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911: The Call That No One Answered

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Abstract

Across the country, municipalities are updating their public service agencies with the addition of advanced “911” emergency telephone systems.

KEYWORDS: call, 911, answer

911: The Call That No One Answered

I. Introduction

Across the country, municipalities are updating their public service agencies with the addition of advanced "911" emergency telephone systems.¹ The systems are designed to immediately dispatch assistance to community members who have become victims of tragedy. Reduced response time offered by the "911" system is the primary reason for its popularity.²

As a result of municipal involvement in implementation of "911" systems, local governments operating emergency assistance systems may suffer tort liability for negligent failure to properly respond to a call.³ Jurisdictions responding to this dilemma have done so differently. Courts holding municipalities liable in tort for mishandling "911" calls predicate their findings on the special duty doctrine⁴ and the waiver of sovereign immunity.⁵ Other jurisdictions relieve municipalities of all liability based on the doctrines of public duty⁶ and common law governmental immunity.⁷

With other jurisdictions responding differently to the issue of whether tort liability should attach, predicting how Florida courts will

1. There are more than 1,100 "911" systems on line serving more than 45% of United States residents. Hackworth, *9-1-1: Antidote to Amnesia*, 1984 JEMS 24. In 1984, 67.5% of the citizens from thirty-one Florida counties were served by "911" systems. Division of Communications, State of Florida Department of General Services, *Florida 911 Program* (1984). Presently, approximately one-half of Florida's counties, nearly 80% of Florida's citizens, are served by "911" systems. Telephone interview with Edward J. Telander, P.E., Communications Engineer, Division of Communications (Dec. 4, 1985).

2. "Response time has different meanings. It can be 1) the time an incident occurs to the time it is reported, 2) the time it is reported until help is dispatched, or 3) the time dispatch occurs until help arrives at the scene." Because the person dialing only has to dial three numbers rather than seven, reporting time is shorter. Also, all calls go to one center equipped with a multitude of emergency resources utilized to reduce dispatch time. Hackworth, *supra* note 1, at 25.

3. Ashman, *Negligent 911 Goof-up Proves Costly in New York*, 69 A.B.A. J. 354 (Mar. 1983).

4. See *infra* text accompanying notes 19-22.

5. See *infra* text accompanying notes 109-12.

6. See *infra* text accompanying notes 84-94.

7. See *infra* text accompanying notes 65-69.

respond is a difficult task. The Florida legislature has taken affirmative action in developing a statewide emergency telephone assistance plan,⁸ and has also waived municipal sovereign immunity in tort actions.⁹ Although the Florida Supreme Court seems to have given new life to the doctrine of sovereign immunity in *Commercial Carrier Corp. v. Indian River County*,¹⁰ the district courts of appeal still ponder the decision's full effects.

This note demonstrates the potential for civil action against Florida municipalities for failing to properly respond to emergency assistance calls. This note predicts how Florida courts may respond to this dilemma. In addition, this note will provide an approach which includes compensating victims of mishandled emergency calls while deferring to the intent of Florida's legislature.

A. *Historical Overview of Florida Municipal Liability*

Florida municipalities have not always enjoyed sovereign immunity¹¹ to the extent the state has. Prior to the enactment of Florida's

8. FLA. STAT. § 365.171 (1985).

9. FLA. STAT. § 768.28 (1985). The statute provides in part:

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

10. 342 So. 2d 1047 (Fla. 3d Dist. Ct. App. 1977), *rev'd and remanded*, 371 So. 2d 1010 (Fla. 1979).

11. This article does not purport to cover the doctrine of sovereign immunity in depth. For an historical overview of the doctrine of sovereign immunity, see Van Alstyne, *Governmental Tort Liability: Judicial Law Making in a Statutory Milieu*, 15 STAN. L. REV. 163 (1962); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI-KENT

waiver statute, traditional common law municipal immunity only attached for governmental functions, as opposed to proprietary functions. Governmental functions are those functions exercised on behalf of the state for the benefit of the general public¹² or those done in furtherance of the public welfare.¹³ Thus, while pursuing this type of state objective, a municipality was shielded from tort action.

A municipality was subject to tort liability if injury resulted from the negligent performance of a proprietary function. Proprietary functions are "those done for the public's convenience and enjoyment."¹⁴ When a municipality is performing functions for the specific benefit of a community embraced within its municipal boundaries rather than for the general public, the municipality is exercising a proprietary function.¹⁵ Thus, under the governmental-proprietary distinction, only tortious acts committed in furtherance of a proprietary function were actionable.

Municipal liability in Florida has also been predicated on the doctrine of *respondeat superior*.¹⁶ The governmental-proprietary distinction was totally ignored in *Hargrove v. Town of Cocoa Beach*.¹⁷ The Florida Supreme Court held that an individual suffering injury as a direct result of a municipal employee's negligence would have an actionable claim against the municipality, as long as the employee acted within the scope of his employment. However, the court did continue to recognize immunity for municipalities for actions taken in the exercise of judicial, legislative, quasi-legislative, or quasi-judicial functions.¹⁸ Although *respondeat superior* remains a separate tort claim in Florida for municipal liability, the application is greatly restricted.

The special duty doctrine, as developed by the Florida Supreme

L. REV. 61 (1985).

12. Budetti & Knight, *The Latest Event in the Confused History of Municipal Tort Liability*, 6 FLA. ST. U.L. REV. 927, 928 (1978).

13. Note, *How Much Wrong Can the King Do? A Look at the Modern Sovereign Immunity Doctrine in Florida*, 13 STETSON L. REV. 359, 360-61 (1984).

14. *Id.* at 361.

15. Budetti & Knight, *supra* note 12, at 929.

16. The scope of this article does not pursue the tort action of *respondeat superior* in detail. See, e.g., Comment, *Employer Liability For Assaults By Employees*, 48 MO. L. REV. 655 (1983); Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579 (1984).

17. 96 So. 2d 130 (Fla. 1957).

18. *Id.* at 133.

Court in *Modlin v. City of Miami Beach*,¹⁹ supplanted the governmental-proprietary distinction as a premise for governmental immunity from tort liability. The *Modlin* court limited those situations in which an injured individual could recover from a municipality.²⁰ Only when the municipality or its employee owed a specific duty to the individual complaining could the municipality's negligence be actionable.²¹ The duty must be something more than that owed by a public officer to the public generally.²²

With little resistance, the special duty doctrine remained the source of municipal tort liability until the *Commercial Carrier Corp.* decision in 1979.²³ Unsatisfied with the present state of municipal tort law at that time, due in part to enactment of the sovereign immunity statute, the Florida Supreme Court disposed of the special duty doctrine. Now when dealing with municipal liability, courts are to determine whether the decision to further governmental actions is accomplished at either a planning level or operational level.²⁴ Negligence resulting from furtherance of planning level decisions is not actionable because the public importance of these decisions requires governmental immunization from tort liability. However, any injuries incurred during promotion of governmental interests at an operational level are subject to tort liability. Because these acts are ministerial in nature, the sovereign immunity doctrine is inapplicable.

19. 201 So. 2d 70 (Fla. 1967).

20. *Id.* at 76.

21. *Id.* at 75; see *Sapp v. Tallahassee*, 348 So. 2d 363 (Fla. 1st Dist. Ct. App.), *cert. denied*, 354 So. 2d 985 (Fla. 1977). The Florida Supreme Court held that before a municipality could be held liable for the negligence of its employees, a special duty must be shown. A special duty is something more than the duty a municipality owes the general public. See also *City of Tampa v. Davis*, 226 So. 2d 450 (Fla. 2d Dist. Ct. App. 1969). The Second District Court of Appeal decided that a municipality could be liable in tort, under the doctrine of respondeat superior, only when the complainant was in privity with the municipal employee.

22. *Modlin*, 201 So. 2d at 76. See, e.g., *Evet v. Inverness*, 224 So. 2d 365 (Fla. 2d Dist. Ct. App. 1969). The court held the city owed no duty, other than that owed to the general public, to plaintiff's decedent, killed by an intoxicated driver previously stopped but released by police.

23. See Note, *supra* note 13, at 362-63. The Florida waiver statute was enacted in 1975. *Commercial Carrier Corp.* was not decided until 1979. During this time period, there was little deviation from the special duty doctrine. See generally *Pennington v. Serig*, 353 So. 2d 107 (Fla. 3d Dist. Ct. App. 1977); *Metropolitan Dade County v. Kelly*, 348 So. 2d 49 (Fla. 1st Dist. Ct. App. 1979).

24. *Commercial Carrier Corp.*, 371 So. 2d at 1018-19. See also *infra* text accompanying notes 115-32.

Although the *Commercial Carrier Corp.* court attempted to settle the confusion surrounding Florida municipal tort liability, the law seems more unsettled now than previously. This uncertainty, which arises from the lower courts' inability to distinguish planning level and operational level functions, creates a dilemma when courts are faced with a tort action arising out of a municipality's failure to properly respond to a "911" emergency call. As the "911" issue has yet to receive judicial attention by Florida courts, the ensuing sections survey how courts of other jurisdictions have reacted to cases involving a municipality's failure to properly answer emergency calls.

B. *Municipal Liability for Failing to Respond Properly to an Emergency Assistance Call*

A municipality's decision to develop a "911" emergency reporting system to counter "increased incidence of crimes, accidents and medical emergencies, inadequacy of existing emergency reporting methods and the continual growth and mobility of the population,"²⁵ is beneficial to recipients of the service. The "911" system, however, is not flawless. Specific instances of the system's shortcomings have left courts throughout the United States confronted with issues of negligence, municipal tort liability and sovereign immunity in cases where emergency calls are mishandled.

The New York Court of Appeals examined these issues in *De Long v. County of Erie*.²⁶ The *De Long* court upheld an award of damages to the husband and children of a woman brutally victimized in their home by an intruder.²⁷ The decedent, Amelia De Long, was in her home on the morning of October 25.²⁸ Hearing a burglar in her home, she immediately dialed "911."²⁹ After receiving assurance that assistance had been dispatched, De Long remained in her home awaiting police arrival.³⁰ Unfortunately, the complaint writer incorrectly recorded the complaint.³¹ Emergency assistance was dispatched to an in-

25. Hackworth, *supra* note 1, at 24.

26. 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

27. *Id.* at 304, 457 N.E.2d at 720, 469 N.Y.S.2d at 615.

28. *Id.* at 300-01, 457 N.E.2d at 719, 469 N.Y.S.2d at 613.

29. *Id.* at 300, 457 N.E.2d at 719, 469 N.Y.S.2d at 613.

30. *Id.* at 301, 457 N.E.2d at 719, 469 N.Y.S.2d at 614.

31. *Id.* The complaint writer, after incorrectly recording the address, informed the dispatcher to send police to 219 Victoria, in the City of Buffalo. Amelia De Long's correct address was 319 Victoria, in the City of Kenmore.

correct address in the wrong city.³² The police finally arrived, but Amelia De Long was pronounced dead on the scene.³³

Amelia De Long's family sued for negligence. Affirming the lower court opinion, the court recognized that the county and city developed a special relationship with Amelia De Long.³⁴ The city and the county implemented a special emergency service designed to take calls at a designated center and then relay them to the proper public safety agency.³⁵ The public safety agencies offered the "911" plan as the system to utilize in an emergency situation.³⁶ In addition, a dispatcher personally assured the victim that help was on the way, furthering her reliance upon police.³⁷ These factors created a special duty³⁸ owed to the victim by the city and the county. Each entity breached its duty.³⁹ Thus, compensation was awarded to the victim's family for her wrongful death.

The Washington Supreme Court has also confronted the issue of

32. *Id.*

33. *Id.* Kenmore police arrived on the scene after a neighbor made a direct call to the police department. By the time paramedics arrived, the victim was dead.

34. *Cf.* *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). The New York Court of Appeals held that the city was not liable in tort to an assault victim who had requested police protection on a number of previous occasions. "[T]here is no warrant in judicial tradition or in the proper allocation of the powers of government for the courts, in the absence of legislation, to carve out an area in tort liability for police protection to members of the public." *Id.* at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899. *But see* Judge Keating dissenting: "[t]he essence of the city's case [suggests] . . . '[b]ecause we owe a duty to everybody, we owe a duty to nobody.'" *Id.* at 585, 240 N.E.2d at 862, 293 N.Y.S.2d at 901.

35. *De Long*, 60 N.Y.2d at 302-03, 457 N.E.2d at 720-21, 469 N.Y.S.2d at 614-15.

36. *Id.* at 302, 457 N.E.2d at 719, 469 N.Y.S.2d at 614.

37. *Id.* at 301, 457 N.E.2d at 719, 469 N.Y.S.2d at 614.

38. *See* *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). The city was liable for the wrongful death of plaintiff's intestate. An actionable special duty was created when police failed to provide promised protection after decedent aided police in arresting and convicting a fugitive from justice. *See also supra* text accompanying notes 19-22.

39. *De Long*, 60 N.Y.2d at 305, 457 N.E.2d at 722, 469 N.Y.S.2d at 616. Also, at the time this action was instituted by Dennis De Long, there was in existence, within the laws of New York, a waiver of immunity statute. N.Y. JURISDICTION LAW § 8 (McKinney 1983), in part, provides that "[t]he state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations. . . ." However, the *De Long* court never referenced this statute in its opinion.

police failure to properly respond to an emergency call. In *Chambers-Castanes v. King County*,⁴⁰ plaintiffs, a married couple, were proceeding through a small Washington town when they were stopped in traffic behind a pick-up truck.⁴¹ Two men exited the truck and began to manhandle the couple.⁴² When the men finally retreated from the scene, the wife phoned for assistance.⁴³ After numerous calls requesting assistance, police finally responded to the call.⁴⁴ Unfortunately, the assailants fled, avoiding apprehension.⁴⁵

In plaintiffs' action for negligence, the *Chambers-Castanes* court concluded that the doctrine of sovereign immunity was inapplicable and held King County subject to liability in tort.⁴⁶ Because the legislature had abolished the sovereign immunity doctrine,⁴⁷ the court carved out a narrowly circumscribed exception.⁴⁸ High level discretionary acts exercised at an executive level remained cloaked with sovereign immunity.⁴⁹ In comparison, operational level decisions, such as dispatching a police officer to the scene of a crime, were not cloaked with immunity.⁵⁰ The two are distinguished as follows: a decision to dispatch an officer in response to an emergency call involves the type of discretion exercised every day,⁵¹ not a decision involving a basic governmental planning consideration.⁵² Therefore, the operator's failure to properly dispatch

40. 100 Wash. 2d 275, 669 P.2d 451 (1983).

41. *Id.* at 278, 669 P.2d at 454.

42. *Id.*

43. *Id.* A number of other persons witnessing the events also phoned for police assistance. They were assured, as was plaintiff, that help was on its way.

44. *Id.* at 280, 669 P.2d at 454.

45. *Id.*

46. *Id.* at 281, 669 P.2d at 457. The Washington Supreme Court has accepted the test established in *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 250, 407 P.2d 440, 444 (1965), as an exception to the rule that the doctrine of sovereign immunity is abolished. See *infra* text accompanying notes 129-31.

47. 100 Wash. 2d at 281, 669 P.2d at 456. WASH. REV. CODE ANN § 4.92.090 (1986) states "[t]he State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

48. 100 Wash. 2d at 281, 669 P.2d at 456.

49. *Id.* at 282, 669 P.2d at 456. In a footnote, the court explained high level discretionary acts. To determine whether acts were exercised at a truly executive level, the court should apply the four-prong test established in *Evangelical United Brethren Church*. See *infra* text accompanying notes 129-31 and 145-50.

50. *Id.*

51. *Id.*

52. *Id.* The court noted that "[t]o fall within the exception . . . , the discretion-

an emergency assistance call is an operational level determination subject to liability.⁵³

The Washington Supreme Court also recognized the creation of a special relationship between plaintiffs and the county.⁵⁴ The operators assured plaintiffs after each call that assistance had been dispatched.⁵⁵ Since plaintiffs continually sought assistance, a nexus developed giving rise to reliance on the part of the plaintiffs.⁵⁶ Consequently, the court recognized plaintiffs' claim for damages pursuant to the special duty doctrine.⁵⁷

C. *Municipalities Enjoying Immunity for Failing to Respond to Emergency Calls*

While some jurisdictions refuse municipalities and their entities sovereign immunity for the performance of discretionary governmental functions,⁵⁸ others continue to protect municipalities from tort liability regarding public safety decisions.⁵⁹

ary act must not only involve a basic policy determination, but must also be the product of a considered policy decision." *Id.* at 282, 669 P.2d at 456.

53. *Id.* at 282, 669 P.2d at 456.

54. *Id.* Plaintiffs also had alleged a cause of action for negligent infliction of emotional distress. The trial court erred in dismissing the complaint on grounds that the duty owed by King County to provide assistance was owed to the public generally and not to any particular individual.

55. *Id.* at 287, 669 P.2d at 458.

56. *See Sapp*, 348 So. 2d at 365; *Davis*, 226 So. 2d at 452.

57. *Chambers-Castanes*, 100 Wash. 2d at 288, 669 P.2d at 458.

58. *See Adams v. State*, 555 P.2d 235 (Alaska 1976). The State Fire Marshall had undertaken an inspection for hazards in a hotel. He breached his duty to disclose discovered hazards. Consequently, when a hotel fire injured patrons, the state was subject to liability. Even with a state statute immunizing the state from tort liability arising out of failure to perform discretionary functions, a common law duty was created when an affirmative action was undertaken. *See also Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985), citing *De Long*, where a special relationship was held to exist between the City of New York and plaintiffs. Plaintiffs, a mother and her daughter, brought an action against the city arising out of injuries they suffered at the hands of the daughter's father. The father refused to return the child, violating a protective order which restricted his visitation rights because of previous abusive behavior. Despite awareness of the father's violent propensities based on his past conduct, police ignored the pleas of the child's mother for her safe return. The court decided this was adequate to establish an actionable duty to the mother and daughter.

59. *City and County of San Francisco v. Superior Court*, 160 Cal. App. 3d 837, 207 Cal. Rptr. 6 (Cal. Ct. App. 1984). After a San Francisco fireman left a fire station

In *Trezzi v. City of Detroit*,⁶⁰ the Michigan Court of Appeals supported the decision of the City of Detroit to install a "911" emergency system. Plaintiff in *Trezzi* complained that the "911" operators attached an unjustifiably low priority rating to emergency calls.⁶¹ A "911" operator passed the call to a police dispatcher who did not dispatch assistance for nearly one and a half hours.⁶² As a result of the police dispatcher's dereliction, plaintiff's decedents suffered numerous injuries, resulting in their deaths.⁶³

The *Trezzi* court maintained that operating a "911" emergency assistance system constitutes a governmental function by a municipality⁶⁴ protected by Michigan law.⁶⁵ The operation of an emergency dispatch plan is an indispensable element in managing a police department.⁶⁶ The system's operation involves decision making regarding the seriousness of each call for police assistance.⁶⁷ Immediately upon receipt of a call, an order of priority for response is attached.⁶⁸ The court determined that this type of system is unique activity associated with

unattended, a fire occurred at a building 300 feet from the station. As the response time was greatly increased, it was alleged that unnecessary property damage had occurred. The California Court of Appeal, First District, dismissed the complaint based on the public entity's absolute immunity from tort liability for failure to provide fire protection and/or from negligence in the provision of such protection. *See also Hartzler v. City of San Jose*, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (Cal. Ct. App. 1975). In *Hartzler*, a woman allegedly called police twenty times concerning problems she was having with her estranged husband. The court held that police enjoyed sovereign immunity from liability. In the absence of evidence showing that police promised the victim protection and the woman relied on such promise, a special relationship had not been created.

60. 120 Mich. App. 506, 328 N.W.2d 70 (Mich. Ct. App. 1982).

61. *Id.* at 509, 328 N.W.2d at 71. There may have been a number of unidentified operators taking calls. Operators attach priority ratings to each call based upon its nature, and police are dispatched accordingly.

62. *Id.* at 509-10, 328 N.W.2d at 71.

63. *Id.* at 509, 328 N.W.2d at 71.

64. *Id.* at 511, 328 N.W.2d at 72.

65. MICH. COMP. LAWS § 691.1407 (1985) (providing that all governmental agencies shall be "immune from tort liability . . . [in] discharge of a governmental function . . .").

66. *Trezzi*, 120 Mich. App. at 512, 328 N.W.2d at 72 (Bronson, J., dissenting). The dissent asks the question "[i]f '911' system is 'indispensable' to police operations, how did Detroit manage to muddle through the many decades in which no system existed?" *Id.* at 517, 328 N.W.2d at 74.

67. *Id.* at 512, 328 N.W.2d at 72.

68. *Id.* at 513, 328 N.W.2d at 72.

operation of a police department.⁶⁹ Logically, the city and its police department are afforded immunity.

The District of Columbia Court of Appeals reached the same result as *Trezzi* but through different reasoning.⁷⁰ Plaintiffs in *Warren v. District of Columbia*,⁷¹ two of whom were sharing a third floor room, all resided in the same boarding house.⁷² The third plaintiff and her daughter occupied a second floor room.⁷³ During the night, the sound of the back door being broken down awakened the women.⁷⁴ Two men entered the house, made their way to the second floor, then raped and sodomized one of the plaintiffs.⁷⁵

Hearing screams from the floor below, plaintiffs on the third floor telephoned police, requesting immediate help. The police dispatcher provided assurance that police assistance would be dispatched promptly. From their third floor room, plaintiffs crawled through their window to an adjoining roof. Four police cruisers, responding to the broadcast, arrived at the boarding house. While on the roof plaintiffs watched the police arrive, conduct a cursory investigation and then leave the scene.⁷⁶

Plaintiffs crawled back inside their room and again phoned for help. Once more they were assured that police assistance was on the way.⁷⁷ Believing police had arrived, and in an attempt to ascertain the conditions of the victimized women, plaintiffs called to the second floor, thereby alerting the intruders to their presence. The abductors then forced all three women, at knife point, to accompany them to an apartment belonging to one of the men. The abductors held the three women captive for fourteen hours, robbing and sexually assaulting them.

The three plaintiffs instituted actions against the city and its police department. Plaintiffs based their claims on the negligent investigation conducted by police once they were dispatched to the scene and the

69. *Id.*

70. *See supra* text accompanying notes 40-57. The court in *Chambers-Castanes* flatly rejected the reasoning in *Warren* as being wholly at odds with its decision.

71. 444 A.2d 1 (D.C. App. 1981).

72. *Id.* at 2.

73. *Id.*

74. *Id.* The two men who broke down the door were later identified and charged.

75. *Id.*

76. *Id.* One officer drove through the alley behind the house, and proceeded to the front of the house without stopping. Another officer knocked on the front door, but departed when no one answered. All the officers left within five minutes of their arrival.

77. *Id.* Actually, assistance was not dispatched the second time.

failure to respond properly to the second emergency call.⁷⁸

The District of Columbia Court of Appeals upheld the trial court's dismissal of the complaint.⁷⁹ The court in *Warren* based its opinion on the "fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."⁸⁰ The court denied plaintiffs' contention that their telephone call requesting assistance created a special relationship.⁸¹ The police did not owe any single individual the duty to provide police protection.⁸² The acts and omissions of defendant police department constituted no more than nonactionable withholding of a benefit.⁸³ Thus, without the establishment of a special duty, plaintiffs' complaint could not stand.⁸⁴

The three dissenting judges in *Warren*⁸⁵ reasoned that if certain factors are present, a general, nonactionable duty to provide police services may narrow to a special actionable duty.⁸⁶ First, some sort of privity must exist between the police department and the victim.⁸⁷ This relationship must set the victim apart from the general public.⁸⁸ Sec-

78. *Id.*

79. *Id.* Notwithstanding their sympathy for appellants who were tragic victims of despicable criminal acts, the appellate court affirmed the judgment of dismissal.

80. *Id.* at 3. The District of Columbia Court of Appeals decided this case based solely on common law municipal tort liability. At the time this suit was commenced by plaintiffs, the District of Columbia had yet to waive sovereign immunity by statute. The only limitation on any negligence action against the District of Columbia is governed by D.C. CODE § 12-309 (1985). In part, this section provides that "[a]n action may not be maintained against the District of Columbia . . . unless, within six months . . . the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia. . . ." This section of the code was never referenced by the court in *Warren*.

81. *Id.* at 4.

82. *Id.* at 7.

83. *Id.* See also *H.R. Moch Co., Inc. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). In *Moch*, the Rensselaer Water Co. had contracted with the city to provide them with an adequate water supply. Plaintiff's property caught fire but there was an insufficient amount of water to extinguish the fire. Justice Cardozo found that the failure to provide an adequate water supply was, at most, an nonactionable withholding of a benefit. *Id.* at 167-68, 159 N.E. at 897-98.

84. *Warren*, 444 A.2d at 9.

85. *Id.* Associate Judge Kelly wrote the opinion with whom Associate Judge Moch and Chief Judge Newman concurred in part and dissented in part.

86. *Id.* at 9.

87. *Id.* See also *Davis*, 226 So. 2d at 451; *Sapp*, 348 So. 2d at 365-66.

88. *Warren*, 444 A.2d at 10.

ond, the public agency must have offered assurances which would cause the victim's justifiable reliance.⁸⁹

The dissenters in *Warren* asserted that the complaint alleged sufficient facts which, if proven, established a legal relationship.⁹⁰ The police department owed a special duty to the plaintiff placing the emergency call. Also, after receiving guarantees on two separate occasions that help was dispatched, the victims chose not to leave the scene, justifiably relying on the dispatcher's assurances that help was coming. Therefore, the dissenters concluded that an actionable special duty existed.⁹¹

The New Mexico Court of Appeals also refused to acknowledge the existence of a special duty in *Doe v. Hendricks*.⁹² The court denied the award of damages to a boy who had been sexually assaulted by a stranger, even though a call for assistance was placed immediately after the boy's abduction.⁹³ Stating that police owed no special duty to the boy, the court granted the city's motion for summary judgment.⁹⁴

In rationalizing its position, the *Doe* court applied the two-step special duty test.⁹⁵ The majority decided no relationship existed between police and the boy.⁹⁶ No prior circumstances between the victim and the officer imposed a duty on the police to protect the boy.⁹⁷ In addition, police made no specific promises which would create justifiable reliance on the part of the victim.⁹⁸ Thus, without a special rela-

89. *Id.* See *Sapp*, 348 So. 2d at 365-66.

90. 444 A.2d at 12.

91. *Id.*

92. 92 N.M. 499, 590 P.2d 647 (Ct. App. 1979).

93. *Id.* at 500, 590 P.2d at 649. Two teenagers witnessed the youth being dragged into an abandoned house by an adult male. The teenagers relayed their story to their brother and sister. The sister called police and further relayed the story. The dispatcher took the message into the office of the chief. The chief was the only officer available to answer the call. However, the chief was in conference with an out-of-state sheriff and did not respond to the call. When assistance did not arrive, the two boys ran to the police station, relayed their story to another officer, who proceeded to the house, and effectuated the arrest.

94. *Id.* at 500, 590 P.2d at 649. The court relied on the Peace Officers Liability Act of 1973, N.M. STAT. ANN. § 39-8-2, 39-8-4 (repealed 1976). The Act was designed to protect officers from personal liability arising out of acts committed during the performance of their activities and within the course and scope of their profession.

95. See *supra* text accompanying notes 19-22.

96. *Doe*, 92 N.M. at 503, 590 P.2d at 651.

97. *Id.*

98. *Id.*

tionship or justifiable reliance, the only duty owed by police was a non-actionable public duty.⁹⁹

II. Florida's Response to Municipal Liability In Failing to Answer Emergency Assistance Calls

Florida courts have yet to answer the question of whether a municipality is liable for failing to properly respond to an emergency assistance call. With a statute that encourages Florida counties to install "911" emergency systems,¹⁰⁰ and a statute that permits the state and its entities to be sued,¹⁰¹ Florida courts will eventually face this predicament.

In 1974, the Florida legislature enacted the Florida Emergency Telephone Act.¹⁰² The Act's purpose is "to shorten time required for a citizen to request and receive emergency"¹⁰³ medical or police assistance. Prior to this enactment, thousands of emergency assistance numbers were used statewide.¹⁰⁴ The implementation of a three-digit number system immensely benefits both law enforcement agencies and public service personnel.¹⁰⁵

The enactment of the Florida Emergency Telephone Act gave a statewide system of emergency assistance to the general public. The plan includes a firm implementation schedule requiring local communities to direct the telephone utility to install a "911" system within twenty-four months following receipt of a local government order.¹⁰⁶ The system must include specific local government requirements for

99. *Id.* The court said, "[i]f and when the people of New Mexico desire a change in the public vs. special duty concept, they must seek relief from the legislature . . . [that] fix[es] the public policy of the State." *Id.* at 503, 590 P.2d at 651.

100. *See supra* note 8.

101. *See supra* note 9.

102. FLA. STAT. § 365.171(1) (1985).

103. *Id.* § 365.171(2).

104. *Id.* This "simplified means of procuring emergency service will result in the saving of life, a reduction in the destruction of property, and a quicker apprehension of criminals." The legislature's intent is to establish an emergency "number (911) plan which will provide citizens with rapid, direct access to public safety agencies. . . ." *Id.*

105. *Id.*

106. *Id.* § 365.171(4)(e). *See also* § 365.171(10) ("All public agencies shall assist the division in their efforts to carry out the intent of this section, and such agencies shall comply with the developed plan."); It is no longer mandatory for counties to install a "911" system. The expense of installing and operating a "911" system is too great for some of Florida's rural counties. Telander, *supra* note 1.

law enforcement, firefighting and emergency medical services, and may also include poison control, suicide prevention and emergency management services.¹⁰⁷

Lawmakers enacted legislation aimed at assuring an accessible remedy to those in immediate emergency need. The majority of the systems developed in Florida are extremely efficient.¹⁰⁸ This is generally the reason a municipality encourages the use of the "911" system as opposed to direct dialing. However, if a Florida municipality holds out the "911" system as preferable to another system in time of emergency, a question arises regarding the municipality's liability when the victim dials "911" seeking help and none arrives.

The issues surrounding Florida municipal liability have not been clearly decided. First, the Florida legislature, in accordance with the State Constitution, waived sovereign immunity for tort liability for itself and for its agencies and subdivisions.¹⁰⁹ In essence, the State permitted itself and its agencies and subdivisions to be sued in tort for money damages arising out of the wrongful acts or omissions of any agency's or subdivision's employee while acting within the scope of his employment.¹¹⁰ As long as the injured plaintiff retains eligibility pursuant to section 768.28,¹¹¹ he may sue the governmental entity as if the entity were an individual.¹¹²

The statute also allows the state to be self-insured by allowing it to purchase liability insurance for whatever coverage it chooses in anti-

107. *Id.* at § 365.171(4)(b).

108. *Florida 911 Program, supra* note 1, at 2. At least seven Florida counties have an enhanced "911" (E911) system. This system includes selective routing which guarantees that only the calls originating within a certain jurisdiction are routed to the Public Safety Answering Point (PSAP) responsible for that particular jurisdiction. E911 systems also include automatic number identification (ANI) which provides the dispatcher with a display of the caller's telephone number and automatic location identification (ALI) which provides a display of the caller's address.

109. FLA. STAT. § 768.28(1) (1985).

110. *Id.*

111. *Id.* § 768.28(6)(a). This section states that "[a]n action may not be instituted against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency. . . ." Section 5 further provides that the state is not liable for punitive damages or interest for the period before judgment. Also, the state is not liable to any one person for a claim exceeding \$100,000 or a total of claims in excess of \$200,000. Section 7 further states that "process shall be served upon the head of the agency. . . ." In addition, Section 9(a) provides that individuals, unless acting maliciously and willfully, shall not be held personally liable.

112. *Id.* § 768.28(2).

pation of any claim.¹¹³ Agencies, subdivisions and sheriffs may purchase liability insurance together, or jointly provide other means of protection against tort liability arising out of their official capacity.¹¹⁴ The language of section 768.28 is explicit with respect to the state's desire to retreat from the doctrine of sovereign immunity and allow compensation for valid claims arising against the state.

The Supreme Court of Florida, however, does not interpret section 768.28 as totally abrogating the doctrine of sovereign immunity. In *Commercial Carrier Corp. v. Indian River County*,¹¹⁵ the Florida Supreme Court had an opportunity to construe the sovereign immunity statute. The supreme court decided that section 768.28 was broadly written and the doctrine of sovereign immunity was not totally abolished.¹¹⁶

Commercial Carrier Corp. reached the Florida Supreme Court¹¹⁷ on writ of certiorari where it was consolidated with a Third District Court of Appeal case, *Cheney v. Dade County*.¹¹⁸ Commercial Carrier Corporation and its insurer were named defendants in a wrongful death action.¹¹⁹ Commercial Carrier Corporation then filed a third-party complaint naming Indian River County and the Florida Department of Transportation (DOT) as third-party defendants.¹²⁰ DOT failed to install a stop sign or provide pavement markings at the intersection where the accident occurred.¹²¹ The third-party complaint sought con-

113. *Id.* § 768.28(13).

114. *Id.*

115. *See supra* text accompanying notes 23-24.

116. *Commercial Carrier Corp.*, 371 So. 2d at 1015.

117. *Id.* at 1012-13. *Commercial Carrier Corp.* allegedly was in conflict with *Gordon v. City of West Palm Beach*, 321 So. 2d 78 (Fla. 4th Dist. Ct. App. 1975). In *Gordon*, the Fourth District Court of Appeal held that a city could be liable for negligence in design, construction or maintenance of streets, but that it could not be liable for failing to install traffic devices at an intersection.

118. 353 So. 2d 623 (Fla. 3d Dist. Ct. App. 1977), *rev'd sub nom.* *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla.), *vacated*, 372 So. 2d 1182 (Fla. 3d Dist. Ct. App. 1979). In *Cheney*, a third party complaint had been filed by *Cheney* and its insurer against *Dade County*. The complaint alleged that the sole cause of an intersection collision was *Dade County's* negligence in maintaining the intersection with proper traffic signals. The trial court held that no cause of action existed to maintain the third party complaint. The Third District Court, while upholding the dismissal, certified the question as one of great public interest.

119. *Commercial Carrier Corp.*, 371 So. 2d at 1013.

120. *Id.*

121. *Id.*

tribution and indemnification from Indian River County and DOT for their negligence in failing to properly maintain the intersection.¹²² The Third District Court of Appeal affirmed the trial court's dismissal of the third-party complaint.¹²³

The main issue the *Commercial Carrier Corp.* court addressed was the status of municipal tort liability under the governmental versus proprietary analysis since the enactment of section 768.28.¹²⁴ The supreme court concluded that because section 768.28¹²⁵ unequivocally includes municipalities within the definition of state entities subject to waiver of immunity,¹²⁶ this distinction died when Section 768.28 became law. In the same breath, the *Commercial Carrier Corp.* court also decided that the special duty-general duty dichotomy had no continuing vitality since section 768.28 became effective.¹²⁷ Traditional municipal tort liability in Florida was subject to a third analysis.¹²⁸

The Florida Supreme Court adopted a test that considers certain discretionary governmental functions as either planning-level or operational-level functions. Planning-level functions enjoy immunity from

122. *Id.*

123. *Id.*

124. *Id.* at 1015-16. See also Note, *supra* note 14, at 364-67; Note, *The Doctrine of Sovereign Immunity Is Alive and Well*, 8 FLA. ST. U.L. REV. 377, 378-80 (1980).

125. FLA. STAT. § 768.28(2) (1985) states: "(2) As used in this act, 'state agencies or subdivisions' including the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities."

126. *Commercial Carrier Corp.*, 371 So. 2d at 1016.

127. *Id.* "Predicating liability upon the 'governmental-proprietary' and 'special duty-general duty' analyses has drawn severe criticism from numerous courts and commentators." *Id.* at 1016, n.8. Therefore, "*Modlin* and its ancestry and progeny have no continuing vitality subsequent to the effective date of section 768.28." 371 So. 2d at 1016.

128. Another problem the *Commercial Carrier Corp.* court faced was Section 768.28, which unlike the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1975), does not contain an express exception for discretionary acts to which immunity attaches. The court responded, however, that the absence of a "discretionary exception" in the waiver statute does not necessarily preclude immunity. Certain areas of governmental conduct must remain immune from judicial scrutiny. *Commercial Carrier Corp.*, 371 So. 2d at 1017-18. See *infra* text accompanying notes 135-39 for application of the test established in *Evangelical United Brethren Church*. See also *Evangelical United Brethren Church*, 67 Wash. 2d at 246, 407 P.2d at 440; *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

tort liability and comprise those basic policy decisions in which a governmental branch makes a conscious decision, balancing the risks and advantages.¹²⁹ Operational-level decisions are characterized as those made on an every day basis implementing broad policy plans.¹³⁰ Operational-level decision-making remains subject to tort liability.¹³¹

To assist the lower courts in their understanding of the distinction between planning-level or operational-level decisions, the *Commercial Carrier Corp.* court recommended application of a four question test established in *Evangelical United Brethren Church v. State*.¹³² The four question test asks: (1) Does the challenged act necessarily involve a basic governmental program? (2) Is the act or decision essential to the accomplishment of that program as opposed to one which would change the course of the program? (3) Does the act or decision require the exercise of a basic policy evaluation, expertise or judgment? (4) Does the governmental agency have the constitutional or statutory authority to make this decision? If all four preliminary questions clearly and unequivocally draw affirmative responses, the challenged discretionary act is not likely to be subject to tort liability. If one or more of the questions suggest a negative answer, depending upon the facts of the case, further inquiry may be necessary.¹³³

In the event a Florida court were confronted with a tort action arising out of the mishandling of an emergency assistance call, the

129. *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). Two examples of planning-level decisions are *Elmer v. City of St. Petersburg*, 378 So. 2d 825 (Fla. 2d Dist. Ct. App. 1979) and *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985). In *Elmer*, the city allegedly failed to give its citizens adequate warnings of riot conditions; this was a discretionary, planning-level decision, not to incite community havoc, cloaked with immunity. In *Everton*, an officer's choice not to issue a citation to an intoxicated driver and to allow him to continue his travels rather than arrest him was discretionary and cloaked with sovereign immunity.

130. *Department of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982). Two examples of operational-level decisions are *Weisburg v. City of Miami Beach*, 383 So. 2d 1158 (Fla. 3d Dist. Ct. App. 1980) and *Sintros v. LaValle*, 406 So. 2d 483 (Fla. 5th Dist. Ct. App. 1981). *Weisburg* held that a police department's decision to have its officers direct traffic is an operational-level decision subject to tort immunity if negligently conducted. *Sintros* held that a government employee's operation of a vehicle within the scope of his employment is an operational-level decision subject to tort liability.

131. *Commercial Carrier Corp.*, 371 So. 2d at 1019.

132. 67 Wash. 2d 246, 407 P.2d 440 (1965).

133. *Commercial Carrier Corp.*, 371 So. 2d at 1019. The test established in *Evangelical United Brethren Church* was applied by the Washington Supreme Court in *Chambers-Castanes*. See *supra* text accompanying notes 40-57.

analysis adopted by the *Commercial Carrier Corp.* court should be the controlling precedent.¹³⁴ If, for instance, a Florida resident dials "911" to report an emergency situation, an operator will likely answer, providing assurance that assistance will be dispatched. If the operator negligently dispatches police to the wrong address, causing a delay resulting in injury, the victim may file suit against the police department and the county as defendants in a civil suit for damages.

The liability of the police department and the county rests with a court's determination of whether operating a "911" emergency system is a judgmental, policy making decision, or whether the operation of the "911" system is merely the implementation of a broad policy decision subject to tort liability. Defendants should move for dismissal and a court should base its decision on *Commercial Carrier Corp.* and its progeny.

In all likelihood, a court will apply the four prong *Evangelical United Brethren Church* test adopted by *Commercial Carrier Corp.*: First, does the challenged act necessarily involve a basic governmental program?¹³⁵ In the hypothetical, the county and the police department developed a system of law enforcement designed to secure safety to the public. The "911" system is part of that overall plan. The language of the Florida Emergency Telephone Act also indicates that the implementation of a statewide "911" emergency system involves broad policy or planning decisions.

Second, is the act or decision essential to the accomplishment of that program as opposed to one which would change the course of the program?¹³⁶ Discretion is fundamental; any limit on discretion would greatly hinder a system of law enforcement. Also, the directing of emergency assistance to people in need is the primary goal of the "911" statute. The plan is designed to serve the public, as are the public service agencies responsible for responding to calls for help. Therefore, broad tort liability would defeat the program's objective.

Third, does the act or decision require the exercise of basic policy evaluation, expertise or judgment?¹³⁷ Because most decisions in law enforcement affect the rights of citizens, there is a great need for expertise, evaluation and judgment in these decisions. The decision to dis-

134. *Evangelical United Brethren Church*, 407 P.2d at 445; *Commercial Carrier Corp.*, 371 So. 2d at 1019.

135. *Id.* at 445; 371 So. 2d at 1019.

136. *Id.*

137. *Id.*

patch help to a resident as quickly and efficiently as possible is but a small part of an entire system designed to provide public services. However, to attach liability where calls are mishandled would undermine the entire system.

Lastly, does the governmental agency have the constitutional or statutory authority to make the decision?¹³⁸ The Florida Emergency Telephone Act encourages municipalities to adopt the "911" system. Thus, each municipality has an affirmative duty to establish a comprehensive, statewide emergency assistance plan. Also, law enforcement is given a high level of discretion, because to do otherwise would cause the system to undergo substantial unknown changes.

With affirmative responses to all four prongs of this preliminary test, a court, with a reasonable degree of assurance, would classify this as discretionary, nontortious, governmental conduct. Thus, it would be a planning-level decision cloaked with sovereign immunity.

The preceding example illustrates that under the *Commercial Carrier Corp.* rationale, the municipality in the hypothetical would be free from liability. Although the resident properly dialed "911" and reported a burglary, inadequate attention to his call resulted in financial and physical injury.

Further evidence of the Florida Supreme Court's desire to immunize municipalities from tort liability is found in a recent court opinion, *Trianon Park Condominium v. City of Hialeah*. In *Trianon Park*,¹³⁹ due to a severe roof leakage and other building defects, the condominium owners sustained extensive damage to their property. The owners brought an action against the City of Hialeah, alleging that the city was negligent in inspecting the condominiums and in enforcing specific provisions of the building code pursuant to the city's police power.

Recognizing sovereign immunity for the city, the supreme court held that the sovereign immunity statute did not create any new causes of action, "but merely eliminated the immunity which prevented recovery for existing common law torts committed by the government."¹⁴⁰ As the city did not owe a common law duty to the individual owners for the enforcement of police power functions, it was unnecessary for the court to reach the planning level versus operational level analysis. The lack of a common law duty to exercise police power functions,

138. *Id.*

139. 423 So. 2d 911 (Fla. 3d Dist. Ct. App. 1983), *vacated*, 468 So. 2d 912 (Fla. 1985).

140. 468 So. 2d at 914.

which include building inspections, immediately immunizes the city from tort liability. The supreme court did, however, state that where a common law duty existed, or where a statutory duty had been created, application of the four prong test developed in *Evangelical United Brethren Church*¹⁴¹ was necessary to determine whether the city acted in furtherance of a planning-level or operational-level function.¹⁴²

The *Trianon Park* decision suggests that should a court determine the state's creation of a "911" emergency system constitutes an exercise of a police power function, a common law duty to provide emergency assistance does not exist, and immunity from a negligence action arising out of a mishandled "911" emergency call would be afforded the city. However, should the court determine that "911" emergency assistance could be provided by private persons as well as governmental entities, the court, recognizing a common law duty, would determine municipal tort liability in accordance with *Commercial Carrier Corp.* and its progeny.¹⁴³ Application of either rationale ultimately produces harsh results for the victim.

When a municipality decides to adopt a plan for emergency telephone assistance, decided authority leaves little doubt that the municipality has made a decision for which immunity attaches. Whether immunity is justifiable because of the public duty doctrine,¹⁴⁴ or because the decision is quasi-legislative or legislative,¹⁴⁵ or because it is a planning-level function,¹⁴⁶ the activity remains immunized from judicial scrutiny.

However, the addition of other factors, such as those presented in the hypothetical, invoke the need to reexamine the sovereign immunity doctrine. Since the Florida legislature enacted the "911" plan, more than one-half of municipalities statewide have adopted the system.¹⁴⁷ The systems are highly sophisticated and efficient, shortening response time for calls and providing more protection for the victim.¹⁴⁸ When a "911" call is placed in some counties, the residence from which the call

141. See *supra* text accompanying notes 132-33.

142. *Trianon Park*, 468 So. 2d at 918-19.

143. See *supra* text accompanying notes 117-31.

144. *Warren*, 444 A.2d at 4; *Doe*, 92 N.M. at 503, 590 P.2d at 651. See also *supra* text accompanying notes 87-103.

145. *Hargrove*, 96 So. 2d at 133. See also *supra* text accompanying notes 17-18.

146. *Payne v. Broward County*, 437 So. 2d 719 (Fla. 4th Dist. Ct. App. 1983), *aff'd*, 461 So. 2d 63 (Fla. 1985).

147. *Florida 911 Program*, *supra* note 1, at 1.

148. *Hackworth*, *supra* note 1, at 25.

originated is immediately recorded by computer and operators know the immediate source of the call.¹⁴⁹ Most counties utilizing "911" systems urge their use as opposed to direct dialing to police. These and many other factors establish a nexus between the public and the public service agencies. As such a nexus is necessary to create an actionable duty, the coalition of all these factors may impose liability on a municipality.

Individuals dialing "911" in times of crisis are relying on the system to afford themselves needed assistance. Injustice occurs if these individuals, not given assistance when dialing "911", are refused compensation for their injuries because the acts of the municipality are immune from tort liability. This injustice calls for a re-evaluation of municipal sovereign immunity in Florida.¹⁵⁰

Decisions that followed the *Commercial Carrier Corp.* rationale have left the doctrine of sovereign immunity in Florida in a confused state. There is uncertainty among lower courts as to what constitutes judgmental, nontortious planning-level functions. *Commercial Carrier Corp.* calls for a case-by-case application of the test emanating from its opinion,¹⁵¹ so that a victim of a municipality's negligence for failing to properly handle a "911" emergency call could be entitled to compensation, although it is unlikely he will receive it. Compensation for injuries resulting from mishandling of a "911" call is unlikely. Yet, the municipality, rather than the individual, is in a better financial position to bear the loss for injuries resulting from its own negligence. The time for victims to be compensated for injuries arising out of a municipality's negligent operation of a public service function is upon us. The Florida Supreme Court must eliminate confusion in the lower courts by clarifying the applicability of sovereign immunity to municipalities.¹⁵²

149. *Id.*

150. The scope of this article does not purport to be all inclusive. There could be instances when the doctrine of sovereign immunity should be applicable. For example, should an emergency call not be communicated because the "911" computer system is nonfunctional or because telephone lines are down, the municipality should not be liable for injury resulting from the "911" call not being handled properly. Injury in this instance is not the fault of the municipality. *But see Galuszynski v. City of Chicago*, 131 Ill. App. 3d 505, 475 N.E.2d 960 (Ill. App. Ct. 1985). Twenty-four minutes elapsed from the time the "911" call was placed until police responded. The court dismissed plaintiffs' action for failing to allege the existence of a special duty owed by the police department to complainants.

151. *Commercial Carrier Corp.*, 371 So. 2d at 1022.

152. Before *Payne* was decided by the Florida Supreme Court, the Fourth Dis-

The planning-level versus operational-level dichotomy may be the rationale for deciding municipal tort liability, but it must first be understood before it can be effectuated.

Legislative action would be an alternative solution to the supreme court's reluctance to clarify confusion circling municipal sovereign immunity. The legislature has the power to express to Florida courts its intent behind section 768.28.¹⁵³ The *Commercial Carrier Corp.* court has carved out an exception to the waiver statute. Since then, district courts have followed suit by carving out exceptions to the *Commercial Carrier Corp.* opinion. To rectify a situation which has left Florida courts clueless as to the meaning of municipal sovereign immunity, and a situation which disfavors compensation to individuals injured because of municipal negligence, the Florida legislature could take affirmative measures to clarify the sovereign immunity doctrine. Without such action, the position of a municipality and a victim remains uncertain and confused. If the Florida Supreme Court continues to avoid clarifying the *Commercial Carrier Corp.* decision, the Florida legislature should act. It should exercise its official duty and pass legislation which provides victims of mishandled "911" calls to compensation for injuries sustained by a municipality's negligence.

III. Conclusion

Municipalities nationwide are utilizing "911" systems to assure community members rapid access to medical and police services. "911" allows municipalities to dispatch emergency assistance to injured individuals with greater accuracy and efficiency. At the suggestion of local governments, individuals in the community are dialing "911" rather than direct dialing to receive emergency services.

However, a municipality's mishandling of an emergency call raises the issue of whether tort liability should attach to this negligent conduct. As Florida has yet to deal with this issue, and other jurisdictions are divided on the liability issue, an interesting problem may confront Florida courts. The legislature encourages the use of the "911" system, yet seemingly shields municipalities from liability for negligently operating the system. This legislative protection potentially creates a situa-

trict Court of Appeal said "continuing with our uncertainty as to the delineation between operations and planning . . . [the] *Modlin* doctrine may well have been unsatisfactory but at least we understood it!" 437 So. 2d at 721.

153. FLA. CONST. art. III.

tion where a person injured as a result of a municipality's negligence is denied compensation. A re-evaluation of the Florida sovereign immunity doctrine, by either the Florida Supreme Court or the Florida legislature, is the only opportunity an injured victim has to recover damages resulting from this negligence.

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