The most recent Florida supreme court case, *Cleveland v. City of Miami,*[54] holding a municipality liable for negligence during an administrative or executive governmental function, did not mention a governmental-proprietary distinction or a special duty requirement. When the court cited *Hargrove* as the foundation of its decision, it raised the question of whether it was attempting to ignore *Modlin* and the surrounding confusion and return to prior law.[55] According to the facts of this case a special duty could be said to exist whether the direct transaction test of the district court of appeal or the detrimental reliance-aggravated negligence test applied.[56] Thus, the court's decision could be explained as the imposition of liability either for the negligent performance of an executive governmental function where a special duty existed or for municipal negligence without regard to a governmental-proprietary distinction or a special duty requirement.

1961), *cert. denied,* 147 So. 2d 530 (Fla. 1962), or when police chased an auto down a main traffic artery at an extremely high speed and the chased auto collided with the tort victim's vehicle. 201 So. 2d 70, 76 (Fla. 1967), *citing* Evanoff v. City of St. Petersburg, 186 So. 2d 68 (2d D.C.A. Fla. 1968).

53. An intentional tort is the culmination of aggravated negligence. 201 So. 2d 70, 76 (Fla. 1967), *citing* Simpson v. City of Miami, 155 So. 2d 829 (3d D.C.A. Fla. 1963), *cert. discharged,* 172 So. 2d 435 (Fla. 1965); Fisher v. City of Miami, 160 So. 2d 57 (3d D.C.A. Fla. 1964), *cert. discharged,* 172 So. 2d 755 (Fla. 1965); City of Hialeah v. Hutchins, 166 So. 2d 607 (3d D.C.A. Fla. 1964); Shipp v. City of Miami, 172 So. 2d 618 (3d D.C.A. Fla. 1963).

54. 263 So. 2d 573 (Fla. 1972).

55. *Id.* at 578.

56. *Id.* The city would be liable for a policeman's negligent discharge of a firearm resulting in the death of an innocent bystander even though the officer had been under sniper fire just prior to shooting the bystander. Under the direct transaction theory a special duty would arise because the bullet went directly from the policeman to the victim. According to the detrimental reliance-aggravated negligence theory the police acted in a wanton and reckless manner by firing blindly into an apartment complex.

State and County Tort Law

The State of Florida and its political subdivisions, which include state agencies, counties,[57] and school boards,[58] cannot be sued except where specific statutes provide authority.[59] In the past, county agencies have sometimes been treated like municipalities by being held immune from liability for the negligent performance of governmental functions[60] but liable for negligence associated with proprietary services.[61] The politically hybrid metropolitan counties — political subdivisions of the state that also exercise certain municipal functions[62] — have enjoyed immunity in the exercise of county functions[63] but have faced liability when carrying out municipal functions that are deemed proprietary in nature.[64]

A county's immunity must be waived "clearly and unequivocally" in a state statute[65] and neither local law[66] nor the acquisition of liability insurance[67] can abolish its sovereign tort immunity. Although the state legislature passed a broad general statute waiving sovereign tort immunity in 1969,[68] the

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57. Arnold v. Shumpert, 217 So. 2d 116, 120 (Fla. 1968).

58. FLA. STAT. §§230.01-.03 (1971).

59. Davis v. Lowe, 99 Fla. 333, 352, 126 So. 374, 381 (1930); FLA. CONST. art. X, §13, provides: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." This constitutional provision may be interpreted as a mandate to the legislature to pass a waiver of sovereign immunity by statute. Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372 (1916) (provision applies to county as well as to state).

60. Waite v. Dade County, 74 So. 2d 681 (Fla. 1954).

61. Suwannee County Hosp. Corp. v. Golden, 56 So. 2d 911 (Fla. 1952).

62. Schmauss v. Snoll, 245 So. 2d 112 (3d D.C.A. Fla.), *cert. denied,* 248 So. 2d 172 (Fla. 1972).

63. Brandeis v. Dade County, 226 So. 2d 873 (3d D.C.A. Fla. 1969).

64. Interview with L.H. Levinson, Professor of Law, University of Florida, Aug. 6, 1973.

65. Arnold v. Shumpert, 217 So. 2d 116, 120 (Fla. 1968). In suing a county, a plaintiff must allege the specific methods by which the county waives its sovereign tort immunity.

66. *Id.*

67. *Id.*

68. Fla. Stat. §768.15 (1969), repealed by Fla. Laws ch. 69-357 (1969). In 1973 the Florida Legislature passed an act, to become effective January 1, 1975, which waives sovereign tort immunity for the state of Florida, its political subdivisions, and municipalities. Under the act public entities will assume liability for injury caused by the negligent or wrongful act or omission of any employee while acting within the scope of his office or employment. Liability will be limited to acts for which the entity would be liable if it were a private person. No action, however, may be brought against a public entity by anyone whose claim arises out of unlawful participation in a riot, assembly, public demonstration, mob violence, or civil disobedience. Further, public entities will accept liability for a maximum of $50,000 per claimant or a total of $100,000 for all claimants from a single accident or occurrence. Those claimants who receive a judgment greater than the allowed dollar limit will still have recourse before the legislature through a special act. Fla. Laws 1973, ch. 313.

The new act is a progressive measure, but could be improved by amendment. Since public entities provide some services that private individuals do not provide, the acceptance of liability to the same extent as a private individual may cause difficulties in judicial interpretation. *See* note 1 and accompanying text *supra.* Additionally, the maximum dollar recovery on claims may be of little utility. *See* text accompanying notes 94, 95 *infra.*

statute was in effect for only one year. Approximately forty claims were filed against the state during that period, but unfortunately no data were kept regarding the expense of this broadened county liability.[69] Presently, sovereign tort immunity is waived in a few limited areas[70] and those claims against a political subdivision of the state not within the purview of these statutes must be brought before the legislature by a claims bill.[71]

A Legislative Solution

Present Florida law permits tort recovery against the state by means of an antiquated claims bill system and a few limited statutory waivers. Municipal tort law, while generally more liberal in its opportunities for recovery, is unclear and some district courts of appeal[72] have granted or denied recovery according to a theory that lacks a definitive policy reason for its distinctions.[73] Comprehensive legislation is therefore needed to achieve more uniform and complete relief based on consideration of legal, social, and economic factors — a task beyond the capabilities of the courts.

Enactment of legislation would force conscious recognition that two theories for sovereign liability exist, the doctrine of *respondeat superior* and the social risk theory. Both represent forms of a social-spreading-of-the-risk approach to governmental tort liability because under either theory state and public entities may be held liable for the negligence of their employees, although the governmental body itself was in no way responsible for the injury.[74] *Respondeat superior* focuses on whether the employee was at fault in causing the injury,[75] while the social risk theory[76] limits *respondeat superior* by balancing justice and succor for the injured against the legal and practical limitations of taxation and the necessity of using funds for services of greater social importance than compensating tort victims. A statute premised on the social risk theory may declare a governmental body responsible on the basis of *respondeat superior* and then make exceptions to liability based on practical necessity.[77]

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69. Letter from Att'y Gen. Robert L. Shevin to Judith G. Korchin, April 30, 1973, filed with the University of Florida Law Review (state liability).

Interview with Jack Harkness, Judiciary Comm. of Florida House of Representatives, in Tallahassee, Fla., Jan. 12, 1973; Interview with Wilson W. Wright, Legal Counsel, State Ass'n of County Comm'rs, in Tallahassee, Fla., Jan. 12, 1973. Both gentlemen suggested the reason for the lack of county data was the failure to inform small counties of the waiver. Many did not realize immunity had been waived and did not insure; others did not keep records.

70. *See* authorities cited *supra* note 17.

71. *See* text accompanying notes 17-19 *supra.*

72. *E.g.,* Town of Largo v. L & S Bait Co., Inc., 256 So. 2d 412 (2d D.C.A. Fla. 1972); Shealor v. Ruud, 221 So. 2d 765 (4th D.C.A. Fla. 1969).

73. *See* text accompanying notes 53-56 *supra.*

74. W. Prosser, Law of Torts §310 (4th ed. 1971).

75. *Id.*

76. "Social risk theory" should be distinguished from the term "social spreading-of-the-risk theory." Social risk theory refers to consideration of the practicalities of government administration as well as to the spreading of the financial burden of injury among the public.

77. *E.g.,* Cal. Gov't Code §§810-996.6 (West 1966).

Before passage of a statute embodying either theory, the legislature should conduct a comprehensive risk survey of all states that have waived sovereign tort immunity in order to benefit from other states' experience and avoid problems created by other state statutes.[78]

Alternative Legislative Solutions

Basically, five legislative solutions to waiver of sovereign tort immunity have been developed.[79] None of these solutions impose total liability; rather, excepted areas of potential liability are carved out, or maximum recovery amounts are established, or both. The first approach, adopted by New York,[80] provides that the state shall be liable to the same extent as a private individual or corporation. Since the state performs some functions that an individual cannot, New York courts have exempted certain governmental functions from liability.[81] Although these exemptions have been few in number, the New

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78. A survey should consider the following questions: (1) the identity of the state's insurance carriers, if any; (2) the method by which the state determined its carriers; (3) an analysis of the profit-loss ratio of the insurance company; (4) the amount of insurance premium and coverage carried; (5) the method by which the amount of coverage was determined; (6) a determination of the extent people not covered by the waiver of immunity still collect (*i.e.*, claims bill); (7) a determination of how much money budgeted for tort claims goes to the injured person and how much goes to administrative costs; (8) a determination of the additional cost to each taxpayer for a waiver of sovereign tort immunity; (9) a finding of approximately how many claims per year are compromised and how many are litigated; (10) a comparison of past means of recovery against the state before waiver and present methods. In addition, specific questions concerning each state's waiver statute should be asked. Both legislative recognition of the theory on which liability is based and a survey of other states' waivers should result in a statute providing specific norms for liability, funding, and administration. A token survey of the type suggested was taken of five states in order to obtain research for this note.

79. *See also* Note, *A Statutory Approach to Governmental Liability in Florida,* 18 U. FLA. L. REV. 653, 662-64 (1966).

80. N.Y. CLAIMS ACT §8 (McKinney 1963).

81. Henderson O. Riggs, N.Y. Ass't Att'y Gen., stated there is no governmental-proprietary distinction in New York. If a police car engaging in a governmental duty negligently hits a pedestrian there is governmental liability, just as there would be if a truck owned by a state operated ski slope pursuing a proprietary function hit the pedestrian. Letter from Henderson O. Riggs, Ass't Att'y Gen. of N.Y., to Judith G. Korchin, April 10, 1973, filed with University of Florida Law Review. Nevertheless, the following exceptions to this general principle exist: (1) neither a judge nor the state is liable for the judge's judicial acts, Farrell v. State, 204 Misc. 148, 123 N.Y.S.2d 29 (Ct. Cl. 1953); (2) the courts have also held the state cannot be liable for alleged errors on the part of numerous administrative agencies acting in a quasi-judicial capacity. *E.g.,* Chikofsky v. State, 203 Misc. 646, 117 N.Y.S.2d 264 (Ct. Cl. 1952) (person injured in a motor vehicle accident cannot recover from the state on the ground that the license of the driver causing the accident should have been revoked); Toyos v. State, 181 Misc. 761, 47 N.Y.S.2d 322 (Ct. Cl. 1944) (person whose liquor license was revoked); (3) the state cannot be liable for an accident that could have been prevented by a proper inspection. Paige v. State, 269 N.Y. 352, 199 N.E. 617 (1936); Herzog, *supra* note 42, at 36-37. Under several state statutes and the Federal Tort Claims Act, these New York exceptions to liability would be encompassed in the "discretionary function exception" to liability. *See, e.g.,* ALASKA STAT. §09.50.250(1) (1962); HAWAII REV. STAT. §662-15(1) (1968);

York approach has been criticized for allowing the judiciary, which lacks sufficient factfinding staffs, to make what should be legislative policy decisions.[82] Furthermore, other New York statutes have been construed as limiting liability under the tort act.[83]

New York's approach, with its broad statutory waiver and uncertain exceptions, would seem to prevent a state from easily acquiring insurance. Yet, insurance experts[84] feel that this statute creates fewer insurance problems than any other statutory waiver. Insurance companies simply list all areas for which they will provide coverage and the remaining liability zones must be self-insured.[85] Although the question remains whether most states are able to afford an assumption of this extensive liability, New York has successfully done so since 1929.[86]

Under a second form of statutory waiver, the state again accepts liability to the same extent as a private individual, but exceptions to liability are specifically stated in the statute. This method of drafting, exemplified by the

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ORE. REV. STAT. §30.262(2)(d) (1971); UTAH CODE ANN. §63-30-10(1) (1963); VT. STAT. ANN. tit. 12, §5602(1) (1959). Illinois specifically provides immunity for issuance or denial of licenses. *See* ILL. STAT. ANN. ch. 85, §2-104 (Smith-Hurd 1966). New York also excepts from liability negligent inspections of property. Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945). Most state statutes encompass this exception as a discretionary function and Illinois specifically denies liability for it. ILL. STAT. ANN. ch. 85, §2-105 (Smith-Hurd 1955).

82. *See* Note, *supra* note 79, at 662-63.

83. Herzog, *Liability of the State of New York for Purely Governmental Functions*, 10 SYRACUSE L. REV. 30, 30-31 (1959). Thus, "N.Y. HIGHWAY LAW §58, which antedates the present Court of Claims Act provides that the State shall not be liable for defects in State highways between November 15 and May 1. It has been held that this section must be read with the provisions of the subsequently enacted Court of Claims Act so that the State is liable for highway defects in existence during the preceding summer season, and for active negligence, even where the accident occurs during the winter season, Karl v. State, 279 N.Y. 555, 18 N.E.2d 852 (1939); Torrey v. State, 266 App. Div. 900, 42 N.Y.S.2d 567 (4th Dep't 1943). N.Y. CANAL LAW §120 absolves the State from liability for injuries arising out of the navigation of the barge canal (but leaves unimpaired liability for other torts connected with the operation of the barge canal system). Under N.Y. EXECUTIVE LAW §10(1)(f) the State is not liable for the exercise (or failure to exercise) of a discretionary duty by a State officer acting pursuant to the State program for assistance to municipalities in major disasters. N.Y. GENERAL MUNICIPAL LAW §209-g(4) provides that neither the State nor a municipality shall be liable in connection with assistance rendered pursuant to the State fire mobilization and mutual aid plan. There is likewise an immunity in connection with civil defense activities. N.Y. CIVIL DEFENSE EMERGENCY ACT §113." *Id.*

84. Interview with Professor Peter Ward, College of Law, University of Florida, in Gainesville, Florida, March 24, 1973.

85. *Id.* Presently New York insures its state vehicles under a blanket policy with a limit of $100,000. All liability above this amount is self-insured. The state self-insures for all other liability. The New York assistant attorney general did not state whether insurance coverage with an agency had been impossible or what the cost of self-insurance was. Letter from Henderson O. Riggs, *supra* note 81.

86. *See* J. DAVISON, CLAIMS AGAINST THE STATE 1-63 (1954). Florida Legislative Reference Bureau, Summary of Procedures for Handling Claims Against the State (Memo, Sept. 23, 1968).

Federal Tort Claims Act[87] and Hawaii's statute[88] does not, however, foreclose the uncertainties inherent in judicial interpretation, and thus compounds insurance difficulties. Under this approach not only must an insurance company predict what functions courts will except from liability because they are not performed by private individuals, but it must also speculate as to those services that courts will interpret as being within the legislatively excepted categories.[89] Insurance may therefore be unnecessarily obtained to provide coverage in areas subsequently held to be immune from liability.

The third method of waiver, exemplified by the Oregon[90] and Minnesota[91] statutes, utilizes the same approach as the Federal Tort Claims Act, removing all immunity and then qualifying removal with statutory exceptions. However, maximum dollar limits are placed on recovery. Minnesota and Oregon both provide for a maximum recovery of 50,000 dollars to any one claimant[92] for personal injury claims arising out of a single accident and 300,000 dollars to any number of claimants from a single accident or occurrence.[93] One Oregon author[94] stated that the limits are not low enough to affect significantly the amount of claims paid or the rate of insurance premiums. Therefore, a statute creating maximum recovery limits should not be passed, since in the rare case in which liability exceeds the limits such a statute would prevent justified recovery without offering the counterbalancing benefit of reduced insurance premiums. Counsel for the League of Minnesota Municipalities nevertheless suggests that maximum recovery provisions are a necessary compromise between an amount likely to permit reasonable reimbursement for injuries suffered and a demand that might bankrupt a small town's treasury.[95]

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87. 28 U.S.C. §2674 (1970). Under the Federal Tort Claims Act (FTCA) the substantive rights of the claimants are to be determined in accordance with the law of the state in which the tort occurred. United States v. Muniz, 374 U.S. 150 (1963).

88. HAWAII REV. STAT. §§662-1 to -15 (1968), *as amended by* Hawaii Laws 1972, ch. 164, §§2, 4.

89. Interview, *supra* note 84. Alaska eliminated one area of uncertainty by providing: "A person or corporation having a claim against the state may bring an action against the state in the superior court." ALASKA STAT. §09.50.250 (1962). For insurance purposes a prediction of those services that private individuals cannot offer and for which the state will therefore not be liable was avoided.

90. ORE. REV. STAT. §§30.260-.300 (1971) (applies to the state and all public bodies).

91. MINN. STAT. ANN. §§466.01-.14 (1966) (applies only to cities, counties, and school districts, not to the state).

92. MINN. STAT. ANN. §466.04 (1963) (does not differentiate between property damage and personal injury claims); ORE. REV. STAT. §30.270 (1971) (subsection (A) allows $25,000 to a claimant for property damage and subsection (B) provides a maximum of $50,000 to a claimant for personal injuries).

93. MINN. STAT. ANN. §466.04 (1963); ORE. REV. STAT. §30.270 (1971).

94. Henke, *Oregon's Governmental Tort Liability Law from a National Perspective,* 48 ORE. L. REV. 95, 121 (1968).

95. Letter from Stanley G. Peskar, Ass't Counsel, League of Minnesota Municipalities to Judith G. Korchin, April 2, 1973, filed with the University of Florida Law Review. Insurance cost was yet another suggested justification. According to the League's assistant counsel: "Were demands against the municipality not subject to limitations, municipal insurers would have to maintain astronomical reserves to assure potential payments of

Utah's statute,[96] which assumes liability for torts committed during performance of a proprietary function[97] of state agencies, counties, school districts, cities, and tax districts represents the fourth type of waiver. It retains immunity for torts committed during performance of a governmental function except for those committed within areas specifically excepted by the statute.[98] The primary weakness of this type of statute is that it creates unpredictability through the inherent inability of the courts to distinguish definitively between proprietary and governmental functions. Litigation is thus stimulated rather than curtailed.[99]

The final statutory approach to waiver, the closed-end method, retains the concept of total immunity but then defines areas of liability tailored to the problems of the state and local public entities. California has such a statute.[100] During the statute's development, the California Law Revision Commission considered and rejected open-end statutes, which accept all tort liability and then qualify acceptance, because it concluded such statutes require extravagant insurance premiums to protect against the indefinite area of liability created.[101] Other authorities noted further that a closed-end approach indicates a legislative intention that statutory acceptance of liability be narrowly construed, while the open-end method supports a more liberal interpretation.[102] State and municipal officials should more easily accept and implement a detailed statute, like that of California, which clarifies their responsibilities.

Although the New York Claims Act most closely approaches the ideal position of compensating all individuals injured by the state, its abdication of policymaking decisions to the courts prevents it from serving as a model. Other open-end statutes, with statutory exceptions and maximum recovery limits, not only possess the disadvantages of the New York act but also compound in-

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pending claims, even though the chances of recovering anywhere near the demand might be nil. Minnesota municipalities are currently suffering this problem in relation to dram shop insurance."

96. UTAH CODE ANN. §§63-30-1 to -34 (1968). *See also* MICH. STAT. §3996 (Supp. 1965).

97. UTAH CODE ANN. §§63-30-2, -3 (1968).

98. *Id.* §63-30-3.

99. Utah had no data on administration of the insurance aspect of the statute. Letter from C. N. Ottosm, Insurance Commissioner, to Judith G. Korchin, April 9, 1973, filed with the University of Florida Law Review. Perhaps the insurance consequences of this form of waiver could be discovered by a survey of Florida cities, since this resembles the governmental-proprietary distinction reinstated by the lower courts. *See* text accompanying notes 47-48 *supra.*

100. CAL. GOV'T CODE §§810-996.6 (Supp. 1973).

101. CALIFORNIA LAW REVISION COMM'N, 4 REPORTS, RECOMMENDATIONS AND STUDIES 811; Note, *supra* note 79, at 663.

102. Henke, *supra* note 94, at 101-03. The Oregon author, however, believed that besides indicating a difference in legislative intent, negligible other substantive differences exist between the open- and closed-end approaches. He noted that the declarations of immunity in the California statute are closely followed by broad provisions creating governmental liability for tortious acts or omissions of employees committed within the scope of employment (CAL. GOV'T CODE §815.2(a)), which are in turn followed by statutory exceptions (CAL. GOV'T CODE §815.2(B)). California, however, provides a far more extensive list of exceptions than do states with open-end statutes.

surance problems. Therefore, the model statute proposed for Florida in this note is patterned after the California statute, which limits judicial interpretation. California's definitive treatment of the areas of liability allows the state and public entities to insure with the confidence that a judgment will not be rendered for an uninsured claim. Hopefully, a definitive statute will also alleviate administrative and litigation costs for unfounded claims, thereby permitting more of the funds budgeted for tort liability to be received by the victim.

INSURANCE CHAPTER OF A FLORIDA STATUTE

The adequacy of insurance programs for public entities determines in large part the viability of a waiver of sovereign tort immunity.[103] Insurance at a reasonable cost also refutes fears that claims will be prohibitively expensive. For these reasons an explanation of the insurance section of the model statute is presented at this point.

The statutory insurance proposal offered here relies to a degree on prior legislative enactment. In 1972 the legislature passed sections 284.30-.42 of the Florida Statutes,[104] establishing the Florida casualty insurance risk management trust fund. This fund, which insures only state agencies, covers workmen's compensation, general liability, and automotive liability insurance. The statute[105] authorizes the Florida Department of Insurance to consolidate the insurance coverage of all state agencies thereby making lower premiums possible because of greater bargaining power. It also provides a central office,[106] thereby reducing administrative detail and assuring more accurate and continuous records. Each state agency must, however, pay the fund for premiums on coverage obtained for the agency's benefit.[107] This amount is paid from the agency's operating budget.

Upon enactment of the proposed model statute all existing statutes[108] waiving tort immunity in limited areas and authorizing purchase of insurance coverage should be repealed in order to prevent statutory conflict and confusion. The existing, although dormant, general liability account of section 284.31 of the Florida Statutes[109] should then be activated with funds ap-

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103. State and municipal property is generally exempt from execution. David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* 6 U.C.L.A.L. REV. 1, 7 (1959). Municipal corporation property acquired for public purposes and the private property of inhabitants is immune from seizure for execution of municipal debts in Florida. Little River Bank & Trust Co. v. Johnson, 105 Fla. 212, 141 So. 141 (1932). However, municipal property unconnected with any public function may be sold under execution. City of Bradenton v. Fusillo, 134 Fla. 759, 760, 184 So. 234, 236 (1938).

104. FLA. STAT. §§284.30-.42 (Supp. 1972).

105. *Id.* §284.32.

106. *Id.* §284.35.

107. *Id.* §284.36.

108. *E.g.,* FLA. STAT. §§232.43, 234.03, 455.06 (1971).

109. Telephone interview with James Campbell, Director of Bureau of Risk Management, Tallahassee, Fla. with Judith G. Korchin on June 19, 1973 (confirmed that the general liability account has been dormant).

propriated exclusively for tort claims. As suggested by California's experience,[110] the automotive tort liability account[111] should remain a separate account funded by a different legislative appropriation from the general tort fund. The general tort and automotive liability accounts, unlike the workmen's compensation account, should be supported by total annual appropriations from the legislature and should not be obtained from the department's budgets. This would prevent interruption of governmental services due to diversion of departmental funds for tort claims.[112] An annual appropriation for the tort fund from the legislature is preferable to a self-insurance trust fund with a principal large enough to pay claims from the interest, since a large trust fund could tempt politicians to invest in state government bonds instead of securities.[113]

The Florida casualty insurance risk trust fund currently exempts medical malpractice and nuclear accident liability from coverage.[114] With waiver of sovereign tort immunity, exemption of medical malpractice from liability coverage should be deleted. Institutions and personnel under supervision of the Board of Regents are also excluded from fund coverage.[115] However, the Board of Regents has authority to secure insurance or to act as a self-insurer.[116] A separate account for the tort liability of institutions and personnel under Board of Regents supervision should be created along with the existing accounts for workmen's compensation, general liability, and automotive liability. The Bureau of Risk Management should have complete control of administration of the Board of Regents' account. The university system, with its vast number of students, patients in hospitals, and employees merits the closer supervision provided by a separate account.

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110. [1973-1974] Budget Bill Analysis (Cal.) 95; Letter from Jack L. Burrows, Claims Coordinator, office of California Attorney General, to Judith G. Korchin, April 12, 1973, filed with University of Florida Law Review. Mr. Burrows included the California Highway Patrol and the Department of Motor Vehicles in special fund agencies, which suggested to the author that the great exposure to risk with automotive liability warranted detailed supervision in a separate account.

111. The automotive liability account should include not only autos but watercraft and aircraft encompassed in part XII of the model statute.

112. *Contra,* interview with Richard Morrissey, Insurance Coordinator of the J. Hillis Miller Health Center, Gainesville, Florida, June 11, 1973. Mr. Morrissey stated that if departments were responsible for their own torts, areas of potential liability would be eliminated more quickly by the departments.

113. Interview, *supra* note 84. California and Hawaii provide for tort claims by an annual appropriation that covers administrative costs, awards, and insurance premiums for excess liability coverage. Letter from Victor A. Bradshaw, Jr., Ass't Insurance Officer, Dep't of General Services of California to Judith G. Korchin, March 2, 1973; Letter from James E. Ross, Deputy Attorney General of Hawaii to Judith G. Korchin, April 3, 1973, filed with University of Florida Law Review.

114. FLA. STAT. §284.34 (1971).

115. *Id.* §240.191 (1971) authorizes the Board of Regents to insure the board, physicians, agents, or employees of the board and any of the institutions under its management or supervision.

116. *Id.* This statute should be repealed upon passage of the statutory waiver of immunity.

No existing legislation in Florida creates a foundation for insurance programs of counties, school boards, or municipalities. Part I of the model statute was therefore patterned after California's statutory approach to insurance for local public entities.[117] Under part I, section 2 of the model statute, authority is given to insure generally. The statute authorizes insurance: (A) for the local public entity, (B) for the public employee of a local public entity if the tort was committed within the scope of his employment, and (C) for the expense of defending claims against the local public entity or its employees. A provision stipulating that government officials may be held liable for negligent failure to insure is included to make certain that liabilities for which the local public entity should insure are covered.

Section 3 of part I of the model statute stipulates the permissible methods of providing insurance. Local public entities are given discretion to select the method most appropriate for them. An insurance plan not normally feasible for small local public entities, although adequate for larger ones, can be effective if a few small local public entities band together. Choice of method is therefore not restricted.

Self-insurance is not required to be funded by appropriations to maintain reserves because under the model statute no maximum recovery limitation exists. For small local public entities the cost of insuring unlimited potential liability might be prohibitive. On the rare occasion that a claim of great magnitude arises, the local public entity can levy a tax,[118] float a bond, or pay the claimant in installments[119] as provided in a later section of the statute.[120]

Self-insurance for small local public entities has been criticized because risk is not transferred to an outside bearer. Development of an adequate self-insurance fund may take decades and critics doubt whether a given fund could ever reach a point at which payments into the fund could be reduced.[121] Further, private insurance companies with their vast schemes of operations should be able to administer an insurance program at lower cost than a small local public entity.[122] Proper investment of funds determines the effectiveness of self-insurance and a small local public entity might lack trained personnel for this purpose. Finally, even if a self-insurance plan meets all requirements of sound insurance, there is no guarantee that succeeding local administrations would maintain the program effectively.[123]

These criticisms do not seem to present problems for larger local public entities. The county of Los Angeles, California, school districts in California exceeding 300,000 in population, and approximately fifteen of the sixty coun-

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117. CAL. GOV'T CODE §§889-991.2 (West 1966).
118. This may require a constitutional amendment. *See* FLA. CONST. art. VII, §9.
119. Model Statute, part XXIII.
120. *Id.* part XXII.
121. J. TODD, EFFECTIVE RISK AND INSURANCE MANAGEMENT IN MUNICIPAL GOVERNMENT 77 (1970).
122. *Id.* at 78.
123. *Id.* at 79.

ties and municipalities in California are self-insured.[124] Self-insurance has also been effectively administered by the Minnesota cities of Duluth, Minneapolis, and St. Paul.[125]

Insurance contracts under the model statute are to be awarded not merely to the lowest but to the lowest and best bidder. While competitive bidding hopefully minimizes bureaucratic politics, a best bidder requirement allows local public entities to select insurers on the basis of capability for handling this type of account as well as on the amount of the bid.

Section 4 of part I authorizes local public entities to purchase insurance as a group. It further authorizes purchase of insurance by several local public entities where they share a facility, for example, a jail used by two neighboring counties.

Section 5 states that the cost of insurance is a proper charge against a local public entity. Section 6 provides that part I affects only the model statute and no other enactments. Further, no other enactment can limit or restrict the operation of part I. Section 7, the final insurance section, provides that neither the authority to insure or its exercise imposes any liability unless such liability otherwise exists. Additionally, insurance procurement does not impair any defense of a local public entity or public employee.

Implementation of Local Public Entity Insurance

If a statutory waiver of sovereign tort immunity and an insurance program are to be implemented effectively, local public entities must first be notified of the passage and exact scope of the waiver. The necessity for such notification is illustrated by the results of a 1970 survey, conducted by the University of Texas, of a cross section of 140 cities throughout the country. Although cities in almost every state did not possess complete tort immunity, thirteen cities assumed they did and fourteen were unsure.[126]

Additionally, local public entities must also be made aware of risk management techniques. Otherwise, fears of costly insurance may result in attempts to reduce the possibility of loss by terminating publicly operated pools, zoos, and other facilities.[127] Proper preventive action, however, encourages the maintenance of existing services and the possible addition of new ones.[128] It also creates a favorable atmosphere in the community toward government, since citizens prefer avoidance of injury to paying just claims against the government.

Nevertheless, ultimate responsibility for preserving the assets and financial position of the city lies with the mayor or city manager and the city commis-

124. Telephone interview with Mr. Marquart, Director of General Services for California, Feb. 20, 1973.

125. Letter from Stanley G. Peskar, Ass't Counsel, League of Minnesota Municipalities to Judith G. Korchin, April 2, 1973, filed with University of Florida Law Review.

126. J. Todd, *supra* note 121, at 49-50.

127. *Id.* at 91.

128. If a local public entity can prevent claims from arising out of potential liability areas, insurance premiums will not be high because of the entity's experience rating.

sion, while responsibility for a county or school board district rests with the county commission or school board respectively. Within each of these entities the function of risk management should therefore be delegated to a single official charged with identifying and measuring risks and with training local employees on safety programs.[129]

Prior to the risk manager's assumption of responsibility, an initial comprehensive survey of all local public entity services and facilities should be made in order to identify areas of potential liability. Three methods of identifying such potential areas of liability are available: (1) the insurance survey approach, (2) the insurance policy checklist approach, and (3) the risk enumeration of logical classification approach.[130]

Under the insurance survey approach representatives of an insurance company determine the services and facilities the local public entity needs to insure. Insurance company representatives may emphasize only insurable risks and overlook those that could be assumed or transferred to nongovernmental bodies.[131] Additionally, a natural tendency exists to channel a local public entity's liability to fit the existing policies offered by the insurer making the analysis.[132]

Insurance companies also offer a second method of risk identification, the insurance policy checklist. It is, however, inferior to an insurance survey because no identification of potential losses is made. Instead, the company compares the local public entity's present policy with policies available after the waiver and indicates additional coverage needed.[133] This method is used mainly by small local public entities.

The third method of identifying risks, the risk enumeration approach, requires the hiring of an independent insurance analyst. If the Florida League of Cities and the State Association of County Commissioners would hire insurance analysts, the smaller local public entities as well as the large counties and cities could avail themselves of this method. Risk enumeration entails the identification of all areas of potential liability, not just insurable risks.[134] Information such as the number of miles of paved streets, floor areas to buildings, the number of gallons of water consumed daily, and the seating capacity of auditoriums and stadiums would be needed from local public entities.[135] The immense task of identifying risks and rating local public entities for insurance necessitates that waiver of sovereign tort immunity should not become effective for at least six months after enactment of the statute.

Local public entities should be informed that the initial identification of areas of potential liability must be constantly updated. A local public entity's risk manager should be alert to all changes in operation and the addition of

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129. J. TODD, *supra* note 121, at 30-31.
130. *Id.* at 15.
131. *Id.*
132. *Id.* at 16.
133. *Id.*
134. *Id.*
135. *Id.* at 73. The list continues indefinitely.

any new services. He should be told of the acquisition or sale of any of the local public entity's property and the sponsorship of any cultural or social events. His job cannot be performed adequately without the cooperation of all department officials within a local public entity. They should be instructed as to the type of information to report to the risk manager.[136]

The extent of risks as well as their identification is subject to change after the initial survey. The insurance fund must be adjusted according to the potential size of liability judgments, especially when a local public entity self-insures.

Even with continual identification and measurement of risks the insurance phase of the statute has not been fully executed. Local public entities should establish safety training programs for all personnel to prevent risks from occurring. Additionally, public employees should be instructed in a standard claims procedure to be used at the time of an accident.

Thus, the total cost of an insurance program includes not only insurance premiums or a self-insurance fund but also the expense of continual identification and measurement of potential liability and the training of public employees in safety techniques and claim reporting procedures. A properly administered program reduces the number and size of claims against a self-insurance fund and entitles a company-insured local public entity to a lower premium because of its experience rating. Most importantly, good community relations with government are fostered, since accidents are reduced and, when a valid claim does develop, the tort victim is compensated.

Conclusion

A legislative waiver of sovereign tort immunity based on careful study of the problems and benefits created under other state statutes is only an initial step in providing recompense to the tort victims of the state, its political subdivisions, and Florida municipalities.[137] An adequate insurance program must be developed in order to satisfy judgments against the public entities. The insurance program presented in this note utilizes and hopefully improves on some aspects of the already proved California insurance plan. Stress has been placed on educating state and municipal officials on the need for and the details of the insurance plan so that they will more readily accept and implement the waiver of sovereign tort immunity and the insurance program.

Judith Goldstein Korchin

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136. *Id.* at 17. Witnesses should be sought at the scene of an accident. Information should be reported promptly to the risk manager. If a standard claim form is prepared immediately, complete and consistent information will be available later. *Id.* at 96.

137. *See* note 68 *supra* (discussion of the recent Florida statute waiving immunity). This act is to become effective in 1975.

APPENDIX

THE FLORIDA MODEL STATUTE

PART I. INSURANCE FOR LOCAL PUBLIC ENTITIES

§1 *"Local Public Entity" Defined.* As used in this part "local public entity" means any public entity including counties, school boards, and municipalities, except a state agency covered by FLA. STAT. §§284.30-.42.

§2 *Authority To Insure Generally.* A local public entity may:

(A) Insure itself against all or any part of any liability for any injury;

(B) Insure any employee of the local public entity against all or any part of his liability for injury resulting from an act or omission in the scope of his employment;

(C) Insure against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim.[1] Governing officials of local public entities shall be liable for negligent failure to insure.[2]

§3 *Manner of Providing Insurance.* The insurance authorized by this part may be provided by:

(A) Self-insurance, which may be, but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes;[3]

(B) Insurance with the lowest and best bidder authorized to transact such insurance in this state;[4]

(C) An annually or bi-annually funded retention fund;

(D) Any combination of insurance authorized by (A), (B), and (C).

§4 *Insurance by Two or More Local Public Entities.* Two or more local public entities, by agreement, may provide insurance by any method specified in §3.[5]

§5 *Cost of Insurance.* The cost of insurance authorized by this part is a proper charge against a local public entity.[6]

§6 *Other Enactments Requiring Local Public Entity To Insure.* Where an enactment, other than this part, authorizes or requires a local public entity to insure against its liability or the liability of its employees:

(A) The authority provided by this part to insure does not affect such other enactment;

(B) Such other enactment does not limit or restrict the authority to insure under this part.[7]

§7 *Effect of Authority To Insure Upon Liability or Defense.* Neither the authority provided by this part to insure, nor the exercise of such authority, shall:

(A) Impose any liability upon the local public entity or its employee unless such liability otherwise exists;

(B) Impair any defense the local public entity or its employee otherwise may have.

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1. CAL. GOV'T CODE §990(A), (B), (C) (West 1966). The permissive language that local public entities may insure means they must insure but may choose between self-insurance or insurance with an agency. Telephone conversation with Mr. Marquart, Insurance Officer for the State of California, Feb. 20, 1973.

2. This provision was added to the model statute to ensure that governing officials who decide to self-insure liability actually establish a self-insurance fund or make provisions for liability in some other way.

3. CAL. GOV'T CODE §990.4(A) (West 1966).

4. UTAH CODE ANN. §63-30-32 (Supp. 1965). This provision reduces the possibility of political favoritism in the awarding of insurance contracts. The "best bidder" provision recognizes the necessity of soliciting a company financially capable and also experienced in this type of insurance coverage.

5. This permits smaller local public entities to have greater negotiating power as a group.

6. CAL. GOV'T CODE §990.6 (West 1966).

7. *Id.* §991.

PART II. DEFINITIONS

§8 *Construction.* Unless the provision otherwise requires, definitions in this part govern the construction of this statute.[8]

§9 *Employee.* "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.[9]

§10 *Enactment.* "Enactment" means a constitutional provision, statute, charter provision, ordinance, or regulation.[10]

§11 *Regulation.* "Regulation" means a rule, regulation, or order having the force of law adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by a constitution, statute, charter, or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency.[11]

§12 *Injury.* "Injury" means death or injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, or estate that does not result from circumstances on which a privilege is otherwise conferred by law and is of such nature that it would be actionable if inflicted by private person.[12]

§13 *Public Entity.* "Public entity" includes the State, the Board of Regents, county, city, school board, and every other independent political or governmental entity in the state.[13]

§14 *Other Relief.* Nothing in this statute affects the right to obtain relief other than damages against a public entity or public employee. Nothing in this statute affects the liability, if any, of a public entity or public employee, based on:[14]

(A) Contract;

(B) Workmen's compensation.

PART III. LIABILITY OF PUBLIC ENTITIES

§15 *Immunity of Public Entity, Defenses.* Except as otherwise provided by statute:

(A) A public entity is not liable for an injury whether such injury arises out of an act or omission of the public entity or a public employee;

(B) The liability of a public entity established by this statute is subject to any immunity of the public entity provided by a statute, including this statute, and is subject to any defenses that would be available to the public entity if it were a private person.[15]

§16 *Injuries by Employee Within Scope of Employment.*

(A) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.[16]

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8. *Id.* §810.

9. *Id.* §810.2; *see* 28 U.S.C. §2671 (1966). Independent contractors carry their own insurance and are liable for their torts under common law. Therefore, there is no need for the state to assume their liability.

10. CAL. GOV'T CODE §810.6 (West 1966); *see* ILL. STAT. ANN. ch. 85, §1-203 (Smith-Hurd 1966).

11. CAL. GOV'T CODE §811.6 (West 1966).

12. *Id.* §810.8 (West Supp. 1967); *see* ILL. STAT. ANN. ch. 85, §1-204 (Smith-Hurd 1966).

13. *See* CAL. GOV'T CODE §811.2 (West 1966).

14. *Id.* §§814-14.2; *see* ILL. STAT. ANN. ch. 85, §2-101 (Smith-Hurd 1966). The section is drafted in order to accommodate addition of other areas in which the legislature affects governmental liability by subsequent statutes.

15. CAL. GOV'T CODE §815(A), (B) (West 1966). This section eliminates common law liability for any public entity and ensures that liability or immunity must be determined by the state legislature's statute and not by a smaller legislative body's charter, ordinance, or other provision. See *Senate-Legislative Committee Comment,* CAL. GOV'T CODE §815 (West 1966). Nevertheless, the public entity may exercise common law and statutory defenses of a private person.

16. CAL. GOV'T CODE §815.2(A) (West 1966); *see* ORE. REV. STAT. §30.265(1) (1967).

(B) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.[17]

§17 *Duty of Public Entity To Protect Against Particular Kinds of Injuries.* A public entity, like a private individual, shall be liable for injury resulting from failure to comply with applicable statutory or regulatory standards unless reasonable diligence has been exercised to comply with the standards.[18]

§18 *Exemplary Damages.* No judgment shall be rendered against a public entity for exemplary or punitive damages.[19]

§19 *Issuance, Denial, Suspension, or Revocation of Permit, License, or Similar Authorization.* A public entity is not liable for any injury that arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, where the public entity or public employee is authorized by enactment to exercise his discretion.[20]

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17. CAL. GOV'T CODE §815.2(B) (West 1966). Section 16 makes public entities liable for torts of their employees, officers, and agents within the scope of employment, as opposed to liability for torts within the scope of the employee's authority. Since an officer or employee may act in excess of or even contrary to his authority and still be found to be within the scope of his employment, this language may broaden liability and avoid judicial exceptions to liability. Henke, *Oregon's Governmental Tort Liability Law from a National Perspective,* 48 ORE. L. REV. 95, 112 (1968). Further, identification of a specific employee tortfeasor is not essential to *respondeat superior. Cf.,* United States v. Hull, 195 F.2d 64 (1st Cir. 1952) (same rule applied under Federal Tort Claims Act).

18. *See* CAL. GOV'T CODE §815.6 (West 1966). California's statute provides for liability only when the "public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury." Most cases coming within §17 will consist of a public employee's discretionary act or omission for which the employee is personally immune under §22. A public entity's liability still exists although it is inconsistent with the employee's statutory immunity. The entity's liability is "otherwise provided by statute" within the meaning of §16(B).

19. *E.g.,* CAL. GOV'T CODE §818 (West 1966); ILL. STAT. ANN. ch. 85, §2-102 (Smith-Hurd 1966); UTAH CODE ANN. §63-30-22 (Supp. 1968). To permit punitive damages against a public entity contravenes public policy. The parties who bear the financial burden of punishment are the taxpayers and citizens, who constitute the very class that is supposed to benefit from the public example made of the wrongdoer. *See* Fisher v. City of Miami, 160 So. 2d 57, 59 (3d D.C.A. Fla. 1964). The dissent presents convincing arguments for application of punitive damages: (1) punitive or exemplary damages would force public entities to have better trained and controlled servants; (2) it is no more justifiable to say it is better for an individual to suffer a grievous wrong than to impose punitive liability on the community than it is to place the loss of compensatory damages on the individual; (3) the practical difficulty of determining the amount of punitive damages could be controlled by application of the rule that punitive damages should bear a reasonable relation to the amount of compensatory damages.

20. *See* CAL. GOV'T CODE §817.4 (West 1966); *e.g.,* ILL. STAT. ANN. ch. 85, §2-104 (Smith-Hurd 1966); UTAH CODE ANN. §63-30-10(3) (1968). This section and §20, in order to avoid incorrect judicial interpretation, enumerate acts that are included in immunity for discretionary functions.

Without governmental immunity public entities would be potentially liable for all building defects, for all crimes, and for all outbreaks of contagious disease. No private person is subjected to risks of this magnitude. Even in New York, where governmental immunity is not generally recognized, wrongful failure of public officials to revoke a license was held nonactionable. Craver v. State, 204 Misc. 214, 123 N.Y.S.2d 58 (Ct. Cl. 1953). Further, the Civil Rights Act imposes liability on public officials who deny licenses in violation of constitutional requirements, 42 U.S.C. §1983 (1970); *cf.* Hornsby v. Allen, 326 F.2d 605 (5th Cir.

§20 *Failure To Inspect or Negligent Inspection of Property.* A public entity is not liable for injury resulting from its failure to inspect, or for its inadequate or negligent inspection of any property, other than its own.[21]

PART IV. LIABILITY OF PUBLIC EMPLOYEES

§21 *Liability for Injuries, Defenses.*

(A) Except as otherwise provided by statute a public employee is liable for injury caused by his act or omission to the same extent as a private person.

(B) The liability of a public employee established by this part is subject to any defenses that would be available to the public employee if he were a private person.[22]

§22 *Discretionary Acts.* Except as otherwise provided by statute a public employee is not liable for an injury resulting from the exercise or performance or the failure to exercise or perform a discretionary function, whether or not such discretion is abused.[23]

§23 *Execution or Enforcement of Laws: Exception.* A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.[24]

1964).

21. CAL. GOV'T CODE §818.6 (West 1966); *see* UTAH CODE ANN. §63-30-10(4) (1968). New York courts have applied immunity when a duty is owed to the public in general, Rivera v. City of Amsterdam, 6 App. Div. 2d 637, 174 N.Y.S.2d 530 (3d Dep't 1958), but have held the public entity liable if the duty to inspect is owed to a specific group for its benefit. Metildi v. State, 177 Misc. 179, 30 N.Y.S.2d 168 (Ct. Cl. 1941). Florida made this same distinction in municipal tort liability. Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967).

22. CAL. GOV'T CODE §820(A), (B) (West 1966). Since public entities are generally immune if their employees are personally immune (§16) the statutory immunities become limitations on the liability of public entities as well as on employees.

23. CAL. GOV'T CODE §820.2 (West 1966). The subjugation of innocent as well as guilty officials to trial and the danger of its outcome would dampen their ardor in the performance of their functions. Therefore, it is better to leave an injury unredressed than to subject honest officials to the fear of retaliation. All statutory waivers of sovereign tort immunity studied contained this exception. *E.g.,* CAL. GOV'T CODE §820.2 (West 1966); ORE. REV. STAT. §30.265(2)(d) (1971); UTAH CODE ANN. §63-30-10(1) (1966); VT. STAT. ANN. tit. 12, §5602(1) (1959). This exception also protects the legislative and executive branches of government from judicial interference. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950); *cf. In re* Texas City Disaster Litigation, 197 F.2d 771, 778 (5th Cir. 1952), *aff'd sub nom.,* Dalehite v. United States, 346 U.S. 15 (1953); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 229, 359 P.2d 465, 467, 11 Cal. Rptr. 93, 99 (1961). One author has suggested: "The imposition of liability on 'in-the-field' operational decisions does not interfere with the business of governing; whereas the imposition of liability on 'higher-up' policy-making decisions is an intrusion upon the balance of powers. Thus, if the OTCA [Oregon's Tort Waiver] follows FTCA precedent, a 'discretionary function or duty' means a legislative or executive policy or planning decision made at a high level in the public body. The line to be drawn is somewhere in the vertical hierarchy of this 'trickle-down' decision-making process." Lansing, *The King Can Do Wrong! The Oregon Tort Claim Act,* 47 ORE. L. REV. 357, 367 (1968). This commentator ignores the second purpose of the exception: the dampen-the-ardor policy.

It should be realized that an act of discretion and its accompanying immunity continue to a point in time. After this point has been reached, subsequent-harm producing acts are not immune. Note, *Notes on Tort Claims Act,* 19 HASTINGS L.J. 561, 568 (1968), *citing* Costley v. United States, 181 F.2d 723 (5th Cir. 1950) (the court, holding the government liable for negligence of the hospital staff, said that after discretion had been exercised by admitting the plaintiff into the hospital, immunity would protect neither the government nor the employees).

24. CAL. GOV'T CODE §820.4 (West 1966). A similar immunity limited to the execution of

§24 *Acting Under Unconstitutional, Invalid or Inapplicable Enactments.* No public employee shall be liable for an injury resulting from an act done or omitted under apparent authority of law, resolution, rule, or regulation that is unconstitutional, invalid, or inapplicable except to the extent that he would have been liable had the law, resolution, rule, or regulation been constitutional, valid, and applicable, unless such act was done or omitted in bad faith.[25]

§25 *Acts or Omissions of Others.* Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another.[26]

§26 *Adoption or Failure To Adopt or Enforce an Enactment.* A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment.[27]

§27 *Issuance, Denial, Suspension, or Revocation of Permit, License, or Similar Authorization.* A public employee is not liable for an injury caused by his issuance, denial, suspension, or revocation of, or by his failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order or similar authorization when an enactment grants him discretion, but he is liable when an enactment creates a mandatory duty to do so.[28]

§28 *Failure To Inspect or Negligent Inspection of Property.* A public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an in-

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statutes or regulations exists under the Federal Tort Claims Act, 28 U.S.C. §2680(A) (1970). If ordinary negligence is shown, the fact that acts or omissions occurred while executing a statute or regulation confers no immunity. *See, e.g.,* Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd per curiam,* 235 F.2d 466 (6th Cir. 1956).

25. *E.g.,* CAL. GOV'T CODE §820.6 (West 1966); ORE. REV. STAT. §30.265(3)(b) (1971). These statutes, unlike the model statute, impose liability if the public employee acted with malice. Oregon's and California's statutes ignore the fact that an employee maliciously enforcing a valid law would be acting within the scope of his duty.

This prevents penalizing an employee for applying a statute that is later narrowly construed to avoid constitutional problems. It also permits good faith, incorrect resolution of conflicting statutes. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 156 (1964).

26. *See* CAL. GOV'T CODE §820.8 (West 1966). Many public entity employees are selected on the basis of competitive exams and their supervisor plays no role in their selection. It would be unjust to hold him liable for their torts. Additionally, if in a large public entity immunity did not exist, the time of the top officer might be filled with depositions and court proceedings with little time left for his official position. David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* 6 U.C.L.A.L. REV. 1, 36 (1959). The immunity of §25 is inapplicable if a supervising employee participated in the subordinate's tort, or was otherwise personally at fault for failing to discipline the subordinate on the grounds he would have committed a tort himself. The torts of subordinate public entity employees provide a basis for liability under §16.

27. CAL. GOV'T CODE §821 (West 1966). This section codifies Florida's case law, McNayr v. Kelly, 184 So. 2d 428, 430 (Fla. 1966), which stated: "Nor is it questioned that such absolute immunity in this state extends to county and municipal officials in legislative or quasi-legislative activities as well as to members of the State Legislature and activities connected with State Legislation." Present Florida law also permits state, county, and city funds to be used in defense of an employee in suit for damages arising out of his legislative actions. Duplig v. South Daytona, 195 So. 2d 581 (1st D.C.A. Fla. 1967) (municipal); OP. ATT'Y GEN. FLA. 071-166 (1971) (state); [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 137 (county).

"There is absolute legislative immunity in this regard, the motive underlying the legislative vote, good or bad, being wholly irrelevant. The necessity for a free and fearless independence of action on the part of members of legislative bodies, in the performance of their legislative duties, is the obvious basis for this absolute immunity." Shellburne, Inc. v. Roberts, 238 A.2d 331, 337 (Del. 1967).

28. *See* CAL. GOV'T CODE §821.2 (West 1966).

adequate or negligent inspection, of any property, other than the property of the public entity employing the public employee.[29]

§29 *Institution or Prosecution of Judicial or Administrative Proceedings.* A public employee is not liable for injury caused by his negligent institution or prosecution of any judicial or administrative proceedings within the scope of his employment.[30]

§30 *Entry Upon Property.* A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law. Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.[31]

§31 *Misrepresentation.* A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, *unless* he is guilty of actual fraud, corruption or actual malice.[32]

PART V. INDEMNIFICATION OF PUBLIC EMPLOYEES

§32 *Request for Defense, Payment of Judgment, Compromise or Settlement, Indemnification of Public Entity by Public Employee.*

(A) If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, the public entity shall conduct the defense.

(B) Whether a public entity conducts an employee's defense, or private counsel is used, the public entity shall pay any judgment based thereon, or any compromise or settlement of the claim or action. The public entity may recover the amount of such payment from the employee unless he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption, or actual malice.[33]

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29. *Id.* §821.4.

30. *Id.* §821.6. The California Code provides greater immunity than does the Florida model statute by extending immunity "even if he [employee] acts maliciously and without probable cause." This extensive immunity is also granted for discretionary functions where it can be justified as preventing a dampening of the ardor of innocent officials for their work. Nevertheless, the broad immunity is unnecessary when a public employee institutes a judicial or administrative proceeding, since (1) his opportunity for instituting the proceeding is not as frequent as his exercise of discretion and thus the public entity's liability exposure is less, and (2) prosecution or institution of a proceeding should be done only after a careful examination of the facts. Innocent officials, therefore, have little fear of potential law suits for malicious prosecution made without probable cause.

31. *Id.* §821.8. This nullifies the common law doctrine of trespass *ab initio,* which applies to a public employee who enters under authority of law but then commits a negligent or wrongful act.

32. *Id.* §822.2. Public entities have a continuing responsibility to advise and inform the citizenry. This creates a high probability of misrepresenting some facts. Immunity from liability avoids the possible reaction of secret government by public entities in order to avoid liability. Lansing, *The King Can Do Wrong! The Oregon Tort Claims Act,* 47 ORE. L. REV. 357, 363 (1968). Oregon waived immunity for misrepresentation, ORE. REV. STAT. §30.265 (1971), and Lansing criticizes this approach.

33. *See generally* CAL. GOV'T CODE §§825-25.6 (West 1966). In order to ensure that tort victims are compensated a public entity must pay any judgment, settlement, or compromise. Nevertheless, selection of the public entity's counsel by a public employee is prompted by the offer of a free defense, thus enabling the public entity to supervise the action from the start.

PART VI. DANGEROUS CONDITIONS OF PUBLIC PROPERTY

Incorporate CAL. GOV'T CODE §§830-831.8 (West 1966), omitting §§830.2, .4, .8.[34]

The Florida model statute, unlike the CAL. GOV'T CODE §§830.2, .4, should impose liability for negligent failure to provide traffic control signals or signs and for negligent planning or design of construction of public highways.[35]

CAL. GOV'T CODE §831.8 should be modified to impose liability for injury to foreseeable trespassers when all other conditions of the section are met. Government has a responsibility to eliminate, if possible, known dangers.

PART VII. LIABILITY OF PUBLIC ENTITY FOR DANGEROUS CONDITIONS OF PUBLIC PROPERTY

Incorporate CAL. GOV'T CODE §§835-35.4 (West 1966).[36]

PART VIII. LIABILITY OF PUBLIC EMPLOYEES FOR DANGEROUS CONDITIONS OF PUBLIC PROPERTY

Incorporate CAL. GOV'T CODE §§840-40.6 (West 1966).[37]

PART IX. POLICE AND CORRECTIONAL ACTIVITIES

Incorporate CAL. GOV'T CODE §§844-46 (West 1966)[38] omitting §844.6 and modifying §845.2.

A Florida model statute, unlike the CAL. GOV'T CODE,[39] should impose liability upon public entities and public employees when their negligent acts or omissions are responsible for: (1) an injury proximately caused by any prisoner or (2) an injury to any prisoner. Under the Federal Tort Claims Act the federal government permits suit by prisoners.[40] The expectation of unfounded suits and the resultant damage to prison administration and dis-

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34. During the first eighteen months following the California supreme court's abolition of sovereign tort immunity, the most frequent source of city and county liability was property defect claims with street and sidewalk claims heading the list. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 185 (1964), *citing* California Fact Finding Committee on Judiciary, Governmental Tort Liability 10. Most tort claims filed against the state in the first two years were also for dangerous property conditions. *Id.* This part defines what constitutes a dangerous condition and those areas where a public entity or public employee will not be liable.

35. This change adopts a New York law based on the premise that with greater governmental responsibility, road safety will be increased. *E.g.*, Neddo v. State, 194 Misc. 379, 85 N.Y.S.2d 54 (1949), *aff'd*, 275 App. Div. 492, 90 N.Y.S.2d 650 (3d Dep't 1949), *aff'd*, 300 N.Y. 533, 89 N.E.2d 253 (1949), *aff'd*, 275 App. Div. 982, 91 N.Y.S.2d 515 (1949) (construction and maintenance of highways); Van de Walker v. State, 278 N.Y. 454, 17 N.E.2d 128 (1938) (traffic sign).

36. This part establishes that a public entity will accept liability if: (a) a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition, or (b) the public entity had actual or constructive notice of the dangerous condition under §42 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. CAL. GOV'T CODE §835 (West 1966). Actual notice and constructive notice are defined. It is also stated that a public entity is not liable under §835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. Those factors that should be balanced in a reasonableness test are delineated. *Id.* §835.4.

37. Included within this part are those factors that must exist in order for a public employee to be liable for the existence of a dangerous condition. CAL. GOV'T CODE §§840, 840.2 (West 1966). Actual notice, constructive notice, and a test for the reasonableness of a public employee's actions are defined. *Id.* §§840.4, .6.

38. *Id.* §§844-46 (West 1966).

39. *Id.* §844.6 (West 1966).

40. 28 U.S.C. §2674 (1970). A statute allowing prisoners to sue the state would present no problem in Florida. There is no civil death. Willingham v. King, 23 Fla. 478, 2 So. 851 (1887). However, action by a prisoner for injuries must be brought under a statute specifically authorizing such action against the state. Valdez v. State Rd. Dep't, 189 So. 2d 823 (2d D.C.A. Fla. 1966).

cipline have not occurred.[41] Further, a California Senate Factfinding Committee on Judiciary found that a fear of prohibitive costs is groundless.[42] Of the 486 tort claims filed against the state of New York in 1959, only ten originated in the penal system.[43] Six of these ten claims were dismissed and the one claim resulting in recovery was for $15,015.[44] The Illinois experience presents additional evidence that injured state prisoners should have a remedy against the public entity or employee for torts. During 1950-1960 Illinois awarded a total of $13,000 for tort actions arising in the penal system.[45]

The Florida model statute should also modify CAL. GOV'T CODE §845.2 and hold a public entity liable for negligent or intentional failure to conform prison, jail, and other detentional facilities to standards imposed by mandatory statutes or regulations.[46]

PART X. FIRE PROTECTION

Incorporate CAL. GOV'T CODE §§850-50.8 (West 1966),[47] modifying §§850-50.4.

The Florida model statute should hold a public entity or public employee liable for negligent and unreasonable failure to provide or maintain sufficient personnel, equipment, or other fire protection service. An unreasonable provision, such as exists in CAL. GOV'T CODE §§835.4 and 840.6 (West 1966), for dangerous conditions of public property, acknowledges the vast exposure to public liability. Thus, recovery is granted only when the public entity or employee was negligent and in addition the probability and gravity of the potential injury exceeded the practicability and cost of alternative action to avoid the injury. The changes in this and other parts[48] of the CAL. GOV'T CODE are based on the premise that with responsibility for one's actions greater efficiency will result.

PART XI. MEDICAL, HOSPITAL, AND PUBLIC HEALTH ACTIVITIES

CAL. GOV'T CODE §§854-56.4 (West 1966) deal primarily with care and diagnosis of the mentally ill. Due to a lack of sufficient research the author is unwilling to advocate either the California statute or the New York approach,[49] which imposes more extensive liability than the former. Although greater efficiency may be achieved with liability, it has been suggested that the freedom of mental patients may become unduly restricted if public officials fear law suits for negligent supervision.[50]

PART XII. LIABILITY FOR OPERATION OF VEHICLES

Incorporate CAL. VEHICLE CODE §§17001-04 (West 1966)[51] adding aircraft and watercraft liability in all situations where motor vehicle liability should also exist.

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41. Muniz v. United States, 374 U.S. 150, 162-63 (1963).

42. Note, *California Public Entity Immunity from Tort Claims by Prisoners*, 19 HASTINGS L.J. 573, 581 (1968), *citing Governmental Tort Liability* (1963 Supp. to the Appendix of the Journal of the Senate).

43. *Id.*

44. *Id.*

45. *Id.*, 27 of 168 tort claims arose therein. State prisoners injured in the course of correctional activities have an additional remedy under the Federal Civil Rights Act against the responsible state or local employees when the injury constitutes a deprivation of constitutional rights. 42 U.S.C. §1983 (1970).

46. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 299 (1964).

47. California denies liability for failure to establish a fire department or to provide fire protection service. CAL. GOV'T CODE §850 (West 1966). Liability also does not exist for lack of sufficient personnel or equipment or inadequate maintenance of firefighting equipment. *Id.* §§850.2, .4.

48. *E.g.*, Florida Model Statute, pts. VI, IX.

49. *See, e.g.*, Doty v. State, 33 Misc. 2d 330, 226 N.Y.S.2d 901 (Ct. Cl. 1961); Foster v. State, 26 Misc. 2d 426, 210 N.Y.S.2d 956 (Ct. Cl. 1961).

50. *See generally* CAL. GOV'T CODE §856.2 (West 1966) (legislative committee comment—senate).

51. This section deals with the liability of a public entity for injury caused by a negligent or wrongful act or omission in the operation of a motor vehicle by a public employee.

CAL. VEHICLE CODE §17004, which grants complete immunity to public employees for injuries caused by operation of a vehicle while responding to an emergency call, should be modified so as to accept liability for negligent action and intentional torts.

PART XIII. ADMINISTRATION OF TAX LAWS

Incorporate CAL. GOV'T CODE §§860-60.4 (West 1966).[52]

PART XIV. PRESENTATION AND CONSIDERATION OF CLAIMS

Incorporate CAL. GOV'T CODE §§910-15.2 (West 1966) substituting Bureau of Risk Management of the Florida Casualty Insurance Risk Management Trust Fund for "state board of control."

PART XV. PROCEEDINGS TO DETERMINE CONSTITUTIONALITY OF CLAIMS AGAINST THE STATE

Incorporate CAL. GOV'T CODE §§920-20.8 (West 1966) substituting Bureau of Risk Management of the Florida Casualty Insurance Risk Management Trust Fund for "state board of control."

PART XVI. PRESENTATION OF CLAIMS TO STATE COMPTROLLER

Incorporate CAL. GOV'T CODE §§925-26.8 (West 1966) substituting Bureau of Risk Management of the Florida Casualty Insurance Risk Management Trust Fund for "state board of control."

PART XVII. CLAIMS PROCEDURE ESTABLISHED BY AGREEMENT

Incorporate CAL. GOV'T CODE §§930-30.6 (West 1966).[53]

PART XVIII. CLAIMS PROCEDURES ESTABLISHED BY PUBLIC ENTITIES

Incorporate CAL. GOV'T CODE §§935-35.6 (West 1966)[54] substituting Bureau of Risk Management of the Florida Casualty Insurance Risk Management Trust Fund for "state board of control."

PART XIX. ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

Incorporate CAL. GOV'T CODE §§940-51 (West 1966).[55]

PART XX. SPECIAL PROVISIONS RELATING TO ACTIONS AGAINST THE STATE — VENUE AND SUMMONS

Incorporate CAL. GOV'T CODE §§955-55.5 (West 1966) substituting "Leon County" for "Sacramento County."

PART XXI. SPECIAL PROVISIONS RELATING TO ACTIONS AGAINST LOCAL PUBLIC ENTITIES

Incorporate CAL. GOV'T CODE §§960.2-60.8 (West 1966).[56]

PART XXII. PAYMENT OF CLAIMS AND JUDGMENTS AGAINST THE STATE

Incorporate CAL. GOV'T CODE §§965.2, .4 (West 1966) deleting any reference to Department of Public Works.

PART XXIII. PAYMENT OF TORT JUDGMENTS AGAINST LOCAL PUBLIC ENTITIES

Incorporate CAL. GOV'T CODE §§907-71.2 (West 1966).[57]

PART XXIV. LOCAL PUBLIC ENTITIES' FUNDING OF JUDGMENTS WITH BONDS

Incorporate CAL. GOV'T CODE §§975-78.8 (West 1966).[58]

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52. Generally, this section denies the liability of a public employee or public entity for a negligent act or omission in the collection or assessment of taxes.

53. This part primarily allows any state agency or local public entity to include provisions governing the claims procedure in any agreement to which it is a party.

54. Within this part provisions are made for the compromise or settlement of claims. CAL. GOV'T CODE §§935.4 (local public entity), 935.6 (state agency) (West 1966). Oregon's experience of compromising or settling 80% of the claims suggests the importance of this section. Letter from W. L. Reagen, Insurance Manager, Dep't of General Service, Oregon, to Judith G. Korchin, April 17, 1973, on file with University of Florida Law Review.

55. This part outlines procedural matters in maintenance of a suit, such as the necessity of a written claim acted upon or deemed to have been rejected before suit can begin. *E.g.*, CAL. GOV'T CODE §945.4 (West 1966).

56. This part delineates the steps in service of process on a public agency.

57. Several alternative methods of paying tort judgments are provided. *E.g.*, installment payments, CAL. GOV'T CODE §970.6 (West 1966); levy of taxes, *id.* §970.8.

58. The procedural steps necessary for a local public entity to incur bonded indebtedness in order to satisfy a tort judgment are provided.