

NOTES

SOVEREIGN IMMUNITY IN MISSOURI: JUDICIAL ABROGATION AND LEGISLATIVE REENACTMENT

Government immunity¹ is a legal doctrine that pits legal theorists² against political pragmatists in a debate of national dimensions.³ Ju-

1. "Immunity" should be distinguished from "privilege." The holder of a privilege—for example, the privilege of self-defense—avoids liability for what would otherwise be tortious conduct because the circumstances surrounding that conduct would make it unjust or unreasonable to impose liability. It is sometimes argued that privilege differs from immunity only as a matter of degree. Judicial officers, for example, hold an absolute privilege against liability for acts committed within the scope of their authority, even though their acts may have been malicious or corrupt. Rather than say that judicial officers possess an absolute privilege to act as they will, it is preferable to say that they are immune from liability in tort. Immunity arises because of the status or position of the defendant; "it does not deny the tort, but [denies] the resulting liability." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 970 (4th ed. 1971); see *RESTATEMENT (SECOND) OF TORTS* § 895, Introductory Note at 392 (1979).

2. The classic critique of governmental immunity is found in a trilogy of articles by Borchard: *Government Liability in Tort*, 34 *YALE L.J.* 1 (1924); *Governmental Responsibility in Tort*, VI, 36 *YALE L.J.* 1 (1926); *Governmental Responsibility in Tort: VII*, 28 *COLUM. L. REV.* 577 (1928). Nationally, two symposia have been influential: *Governmental Tort Liability*, 9 *L. & CONTEMP. PROB.* 181 (1942); *Sovereign Immunity and Public Responsibility*, 1966 *U. ILL. L.F.* 795. Articles on the subject are legion and largely repetitive; certain of the more influential ones include: Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 *OR. L. REV.* 250 (1937); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 *U. COLO. L. REV.* 1 (1972); Note, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity*, 26 *U. FLA. L. REV.* 89 (1973). Governmental immunity in Missouri is discussed in: Lauer, *Municipal Law in Missouri*, 28 *MO. L. REV.* 555 (1963); Littlefield, *Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity*, 9 *ST. LOUIS U.L.J.* 56 (1964); Noel, *Municipal Tort Immunity in Police Misconduct Litigation: The Case for Judicial Abrogation in Missouri*, 18 *ST. LOUIS U.L.J.* 602 (1974); Comment, *Municipal "Governmental" Tort Immunity Doctrine in Missouri*, 27 *MO. L. REV.* 224 (1962); Note, *Governmental Immunity from Tort Liability: Has the Rationale Disappeared?*, 39 *U.M.K.C. L. REV.* 252 (1971); 43 *MO. L. REV.* 387 (1978).

3. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS* 99 (rev. ed. 1976) [hereinafter cited as *NAAG REPORT*]:

The recent history of sovereign immunity and public official liability is characterized by two basic themes: The caustic and continued criticism of immunity by courts and commentators, and the steadfast unwillingness of legislators to subject the state (though not necessarily its officials and employees) to liability similar to that of a private corporation or individual. In almost all instances in which a state court has abolished immunity, the state legislature has either completely reinstated it or limited the liability statutorily.

See *RESTATEMENT (SECOND) OF TORTS*, Special Note §§ 895B-895C at 12-22 (Tent. Draft No. 19, 1973).

rists⁴ and commentators⁵ argue that "sovereign" immunity, typified by the maxim "the king can do no wrong,"⁶ is paradoxical and theoretically unsupportable in a democratic republic.⁷ Opponents of the doctrine also contend that the historical distinction between a municipality's governmental activities, which are immune from tort liability, and its proprietary activities, which are not immune, is often an arbitrary distinction⁸ ill-suited to the twin objectives of modern tort law—distribution of risks⁹ and compensation of victims.¹⁰

Fearing that politically crippling tort judgments would quickly follow abrogation of governmental tort immunity,¹¹ legislatures have reacted to the courts and commentators with surprising unanimity by codifying, at least in part, the common-law doctrine of governmental immunity.¹² Missouri's recently enacted Tort Immunity Act¹³ is a tentative attempt to resolve¹⁴ the tension between those who advocate total

4. See notes 7, 31 *infra* and accompanying text.

5. See note 2 *supra*.

6. 1 W. BLACKSTONE, COMMENTARIES *246, quoted in Kramer, *The Governmental Tort Immunity Doctrine in the United States from 1790-1955*, 1966 U. ILL. L.F. 795, 802 n.31; see 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 458-69 (4th ed. 1956).

7. In *O'Dell v. School Dist.*, 521 S.W.2d 403 (Mo.) (en banc), cert. denied, 423 U.S. 865 (1975), the Missouri Supreme Court addressed the apparent paradox of adhering to the doctrine of "sovereign" immunity in a democratic republic:

Many of those who urge the abolition of the doctrine of sovereign immunity attribute its origin to the theory that "the King can do no wrong," and then proceed to discredit the doctrine by noting "the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based." We consider such exhortations irrelevant. In Missouri, the people are sovereign. The immunity is theirs.

521 S.W.2d at 407 (citation omitted); see, e.g., *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1970) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."); *United States v. Lee*, 106 U.S. 196, 206 (1882) (Governmental immunity is based on the general policy that "the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."); *But see Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (en banc); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). See generally W. PROSSER, *supra* note 1, at 970; Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1 (1926).

8. See notes 52-55, 59-61 *infra* and accompanying text.

9. See note 31 *infra*.

10. *Id.*

11. See notes 205-07 *infra* and accompanying text.

12. See note 3 *supra*.

13. MO. REV. STAT. § 537.600-.650 (1978). This Note will refer to the statute as the Tort Immunity Act.

14. See note 170 *infra* and accompanying text.

abrogation of the common-law doctrine of governmental immunity and those who argue for its retention.

Part I of this Note surveys the case law of governmental immunity in Missouri prior to the passage of the Tort Immunity Act, discusses the problem of reasonably discriminating between governmental and non-governmental activities, and explores the application of two litigation options—nuisance and inverse condemnation—to situations in which the public entity retains immunity. Part II analyzes the probable impact of the Tort Immunity Act on traditionally governmental functions and predicts the extent to which it will extend or broaden the public entity's liability in tort. Part III then examines the Act's statutory provisions to determine the scope of retained governmental immunity and the adequacy of the Act's insurance options, and critically evaluates the Act's conspicuous omissions.

This Note concludes that the Tort Immunity Act, although marred by hasty omissions and ambiguities,¹⁵ should effectively eliminate the troublesome governmental-proprietary distinction.¹⁶ Moreover, by holding the "public entity" liable for certain tortious conduct,¹⁷ the statute will result in more adequate compensation of victims of governmental torts than provided under the prior law.¹⁸

I. THE DOCTRINE OF SOVEREIGN IMMUNITY IN MISSOURI

A. *Historical Overview*

On January 19, 1816, the Third Territorial Assembly of Missouri adopted the common law of England as it existed before 1607.¹⁹ In 1821 when Missouri attained statehood, its new constitution reaffirmed the 1816 act,²⁰ which then became the common law of Missouri.²¹ The

15. See notes 174, 187-93, 204-10 *infra* and accompanying text.

16. See notes 96, 128 *infra* and accompanying text.

17. The preamble to the Tort Immunity Act provides:

Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in [two] instances

MO. REV. STAT. § 537.600 (1978).

18. See notes 50-51 *infra* and accompanying text.

19. See *O'Dell v. School Dist.*, 521 S.W.2d 403, 405-06 (Mo.) (en banc), *cert. denied*, 423 U.S. 865 (1975).

20. MO. REV. STAT. § 1.010 (1978).

21. *Elks Inv. Co. v. Jones*, 187 S.W. 71, 74 (Mo. 1916).

scope of the sovereign immunity doctrine in Missouri, therefore, can be traced back to its common-law origins. The case most influential in the common-law development of the doctrine is *Russell v. The Men of Devon*,²² a 1788 English case. In *Russell* an individual brought suit against the residents of an unincorporated English county to recover for damages caused by the county's negligence. The court declared the county immune from suit,²³ presumably because the county lacked funds to satisfy a judgment.²⁴

Technically, *Russell* is not a part of Missouri common law because it was decided subsequent to the corpus adopted in 1816;²⁵ nevertheless, a minority of states, including Missouri, considers the decision as a most important opinion for the principle that an "action cannot be maintained for negligence against the public."²⁶ Because this principle dates back to the period of common law adopted by Missouri, even though the decision itself does not, *Russell*, in effect, represents Missouri common law on sovereign immunity.

The *Russell* principle served as the theoretical support for translating the English common-law doctrine of sovereign immunity into the

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

23. *Id.* at 362. The *Russell* court cited a case reported before 1558 as authority for its holding that the action could not be maintained. "[T]here is no law or reason for supporting the action; and there is a precedent against it in Brooke: though even without that authority I should be of opinion that this action cannot be maintained." *Id.*, quoted in *O'Dell v. School Dist.*, 521 S.W.2d 403, 406 (Mo.) (en banc), cert. denied, 423 U.S. 865 (1975). A Wyoming court also noted the *Russell* court's reliance on Brooke's abridgment:

While we have been unable to find the full report of the case abridged by Brooke, the language used by the opinion writers in the Devon case clearly indicates that antecedent to *Russell v. The Men of Devon* . . . a previous judicial pronouncement had recognized the doctrine of municipal immunity. We do find, however, in II Holdsworth's History of English Law, 3d ed., p. 545, a reference stating the author of Brooke's Abridgements died in 1558. So it is clear the early decision Brooke abridged was made before that year.

Maffei v. Incorporated Town of Kemmerer, 80 Wyo. 33, 43, 338 P.2d 808, 810-11 (1959).

24. See generally W. PROSSER, *supra* note 1, at 978.

25. The corpus adopted by Missouri in the 1816 act only included decisions through 1607; thus, *Russell*, decided in 1788, does not fall within the adopted body of common law. See text accompanying note 19 *supra*.

26. 521 S.W.2d at 407. The majority of states argue that although *Russell* contained the historical roots of governmental immunity, it did not apply an already established principle of law because the common law adopted by the American states does not include *Russell*; thus, its use as precedent constitutes judicial legislation. As judge-made law, the majority position advocates aggressive judicial abrogation of the doctrine of governmental immunity. See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). See generally W. PROSSER, *supra* note 1, at 978; Kramer, *supra* note 6, at 811.

American doctrine of state governmental immunity.²⁷ Among the state's political subdivisions, however, common law distinguished municipal corporations from quasi-corporations.²⁸ Only the latter, which included counties, townships, school districts, and special districts, enjoyed full immunity;²⁹ municipal corporations, like private corporations, remained liable for the torts of their agents and employees under the theory of respondeat superior.³⁰ The first American case to recognize the tort liability of a municipal corporation qua corporation was *Hooe v. Alexandria*.³¹ Forty years later *Bailey v. Mayor of New York*³² became the first tort liability case to bifurcate the municipal corporation into "governmental" and "proprietary" elements: a municipal cor-

27. 521 S.W.2d at 407.

28. See Kramer, *supra* note 6, at 810-21.

29. *Id.* at 812-13.

30. Judge Friendly provided a classic definition of this theory of liability:

[R]espondeat superior, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.

fra S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).

31. 12 F. Cas. 462 (C.C.D.C. 1802) (No. 6,667). A discussion of the competing policy arguments for and against governmental immunity is beyond the scope of this Note. Briefly, however, various substantive arguments advanced in favor of state tort immunity include:

the absurdity of a wrong committed by an entire people; the idea that whatever the State did must be lawful; the dubious theory that any agent of the State was always outside of his authority when he committed any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment that would descend upon the State government if it should be subjected to the litigation.

RESTATEMENT (SECOND) OF TORTS § 895B, Comment a, at 401 (1979). For state subdivisions, Prosser suggests four rationales and Kramer offers several other justifications. W. PROSSER, *supra* note 1, at 978; Kramer, *supra* note 6, at 812-13. Essentially, these authors argue: (1) state funds, derived as not-for-profit from municipal functions, should be expended on public purposes rather than to compensate private injuries; (2) a political subdivision should share in the state's governmental immunity when it acts primarily on behalf of the state for the benefit of state citizens rather than to benefit its own inhabitants, *see, e.g.*, *Krueger v. Board of Educ.*, 310 Mo. 239, 274 S.W. 811 (1925); and (3) liability could either bankrupt the political subdivision or inhibit the zealous performance of its discretionary duties, *see, e.g.*, *Payne v. County of Jackson*, 484 S.W.2d 483, 486 (Mo. 1972).

Critics of immunity for political subdivisions typically reject the *Bailey* bifurcation, *see* note 33 *infra*, and argue that the doctrine of respondeat superior should apply equally to public corporations and to private corporations, *see* note 30 *supra*. The dominant argument against municipal immunity is that the government is a more equitable loss-spreader; *i.e.*, that tort judgments, as a cost of administering government, should be borne by the public through taxation rather than shouldered solely by the injured individual. *See* W. PROSSER, *supra* note 1, at 978; RESTATEMENT (SECOND) OF TORTS § 895, Introductory Note at 394-95 (1979); Note, *The State as Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland*, 36 MD. L. REV. 653, 664 (1977).

32. 3 Hill & Den. 531 (N.Y. Sup. Ct. 1842).

poration would be held liable for torts in the exercise of its proprietary, but not its governmental, functions.³³

Missouri adopted the *Bailey* doctrine in 1860 in *Murtaugh v. City of St. Louis*.³⁴ The court distinguished governmental from proprietary functions by the nature of the benefit to be derived from the governmental activity. An activity intended to further the public's good enjoyed immunity as a governmental function, but an activity designed to confer a localized benefit could give rise to liability as a proprietary function.³⁵ The doctrine phrased the principles that guided the development in Missouri of a body of law that distinguished a political subdivision's governmental functions, which served the public's good, from its proprietary functions, which unequally benefited its own residents. Governmental activities enjoyed immunity, but proprietary functions did not.³⁶ By the end of the nineteenth century a majority of states subscribed to the *Bailey* doctrine.³⁷

Despite the acceptance in *Murtaugh* of the governmental-proprietary distinction, a latent hostility to immunity continued to exist in Missouri.³⁸ Seven times in the past fifteen years the Missouri Supreme

33. Barnett, *supra* note 2, at 268-69; Kramer, *supra* note 6, at 816. The effect of this bifurcation is to carve out a category of functions, label it "governmental," and confer immunity where liability previously existed. See Barnett, *supra* note 2, at 268-69; Kramer, *supra* note 6, at 816. Proceeding from the premise that municipal corporations traditionally shared the state's governmental immunity, Judge Dillon offered an alternate and conflicting analysis of the origins of the governmental-proprietary bifurcation. Judge Dillon saw the bifurcation as an attempt to promote justice by carving out a category of functions labeled "proprietary" for which the municipality was liable in tort. 1 J. DILLON, MUNICIPAL CORPORATIONS 184 (5th ed. 1911). In support of Judge Dillon's analysis, see *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). Missouri case law in 1865 also supported Judge Dillon's view. *Reardon v. St. Louis County*, 36 Mo. 555 (1865), stood for the proposition that entities, "created by the Legislature for purposes of public policy, are not responsible for the neglect of duties enjoined of them unless the action is given by the statute." *Id.* at 562-63.

34. 44 Mo. 479 (1869).

35. The *Murtaugh* court reasoned:

[W]here the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequence of such acts or omissions on the part of its officers and servants.

Id. at 480.

36. *Id.*

37. Kramer, *supra* note 6, at 816.

38. Nationally, the issue of governmental immunity became volatile. The drafters of the *Restatement of Torts* went so far as to claim a "definite modern trend" toward abrogation of

Court had to address frontal assaults on governmental immunity.³⁹ The seventh assault, *Jones v. State Highway Commission*,⁴⁰ proved decisive when the majority essentially adopted Judge Finch's passionately reasoned dissent⁴¹ from *O'Dell v. School District*.⁴² Plaintiff in *Jones* sought damages for personal injuries suffered in an automobile accident allegedly caused by the negligent design and maintenance of a state highway.⁴³ The court prospectively abrogated the doctrine of sovereign immunity against tort liability for all claims arising on or after August 15, 1978.⁴⁴

Jones was not so much a watershed as it was a catalyst. Within nine months of the decision the Missouri legislature passed House Bill No. 1650⁴⁵ entitled, "An Act relating to asserting claims against the state and its political subdivisions for tortious conduct."⁴⁶ This bill reen-

immunity. RESTATEMENT (SECOND) OF TORTS, Introductory Note §§ 895A-895J (1979). Notwithstanding the drafters' analysis, the only legitimate trend has been for courts to abrogate governmental immunity just to have the state legislature quickly reinstate it. See NAAG REPORT, *supra* note 3. The recent demise of charitable immunity in Missouri, announced in *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (Mo. 1969) (en banc), is a further indication of judicial hostility to immunities generically.

39. See *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc); *O'Dell v. School Dist.*, 521 S.W.2d 403 (Mo.) (en banc), *cert. denied*, 423 U.S. 865 (1975); *Payne v. County of Jackson*, 484 S.W.2d 483 (Mo. 1972); *Wood v. County of Jackson*, 463 S.W.2d 834 (Mo. 1971); *Glenn v. Department of Corrections*, 434 S.W.2d 473 (Mo. 1968); *Smith v. Consolidated School Dist. No. 2*, 408 S.W.2d 50 (Mo. 1966); *Fette v. City of St. Louis*, 366 S.W.2d 446 (Mo. 1963).

40. 557 S.W.2d 225 (Mo. 1977) (en banc).

41. In 1975 the four-member *O'Dell* majority, although admitting that the common law of governmental immunity needed modernizing, argued that the doctrine was legislatively enacted, theoretically supportable, frequently reaffirmed, and clearly a legislative question. The three-member *O'Dell* minority voiced its unwillingness to wait any longer for action from what it perceived to be an apathetic and lethargic legislature. Two years later the *O'Dell* minority attained majority status. Judge Rendlen, who replaced the departing Judge Holman, one member of the *O'Dell* majority, provided the swing vote in the new four-to-three *Jones* majority.

42. 521 S.W.2d 403, 409 (Mo. 1975) (en banc), *cert. denied*, 423 U.S. 865 (1975).

43. 557 S.W.2d at 226-27; see 43 Mo. L. REV. 387 (1978).

44. Prospective abrogation is not unusual in sovereign immunity cases. See, e.g., *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971) (en banc); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Becker v. Beaudoin*, 106 R.I. 1562, 261 A.2d 896 (1970); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). See generally Note, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888. The court in *Jones* explained: "In order that an orderly transition be made, that adequate financial planning take place, that governmental units have time to adjust their practices and that the legislature be afforded an opportunity to consider the subject in general, the doctrine is abrogated prospectively." 557 S.W.2d at 231.

45. On June 8, 1978, the Bill was signed into law.

46. MO. REV. STAT. §§ 537.600-.650 (1978).

acted the common-law doctrine of governmental immunity as it existed in Missouri immediately prior to *Jones*, but with two important exceptions.⁴⁷ Caught between a court bent on abrogation and a coalition of political subdivisions lobbying for complete reinstatement of the common law,⁴⁸ the legislature ultimately chose a middle course—the elimination of governmental immunity in those areas in which compensable public injury is most likely to occur.⁴⁹ Specifically, immunity is waived for injuries directly resulting from the negligent use of motor vehicles by public employees in the course of their employment⁵⁰ and for injuries caused by the public entity's negligent failure to maintain its property in a safe condition.⁵¹

B. *The Governmental-Proprietary Distinction: A Problem of Labeling*

The political entity in its several manifestations—state, quasi-corporation, and municipal corporation—performs a multitude of functions that do not fall neatly into categories labeled “immune” or “liable.” Consequently, the courts must first distill the essence of the function and then formulate the category. Unfortunately, courts too often shirk this duty and succumb to labeling, substituting talismanic words for principled explanation.⁵² Designation of one set of functions as “governmental” or “discretionary” and another set as “proprietary” or

47. *Id.* § 537.600. See note 17 *supra*.

48. Letter from J. Anthony Dill, Missouri State Representative, to Michael S. Anderson, October 30, 1978, on file with the *Washington University Law Quarterly*.

49. *Id.*

50. MO. REV. STAT. § 537.600(1) (1978) provides: “Injuries directly resulting from the negligent acts or omissions by public employees arising out of operation of motor vehicles within the course of their employment.”

51. *Id.* § 537.600(2) provides:

Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

52. Missouri decisions are replete with language similar to that used in *Catalano v. Kansas City*, 475 S.W.2d 426 (Mo. Ct. App. 1971), in which a ten-year-old boy brought an action for injuries sustained when he stepped on a piece of broken bottle on the city's playground. The court stated: “It is conceded that the defendant City operated this park in a proprietary capacity and that it is required to exercise ordinary care to maintain such park in a reasonably safe condition.” *Id.* at 426-27. The court did not explain why the city conceded this duty. From the context, it would appear that parks qua parks are proprietary; however, the thrust of the concession is that

“ministerial” presumes the point at issue and predictably results in arbitrary application of the law.⁵³

Attempting to avoid arbitrary applications of law, Missouri structured its common law of governmental immunity around an organizing principle: when the political entity exercises its police power, acting “in the interest of the public health, safety, and welfare,”⁵⁴ it is immune from liability in tort. The term “police power,” however, is a nebulous and potentially all-embracing concept open to the same criticisms about labeling.⁵⁵ In *Dallas v. City of St. Louis*,⁵⁶ for example, the wife of a decedent municipal employee, who was fatally injured while servicing a city garbage truck in the municipal garage, brought a wrongful death action against the municipality. Elaborating on the police power concept,⁵⁷ the court succeeded only in muddying the waters when it reasoned that a municipal activity that duplicates services available in the marketplace is a proprietary activity.⁵⁸

the park was a city park. If it had been a county park, the activity would have been deemed governmental. See notes 69-73 *infra* and accompanying text.

53. See, e.g., notes 61, 84 *infra*.

54. *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348, 353 (Mo. 1964).

55. Its potential for overinclusiveness is what renders “police power” an ineffective organizing principle. Sewer districts, the highway commission, penitentiaries, the state university, hospitals, and many other entities have all successfully claimed immunity under the police power. See notes 74-95 *infra* and accompanying text. Not surprisingly, use of a concept this amorphous has produced highly arbitrary distinctions. In *Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W.2d 888 (1951), for example, the court held noncompensable injuries sustained by a plaintiff hit by a truck that had been scooping garbage from the street, because the truck’s activities came within the city’s police power; however, in *Schweikert v. Kansas City*, 358 S.W.2d 425 (Mo. Ct. App. 1962), the court awarded compensation to a plaintiff for injuries sustained when the city’s street cleaning truck rear-ended plaintiff’s car. Indistinguishable as the cases seem to be, the *Schweikert* court avoided the police power defense by tracing the accident to defective brakes on the truck, which had been negligently repaired by the city’s maintenance garage; thus, the court held the injury compensable within the *Dallas* doctrine. See notes 56-58 *infra* and accompanying text. The court reached an equally anomalous result in *Myers v. City of Palmyra*, 355 S.W.2d 17 (Mo. 1962), in which it held that the governmental immunity doctrine does not embrace snowplows engaged in snow removal. *Hayes* and *Myers*, when read together, produce a most peculiar result: if a city truck is shoveling garbage when it hits a person, the city is immune from liability; however, if the truck is shoveling snow, the injured person will have a cause of action against the city.

56. 338 S.W.2d 39 (Mo. 1960); accord, *Wasserman v. Kansas City*, 471 S.W.2d 199 (Mo. 1971) (en banc).

57. 338 S.W.2d at 44 (quoting *Krueger v. Board of Educ.*, 310 Mo. 239, 248, 274 S.W. 811, 814 (1925)).

58. “[W]hen the city elected to own and operate a garage for the maintenance and repair of its motor vehicles, it entered the area of proprietary functions, and not governmental, and may be liable for the negligence of its employees in the operation of the garage.” *Id.* See also *Miller v. Municipal Theatre Ass’n*, 540 S.W.2d 899 (Mo. Ct. App. 1976), in which plaintiff-actress brought

In *Weiser v. Kansas City*⁵⁹ plaintiff suffered injury when a coemployee stumbled on a negligently maintained rubber runner in City Hall, the governmental seat for the municipality. Under common law the city would not be liable to suit in tort because the city maintained the property in its "governmental capacity." Fortunately for plaintiff, however, the court found that the injury occurred in the Water Department of City Hall, a statutorily "proprietary" department; consequently, plaintiff could maintain the tort action.⁶⁰ Under a functional approach, liability would not turn on the definition of the political entity whose property was involved.⁶¹

Before *Jones v. State Highway Commissioner*⁶² Missouri courts, using the same definitional analysis, conferred tort immunity on all quasi-corporate political subdivisions. The Bureau of the Census classifies state political subdivisions by five major types:⁶³ counties,⁶⁴ municipalities,⁶⁵ townships,⁶⁶ school districts,⁶⁷ and special districts.⁶⁸ All types,

an action for physical injuries caused by the city's negligent maintenance of the Municipal Theatre's premises. The city, implicitly conceding that it was engaged in a proprietary activity, did not deny the negligence; rather, it unsuccessfully sought to establish that plaintiff was an employee, not an independent contractor, and thus was required to sue for workers' compensation.

59. 481 S.W.2d 568 (Mo. Ct. App. 1972).

60. See note 166 *infra* and accompanying text.

61. Consideration of *Harvey v. Clyde Park Dist.*, 32 Ill. 2d 60, 203 N.E.2d 573 (1965), will clarify the distinction. In *Harvey* plaintiff sustained injuries allegedly caused by the negligent maintenance by defendant-park district of its playground facilities. The trial court dismissed the suit on the ground that the park district was immune by definition under the controlling statute; that is, a park district qua park district could not be sued in tort. The Illinois Supreme Court held that this classification denied plaintiff equal protection of the laws. The court reasoned that, "[I]f it is feasible, and it may be thought desirable, to classify in terms of types of municipal function, instead of classifying among different governmental agencies that perform the same function." *Id.* at 67, 203 N.E.2d at 577.

62. 557 S.W.2d 225 (Mo. 1977) (en banc).

63. D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 38 (1977); see 1 U.S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS, GOVERNMENTAL ORGANIZATION 1-6 (1967) [hereinafter cited as GOVERNMENTAL ORGANIZATION].

64. Counties, as the basic governmental building block, were designed in a then-predominantly rural society to carry out certain state-based governmental functions; e.g., the administration of justice, the assessment and collection of taxes, and the provision of basic services such as roads and keeping the peace. Counties, however, do not generally possess legislative powers. D. MANDELKER & D. NETSCH, *supra* note 63, at 39; GOVERNMENTAL ORGANIZATION, *supra* note 63, at 41-42.

65. D. MANDELKER & D. NETSCH, *supra* note 63, at 39. "[A] municipality is a political subdivision within which a municipal corporation has been established to provide general local government for a specific population concentration in a defined area." *Id.*

66. *Id.* at 41. "As distinguished from municipalities . . . townships exist to serve inhabitants of areas defined without regard to population concentrations." Townships, which generally pro-

except municipalities, are quasi-corporate by definition. The definitional approach, by immunizing all quasi-corporate entities, thus removes a large segment of political activity from tort liability. Moreover, this approach creates a major incongruity: the quasi-corporation of St. Louis County exercises all the powers of an urban government, yet it enjoys immunity from torts for which the City of St. Louis would be liable.⁶⁹ In *Coleman v. McNary*,⁷⁰ for example, plaintiff sued the St. Louis County Supervisor for slander, disparagement, and tortious interference with a contractual agreement.⁷¹ The court emphatically stated that a municipal corporation is "protected only against claims which arise from the exercise of [its] governmental function[s],"⁷² but "a county is protected against all claims by sovereign immunity."⁷³

In recent years the Missouri Supreme Court has applied the doctrine of quasi-corporate governmental immunity to a school district, a metropolitan sewer district, and the Missouri Highway Commission. *O'Dell v. School District*⁷⁴ represents the most recent restatement on governmental immunity for school districts. The *O'Dell* court drew heavily from *Smith v. Consolidated School District*,⁷⁵ which noted that

vide a limited range of services for predominantly rural areas, appear in only 24 of Missouri's 115 counties. Some Missouri municipalities operate within territory that is also served by township government. *Id.* at 40-41.

67. There are 370 school districts in Missouri. Each is "governed by an elected board of directors authorized to levy taxes and issue bonds." GOVERNMENTAL ORGANIZATION, *supra* note 63, at 381.

68. D. MANDELKER & D. NETSCH, *supra* note 63, at 42. "A majority of special districts are established to perform a single function [including, *e.g.*, cemeteries, fire protection, highways, hospitals, housing and urban renewal, libraries, parks and recreation, school buildings, sewerage, and urban water supply, *id.* at 44], but some have been given authority by their enabling legislation to provide several kinds of services." *Id.* at 42.

69. St. Louis County is a charter county, governed by an elected county supervisor and county council. The charter asserts that the county has "all powers possible for a county to have under the constitution and laws of Missouri." ST. LOUIS COUNTY CHARTER art. 1, § 1.030 (1968). See generally 41 Mo. L. REV. 49, 53-57 (1976) (discussing county home rule and the charter powers of St. Louis County).

70. 549 S.W.2d 568 (Mo. Ct. App. 1977).

71. *Id.* at 569.

72. *Id.* at 570.

73. *Id.* See *Reardon v. St. Louis County*, 36 Mo. 555, 562 (1865) (counties are "quasi corporations, created by the Legislature for purposes of public policy, [and] are not responsible for the neglect of duties enjoined on them unless the action is given by the statute."); see, *e.g.*, *Payne v. County of Jackson*, 484 S.W.2d 483 (Mo. 1972); *Wood v. County of Jackson*, 463 S.W.2d 834 (Mo. 1971); *Cullor v. Jackson Township*, 249 S.W.2d 393 (Mo. 1952).

74. 521 S.W.2d 403 (Mo.) (en banc), *cert. denied*, 423 U.S. 865 (1975).

75. 408 S.W.2d 50 (Mo. 1966).

school districts, as political subdivisions of the state under the Missouri constitution,⁷⁶ had long been immune from liability in tort for negligence.⁷⁷ The *O'Dell* court justified this immunity as conferred by the sovereign polity on "governmental entities for the performance of tasks considered essential to their general welfare."⁷⁸ Moreover, "the immunity of the sovereign people must pass to those governmental entities which serve the public interest"⁷⁹ for those entities to remain viable.⁸⁰

*Page v. Metropolitan St. Louis Sewer District*⁸¹ demonstrates the pre-*Jones* application of the "police power" label to special districts. Plaintiff alleged that defendant's negligent maintenance of its drainage ditch caused injury to his private property.⁸² Observing that the district was a constitutionally created⁸³ public corporation, the court distinguished it from a municipal corporation by emphasizing that maintenance of drainage ditches furthered the police power goals of public health, safety, and welfare; thus, the district should share in the state's immunity from liability for negligent maintenance of those ditches.⁸⁴

Like the Metropolitan Sewer District, the State Highway Commission⁸⁵ is a quasi-corporate entity.⁸⁶ Generally, the enabling statutes of

76. MO. CONST. art. 10, § 15 provides: "The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

77. See *Cochran v. Wilson*, 287 Mo. 210, 229 S.W. 1050 (1921) (school districts are instrumentalities engaged in the performance of governmental functions). See generally *Krueger v. Board of Educ.*, 310 Mo. 239, 274 S.W. 811 (1925).

78. *O'Dell v. School Dist.*, 521 S.W.2d 403, 407 (Mo.) (en banc), cert. denied, 423 U.S. 865 (1975).

79. 521 S.W.2d at 407.

80. *Id.*

81. 377 S.W.2d 348 (Mo. 1964) (en banc).

82. *Id.* at 350.

83. *Id.* at 352 (citing MO. CONST. art. 6, § 30).

84. *Id.* at 352-53. The court stated that the Sewer District was "an arm of the state exercising exclusively governmental functions." *Id.* at 353. Thus, it could not be held liable even for negligent maintenance, control, or regulation of the sewerage ditches and drains under its jurisdiction. *Id.* See *St. Joseph Light & Power Co. v. Kaw Valley Tunneling, Inc.*, No. 60682 (Mo. Nov. 14, 1979) (en banc) ("this court has traditionally denied immunity to municipal corporations for acts performed in the construction of sewers on the basis that in so acting they are performing a proprietary rather than a governmental function . . . [but] sewer districts, which can only act in a governmental capacity, do enjoy immunity for performance of these same acts").

85. In *Bush v. Highway Comm'n*, 329 Mo. 843, 46 S.W.2d 854 (1932), the Missouri Supreme Court determined that the State Highway Commission is "a subordinate branch of the executive department." *Id.* at 853, 46 S.W.2d at 858.

86. MO. CONST. art. 4, § 29 provides:

quasi-corporations provide that the entity may "sue and be sued in its official name."⁸⁷ Traditionally, however, the Missouri Supreme Court has distinguished between waivers of immunity from suit and waivers from liability.⁸⁸ This distinction has led to the conclusion that although the state may be sued, it will not be held tortiously liable in the absence of an express statutory authorization of the tort action and the payment of damages.⁸⁹ Thus, in *Bush v. Highway Commissioner*⁹⁰ the court emphatically declared that, "The proposition that the State is not subject to tort liability without its consent is too familiar to deserve extended citations of authorities."⁹¹

The Tort Immunity Act, by broadly conferring the requisite consent,⁹² dramatically changes the liability of a quasi-corporation. Allegations by injured plaintiffs that the Curators of Missouri University negligently furnished its employee with a dangerous scaffold,⁹³ or that the State Highway Commission carelessly maintained the shoulder on a state highway,⁹⁴ or that the local sewer district heedlessly allowed erosion to encroach upon private property,⁹⁵ no longer will be dismissed for failure to state a cause of action. In the specific instances in which the Act waives governmental immunity, it abandons the distinction between quasi- and municipal corporations. The Act thus mitigates the irrationality⁹⁶ of apportioning immunity according to the

The department of highways shall be in charge of a highway commission. . . . It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law.

87. *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348 (Mo. 1964); *Todd v. Curators of Mo. Univ.*, 347 Mo. 460, 147 S.W.2d 1063 (1941); *Bush v. Highway Comm'n*, 329 Mo. 843, 46 S.W.2d 854 (1932).

88. *Bush v. Highway Comm'n*, 329 Mo. 843, 46 S.W.2d 854 (1932).

89. *Id.* at 850, 46 S.W.2d at 857.

90. 329 Mo. 843, 46 S.W.2d 854 (1932).

91. *Id.* at 850, 46 S.W.2d at 857.

92. MO. REV. STAT. § 537.600 (1978); see notes 46-51 *supra* and accompanying text.

93. *Todd v. Curators of Mo. Univ.*, 347 Mo. 460, 147 S.W.2d 1063 (1941).

94. *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc).

95. *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348 (Mo. 1964).

96. See notes 59-61 *supra* and accompanying text. Justice Traynor, writing for the California Supreme Court in *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (en banc), clearly articulated this irrationality:

Some who are injured by governmental agencies can recover, others cannot; one injured while attending a community theater in a public park may recover . . . but one injured

definition of the political entity that allegedly committed the tort. From the perspective of the injured party, a broken leg is a broken leg; where the injury occurred or what political entity caused the injury should not determine whether the injured party receives compensation.

C. *No Waiver of Immunity: Available Litigation Strategies*

The Tort Immunity Act expressly waives immunity only for "negligent [or wrongful]⁹⁷ acts or omissions"⁹⁸; it does not confer liability on the governmental entity for torts in general. In four cases in which the government's waiver of immunity is uncertain, two litigation options may be used to counter a claim of governmental immunity.

The first strategy attempts to characterize the public entity's action as nuisance⁹⁹ rather than as negligence.¹⁰⁰ A separate body of pre-*Jones* case law¹⁰¹ clearly recognizes that the state or its political subdivisions may be liable for nuisance even though the same governmental entity

in a children's playground may not . . . We are asked to affirm a rule that denies recovery to one injured in a county or hospital district hospital, although recovery may be had by one injured in a city . . . hospital.

Id. at 216-17, 359 P.2d at 460, 11 Cal. Rptr. at 92 (citations omitted).

97. MO. REV. STAT § 537.600(2) (1978).

98. *Id.* § 537.600(1).

99. Interestingly, *Rogers v. Kansas City*, 327 S.W.2d 478 (Mo. Ct. App. 1959), is the only case in which a Missouri court has found a fire department liable for damages in tort. In *Rogers* the fire department maintained a nuisance on its land that injured adjacent property.

100. The philosophical origins of the doctrine of nuisance in Missouri can be traced to *Pearson v. Kansas City*, 331 Mo. 885, 55 S.W.2d 485 (1932). The *Pearson* court distinguished negligence, "the failure to exercise the degree of care required by the circumstances," from nuisance, which "does not rest on the degree of care used, but on the degree of danger existing with the best of care." *Id.* at 894-95, 55 S.W.2d at 489. See *Carpenter v. City of Versailles*, 65 S.W.2d 957 (Mo. Ct. App. 1933) (discharge of sewage upon person's premises may constitute nuisance); see, e.g., *Kinlough v. City of Maplewood*, 201 S.W. 625 (Mo. Ct. A., p. 1918); *Martin v. City of St. Joseph*, 136 Mo. App. 316, 117 S.W. 94 (1909); *Martinowsky v. City of Hannibal*, 35 Mo. App. 70 (1889).

101. See, e.g., *Brown v. City of Craig*, 350 Mo. 836, 168 S.W.2d 1080 (1943). Plaintiff in *Brown* alleged nuisance, but the facts only supported negligence; thus, the city successfully asserted governmental immunity. Today, a *Brown*-type case should be brought under MO. REV. STAT. § 537.600(2) (1978), because it is a classic case of maintaining property in a negligent condition.

Regarding nuisance generally, Prosser observed:

One anomaly is the generally accepted view that the municipality is liable if it can be found to have created or maintained a nuisance, even though it be in the course of an otherwise "governmental" function. . . . [Nuisance] rests in many cases upon nothing more than negligence [and is probably not a rationally supportable distinction]. [Thus,] resort to the more or less undefined concept of nuisance is merely one method by which the courts have retreated from municipal nonliability.

W. PROSSER, *supra* note 1, at 982-83. See also note 100 *supra*.

would be immune in a case of mere negligence.¹⁰² Illustrative of this option is *Flanigan v. City of Springfield*.¹⁰³ City residents brought an action for both personal and property damages caused by the emission of noxious gas from the city's sludge treatment plant. The Missouri Supreme Court affirmed the trial court's judgment for plaintiffs, reasoning that an action for temporary nuisance is appropriate in cases in which expert testimony establishes that it is "scientifically possible and reasonably practicable"¹⁰⁴ for a city to operate its plant without emitting noxious and harmful gases.¹⁰⁵

The second strategy to recover from a governmental entity for its tortious acts is the comparatively new theory of inverse condemnation or reverse eminent domain.¹⁰⁶ As an exception to the general rule that "no compensation is payable for consequential damage in eminent domain,"¹⁰⁷ the theory incorporates "nuisance recovery principles into eminent domain law."¹⁰⁸ In *Page v. Metropolitan St. Louis Sewer District*,¹⁰⁹ plaintiffs contended that the district "had assumed control over a natural watercourse and used it for drainage purposes with a resulting injury to them."¹¹⁰ The Missouri Supreme Court denied recovery on plaintiffs' negligence and nuisance claims.¹¹¹ The court in dictum, however, suggested that an inverse condemnation cause of action would have been recognized.¹¹² Inverse condemnation, or reverse eminent domain, is based on the Missouri constitutional provision that for-

102. In *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348 (Mo. 1964), the court, in dictum, spoke of the "tort of nuisance": "MSD partakes of the state's sovereignty with respect to tort liability for negligence and there is no logical reason why it should not enjoy the same immunity with respect to the tort of nuisance." *Id.* at 353. A string of citations to opinions from other jurisdictions followed the quotation. The dictum did not mention the body of case law referred to previously, see note 100 *supra*; text accompanying notes 103-04 *infra*. These cases, therefore, must still be controlling on the question of nuisance.

103. 360 S.W.2d 700 (Mo. 1962).

104. *Id.* at 704.

105. *Id.*

106. See *Twiehaus v. Wright City*, 412 S.W.2d 450, 453 (Mo. 1967); *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348, 352-54 (Mo. 1964); *Mattingly v. St. Louis County*, 569 S.W.2d 251, 251-52 (Mo. Ct. App. 1978). See generally Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. REV. 3; Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969).

107. D. MANDELKER & D. NETSCH, *supra* note 63, at 889.

108. *Id.*

109. 377 S.W.2d 348 (Mo. 1964).

110. *Id.* at 352.

111. *Id.*

112. *Id.* at 353-54.

bids appropriation of a person's property for a public use without compensation.¹¹³ Although the state typically cannot be sued without its consent,¹¹⁴ the state need not statutorily authorize an action in inverse condemnation because the alleged injury entails violation by the state of a person's constitutionally protected interest; the constitutional provision is self-enforcing.¹¹⁵ The *Page* court thus concluded that an action for inverse condemnation could be brought against "the state as well as others having the power of eminent domain"¹¹⁶ including drainage districts."¹¹⁷

II. IMPACT OF THE TORT IMMUNITY ACT

A. *Effect of the Act on Traditionally "Governmental" Functions*

The state's police power traditionally has been construed to authorize municipalities to incarcerate lawbreakers,¹¹⁸ hospitalize the infirm,¹¹⁹ regulate traffic,¹²⁰ enforce the laws, and protect the community from fire.¹²¹ Before the Tort Immunity Act, Missouri courts defined the limits of governmental immunity by the extent to which an activity promoted the "health, safety and welfare"¹²² of the polity. This standard, however, was unworkable and amorphous.¹²³ The Tort Immu-

Recently, in *Mattingly v. St. Louis County*, 569 S.W.2d 251 (Mo. Ct. App. 1978), the court reviewed the dismissal of a complaint that stated claims based on tort and inverse condemnation. The court found the county immune from tort liability, but not from claims of inverse condemnation.

113. Mo. CONST. art. I, § 26 ("private property shall not be taken or damaged for public use without just compensation"). See, e.g., *State ex rel. State Highway Comm'n v. Swink*, 537 S.W.2d 556, 558 (Mo. 1976) (en banc); *State ex rel. Hausgen v. Allen*, 298 Mo. 448, 459-60, 250 S.W. 905, 907 (1923) (en banc).

114. See *Charles v. Spradling*, 524 S.W.2d 820 (Mo. 1975); *State ex rel. State Highway Comm'n v. Bates*, 317 Mo. 696, 296 S.W. 418 (1927).

115. *Anderson v. Inter-River Drainage & Levee Dist.*, 309 Mo. 189, 274 S.W. 448 (1925); see *State ex rel. State Highway Comm'n v. Swink*, 537 S.W.2d 556 (Mo. 1976) (en banc); *Wells v. State Highway Comm'n*, 503 S.W.2d 689 (Mo. 1973); *McGrew v. Granite Bituminous Paving Co.*, 247 Mo. 549, 155 S.W. 411 (1912).

116. 377 S.W.2d at 354 (citing 29 C.J.S. *Eminent Domain* § 97 (1965)).

117. *Id.* (citing *Southwestern Bell Tel. Co. v. Drainage Dist.*, 215 Mo. App. 456, 247 S.W. 494 (1923)).

118. See notes 124-28 *infra* and accompanying text.

119. See notes 129-39 *infra* and accompanying text.

120. See notes 140-48 *infra* and accompanying text.

121. See notes 149-54 *infra* and accompanying text.

122. See note 55 *supra* and accompanying text.

123. *Id.*

nity Act will be both more predictable in its application and more comprehensive in its compensation of victims of governmental torts.

As an inmate of the Missouri State Penitentiary, Edgar Glenn obeyed orders to operate an obviously dangerous and deteriorated machine and, consequently, sustained injuries necessitating amputation of his fingers.¹²⁴ In *Glenn v. Department of Corrections*¹²⁵ the Department moved to dismiss Glenn's action for damages on the ground of sovereign immunity. The trial court sustained the motion and the Missouri Supreme Court affirmed on appeal in light of *Ulrich v. City of St. Louis*.¹²⁶ In *Ulrich* the superintendent of a city workhouse ordered plaintiff-inmate to harness a mule, which the superintendent knew to be vicious. The court denied plaintiff's damages action for injuries sustained when the mule kicked him, because negligence is not compensable in cases in which defendant is engaged in a governmental activity.¹²⁷

The Tort Immunity Act undermines both *Glenn* and *Ulrich* in that it waives governmental immunity for injuries caused by a public entity's negligent maintenance of its property. The Act thus signals increased accountability for persons charged with maintaining public property and, more specifically, for wardens and jailers.¹²⁸

Negligently maintained city and county hospitals also will no longer be shielded from tort liability by the governmental immunity doctrine. As recently as January 1978, the Missouri Court of Appeals affirmed the dismissal of a negligence claim against a county hospital in *Hanson*

124. *Glenn v. Department of Corrections*, 434 S.W.2d 473 (Mo. 1968). Glenn had been ordered to wire around the safety button on an automobile license-stamping machine that was evidently out of repair.

125. *Id.*

126. 112 Mo. 138, 20 S.W. 466 (1892).

127. *Id.* at 148-49, 20 S.W. at 469.

128. The Tort Immunity Act waives immunity from actions and liability for:

Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

MO. REV. STAT. § 537.600(2) (1978).

This waiver, however, does not affect the doctrine of official immunity; *i.e.*, to the extent that either the *Glenn* or *Ulrich* court based its denial of liability on the official's discretionary authority, the decisions are not undermined by the Tort Immunity Act. See note 151 *infra*.

v. Pulaski County Memorial Hospital.¹²⁹ Without questioning the viability of the sovereign immunity doctrine or citing any authority, the court applied the principles first enunciated in *Schroeder v. City of St. Louis*.¹³⁰ Plaintiff in *Schroeder* asserted that the wrongful death of his infant daughter, a paying patient,¹³¹ resulted from the negligence of both the city hospital and its doctors. Even though the hospital carried liability insurance, the court held that the preservation and protection of public health fell within the city's police powers; thus, the city, the hospital, and the doctors enjoyed immunity from the action.¹³²

The *Schroeder* court did not indicate whether plaintiff alleged medical malpractice or negligent maintenance of hospital property. Applying the analysis of the Tort Immunity Act advanced above concerning the immunity *vel non* of the Department of Corrections,¹³³ the immunity of hospitals no longer can be perfunctorily presumed; the negligent maintenance of hospital property will support a damages award to an injured plaintiff¹³⁴ just as the negligent maintenance of jail facilities can result in the imposition of liability.

The Tort Immunity Act, however, will not require a finding of liability in all situations. *Pitts v. Malcolm Bliss Mental Health Center*¹³⁵ demonstrates that the doctrine of governmental immunity, in a limited number of circumstances, is a necessary and equitable doctrine. Decedent's wife in *Pitts* brought an action against the state, the mental health center, and two of its doctors for the wrongful death of her husband, who had been shot by a former patient. The court conferred immunity on the hospital as an instrument of the state, recognizing that a governmental action that breaches no affirmative duty is nontortious

129. 560 S.W.2d 615 (Mo. Ct. App. 1978).

130. 360 Mo. 293, 228 S.W.2d 677 (1950).

131. The court considered the status of the patient, paying or indigent, as irrelevant. *Id.* at 293, 228 S.W.2d at 678.

132. See *Bullmaster v. City of St. Joseph*, 70 Mo. App. 60 (1897) (rules of respondeat superior do not apply to agents of municipality engaged in performance of a governmental function); see, e.g., *Zummo v. Kansas City*, 285 Mo. 222, 225 S.W. 934 (1920); *Watrous v. City of St. Louis*, 281 S.W.2d 594 (Mo. Ct. App. 1955).

133. See note 128 *supra* and accompanying text.

134. The import of the Tort Immunity Act is that if the building, equipment, or other property of a public hospital is negligently maintained, the public entity will be liable. The Act does not extend liability to negligent acts or omissions. See note 151 *infra*. To that extent, the liability of public hospitals is less than that of charitable hospitals because of the total abrogation of charitable immunity. See *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (Mo. 1969). See also *Garnier v. St. Andrew Presbyterian Church*, 446 S.W.2d 607 (Mo. 1969) (en banc).

135. 521 S.W.2d 501 (Mo. Ct. App. 1975).

even if it harms an individual.¹³⁶ The *Pitts* court, moreover, granted immunity for an error of medical judgment, not for the negligent maintenance of medical facilities. Because the Tort Immunity Act does not address errors in medical judgment, *Pitts* should continue to be authoritative.¹³⁷

An area related to, but distinguishable from, hospitals is the liability *vel non* of ambulances that service a city hospital. Although Missouri case law never has addressed the issue directly, dicta in *Dugan v. Kansas City*¹³⁸ indicated that when an ambulance, whether privately or governmentally owned, services a city hospital, it shares in the hospital's immunity. The Tort Immunity Act, however, will preempt the *Dugan* dicta because the Act categorically waives liability for injuries arising out of the operation of motor vehicles used in the course of government employment.¹³⁹

The Tort Immunity Act also will affect traffic regulation by the government. Analogizing automatic traffic signals to the policemen of an earlier era who manually directed traffic through intersections, the Missouri Supreme Court in *Prewitt v. City of St. Joseph*¹⁴⁰ concluded that the regulation of traffic and the installation and maintenance of traffic signals constitute governmental functions.¹⁴¹ The legislators and al-

136. RESTATEMENT (SECOND) OF TORTS § 895B (1979). A tort is the breach of an affirmative duty that gives rise to an action for damages. See W. PROSSER, *supra* note 1, at 1.

137. Courts have unanimously recognized that doctors are not liable for mere errors of judgment. RESTATEMENT (SECOND) OF TORTS § 895B, Comment e (1979). See W. PROSSER, *supra* note 1, at 162-66.

138. 373 S.W.2d 175, 176 n.1 (Mo. Ct. App. 1963).

139. MO. REV. STAT. § 537.600(1) (1978). See note 50 *supra*.

Before the Tort Immunity Act, Missouri common law extended governmental immunity to city vehicles. In *Cassidy v. City of St. Joseph*, 247 Mo. 197, 152 S.W. 306 (1912), a city employee negligently, and in violation of a city ordinance, left unhitched a team of horses. In the course of running away, the horses fatally struck a fellow employee. A wrongful death action ensued, but, denying recovery, the court held that, "The patrol wagon and its driver, the city ambulance with its driver, the street sweepers with the vehicles and employees that gather the dirt, are all agencies of the government." *Id.* at 207, 152 S.W. at 310. The court in *Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W.2d 888 (1951) reaffirmed that, "It is unquestionably the law in this state that street cleaning is a governmental function for which the city is not liable for negligence in its performance." *Id.* at 371, 241 S.W.2d at 890 (quoting Appellant's Brief). With the abolition of the governmental-proprietary distinction for injuries arising out of the operation of motor vehicles, the immunity of garbage collectors is also destined for the trash heap.

140. 334 Mo. 1228, 70 S.W.2d 916 (1934).

141. *Id.* at 1232, 70 S.W.2d at 918. See *Watson v. Kansas City*, 499 S.W.2d 515, 518 (Mo. 1973) (en banc):

[T]he placing (or failure to place) of a sign on North Manchester to warn that the intersection in question was a T intersection is a form of traffic regulation, direction, or con-

derpersons who choose the installation sites,¹⁴² and correlatively, the city that maintains them, were immune from liability claims,¹⁴³ even for injury "caused by the disintegration of a stop sign, or for a failure to keep traffic lights functioning properly,"¹⁴⁴ unless the city breaches its duty to barricade or warn of dangerous conditions near a roadway.¹⁴⁵

Under the Tort Immunity Act, the governmental entity will continue to enjoy immunity for injuries that result from the legislative decision in the location of signals. The Act, however, narrows the scope of immunity for cases in which liability is based upon negligent maintenance of signals.¹⁴⁶ If the facts support a plaintiff's allegations that the public entity had actual or constructive knowledge of the dangerously maintained signal, then courts will hold the public entity liable. Furthermore, when faced with the difficulty of establishing the dangerous condition of the signal, a plaintiff may plead in the alternative that the defective street signal constitutes a breach by the governmental entity of its duty to keep streets in a safe condition.¹⁴⁷ This characterization of the breach is possible because defective traffic signals, as obstructions, arguably fall within the duty-to-warn exception under the common law.¹⁴⁸

Not surprisingly, two of the most firmly entrenched immunities ex-

ontrol, and hence a governmental function. It follows that there would be no liability on defendant for its alleged negligence in failing to install such a sign on North Manchester.

See also Gillen v. City of St. Louis, 345 S.W.2d 69 (Mo. 1961).

142. Regarding the immunity that attaches to discretionary lawmaking, see *Bean v. City of Moberly*, 350 Mo. 975, 169 S.W.2d 393 (1943) (no liability for failure to make or enforce proper laws); *Moore v. City of Cape Girardeau*, 103 Mo. 470, 15 S.W. 755 (1891) (same).

143. That this is not a necessary corollary is manifest by considering *Cassidy v. City of St. Joseph*, 247 Mo. 197, 152 S.W. 306 (1912), in which the court held that the decision whether and where to construct a street is purely discretionary, hence governmental, but once a street is constructed, its maintenance is purely proprietary. *Id.*

144. *Watson v. Kansas City*, 499 S.W.2d 515, 518 (Mo. 1973) (citing 18 E. McQUILLAN, MUNICIPAL CORPORATIONS § 53.42).

145. *German v. Kansas City*, 512 S.W.2d 135, 143 (Mo. 1974) (en banc) ("submissible case of negligence on the City's failure to barricade or warn in violation of its duty to keep its streets in a reasonably safe condition for travel"); *Treon v. City of Hamilton*, 363 S.W.2d 704 (Mo. 1963) (city has duty to warn or barricade newly constructed and dangerously deceptive roadway); *Lavinge v. City of Jefferson*, 262 S.W.2d 60 (Mo. Ct. App. 1953) (city liable for collision occurring outside traveled portion of highway only if location was inherently dangerous or known by city to be commonly used); *Williams v. City of Mexico*, 224 Mo. App. 1224, 34 S.W.2d 992 (1931) (city negligent for failing to barricade road leading to bridge that had been removed).

146. MO. REV. STAT. § 537.600(2) (1978). *See* note 51 *supra*.

147. *See* note 161 *infra* and accompanying text.

148. *See* note 145 *supra* and accompanying text.

tend to police¹⁴⁹ and fire departments.¹⁵⁰ This almost unanimous body of case law is the result of a consensus that these officers represent not only the municipality, but the public as well.¹⁵¹ This rationale, however, is less persuasive in cases of the careless or reckless use of motor vehicles by firemen¹⁵² or policemen.¹⁵³ Under the Tort Immunity Act, in any event, injuries suffered because of the negligent use of any motor vehicle by any public employee will constitute a cause of action for which immunity has been waived.¹⁵⁴

149. In *Hinds v. City of Hannibal*, 212 S.W.2d 401 (Mo. 1948), plaintiff alleged in part that he had been assaulted by a policeman while in the city jail, and that the city negligently failed to exercise due care in its selection and retention of an unqualified and dangerous employee. *Id.* at 402. The court held that the city did not have an absolute duty to select and retain only safe and competent police officers; rather, "in its governmental function of maintaining and operating a police force," it had only a relative duty to exercise reasonable care in the selection and retention of police officers. *Id.* at 403. *See, e.g.*, *Brown v. City of Craig*, 350 Mo. 836, 168 S.W.2d 1080 (1943) (action for wrongful death of husband who burned in city jail; plaintiff alleged actionable nuisance in city's failure to safely maintain the jail, but court held that immunity attached because facts could only support negligence claim); *Worley v. Inhabitants of Columbia*, 88 Mo. 106 (1885) (action for false arrest; court held that bare allegation of trespass by marshal on the person of plaintiff does not make out prima facie case against the municipal corporation, which prima facie is not liable for its wrongful acts); *McConnell v. City of St. Charles*, 188 Mo. App. 49, 204 S.W. 1075 (1918) (action for false imprisonment for violation of town ordinance prohibiting sale of meat without a license; court held that because ordinance was a valid exercise of police power, even tortious enforcement of the valid ordinance was immunized).

150. *See, e.g.*, *Fette v. City of St. Louis*, 366 S.W.2d 446 (Mo. 1963); *Richardson v. City of Hannibal*, 330 Mo. 398, 50 S.W.2d 648 (1932) (en banc); *Heller v. Mayor of Sedalia*, 53 Mo. 159 (1873); *Light v. Lang*, 539 S.W.2d 795 (Mo. Ct. App. 1976); *McKenna v. City of St. Louis*, 6 Mo. App. 320 (1878).

151. *See* notes 149-50 *supra*.

The Tort Immunity Act does not address the issue of official immunity. Because the theoretical bases and the purposes of official immunity differ from those of governmental immunity, a discussion of official immunity is beyond the scope of this Note. *See generally* *Butz v. Economou*, 438 U.S. 478, 522 (1978) (Rehnquist, J., dissenting) (under majority's holding, "the defense of official immunity [for federal officers] will have been abolished in fact if not in form").

The question of official immunity *vel non*, however, should be considered by the plaintiff in determining available defendants. *See, e.g.*, *Clark v. Furch*, 567 S.W.2d 457, 458 (Mo. Ct. App. 1978) (public grade school gym teacher not immune from suit for negligent supervision); *Kersey v. Harbin*, 531 S.W.2d 76, 81 (Mo. Ct. App. 1975) ("we know of no general principle of law which clothes grammar school teachers with immunity from liability for their negligent acts").

152. *See Richardson v. City of Hannibal*, 330 Mo. 398, 50 S.W.2d 648 (1932) (en banc) (fire-truck driven on wrong side of road collided with and destroyed parked car).

153. *See Statler v. City of Joplin*, 189 Mo. App. 383, 176 S.W. 241 (1915) (police officer, who recklessly drove car that he knew to be mechanically defective, struck and crippled innocent third party).

154. MO. REV. STAT. § 537.600(1) (1978). *See* note 50 *supra*.

B. *Extension of Liability for "Proprietary" Activities to Quasi-Corporations*

Before *Jones*, the nonimmunity of municipal corporations extended to those activities for which the governmental entity most likely would be negligent; namely, the maintenance of parks and playgrounds and the construction, maintenance, and repair of streets, curbs, and sidewalks.¹⁵⁵ Contrary to the majority of jurisdictions,¹⁵⁶ Missouri considered the maintenance of municipal parks to be a proprietary function.¹⁵⁷ In addition, the Missouri Supreme Court frequently acknowledged the nondelegable duty of municipal corporations to construct and maintain streets¹⁵⁸ and adjacent curbs and sidewalks¹⁵⁹ in a reasonably safe condition. Courts also imposed liability on the municipality if it had actual or constructive notice of the dangerous condition of a park, street, or sidewalk.¹⁶⁰

155. See Orlove, *Municipal Tort Liability*, 15 J. Mo. B. 291 (1959). "[S]idewalks and streets . . . are the largest areas of litigation as far as municipal litigation is concerned. In Kansas City 90% of the tort cases involve sidewalks and streets." *Id.* at 293.

In addition to parks, roads, and sidewalks, Missouri common law considered city ownership and maintenance of an airport a proprietary, not a governmental, function. *Behnke v. City of Moberly*, 243 S.W.2d 549 (Mo. Ct. App. 1951). Mo. CONST. art. 6, § 26(e) provides:

Any city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness in an amount not to exceed an additional ten per cent of the value of the taxable tangible property shown as provided in section 26(b), for the purpose of paying all or any part of the cost of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city, provided the total general obligation indebtedness of the city shall not exceed twenty per cent of the assessed valuation.

Thus, these municipal functions are implicitly proprietary. See, e.g., *Lockhart v. Kansas City*, 351 Mo. 1218, 175 S.W.2d 814 (1943); *Burgess v. Kansas City*, 259 S.W.2d 702 (Mo. Ct. App. 1953).

156. See W. PROSSER, *supra* note 1, at 982.

157. *Catalano v. Kansas City*, 475 S.W.2d 426 (Mo. Ct. App. 1971) ("It is conceded that the defendant City operated this park in a proprietary capacity and that it is required to exercise ordinary care to maintain such park in a reasonably safe condition."); see *Jackson v. City of St. Louis*, 422 S.W.2d 45 (Mo. 1967); *Capp v. City of St. Louis*, 251 Mo. 345, 158 S.W. 616 (1913) (en banc). Compare note 52 *supra* with note 61 *supra*. See also *Teaney v. City of St. Joseph*, 520 S.W.2d 705 (Mo. Ct. App. 1975).

158. See, e.g., *Carruthers v. City of St. Louis*, 341 Mo. 1073, 111 S.W.2d 32 (1937).

159. See, e.g., *Hart v. City of Butler*, 393 S.W.2d 568 (Mo. 1965).

160. See *Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W.2d 888 (1951).

[A city] has the duty to construct and maintain [streets] in such condition that they will be reasonably safe for public travel, and therefore, is liable in damages for injuries caused by negligent construction or by failure to keep them "free from nuisances, defects, and obstructions caused by itself or by third parties if it . . . had actual or constructive notice thereof in time to abate the nuisance, remove the obstruction or repair the defect." There can be no question about these well established rules or that the duties imposed by them are non-delegable duties.

Id. at 371, 241 S.W.2d at 890.

*German v. Kansas City*¹⁶¹ represents the court's most recent encounter with the issue of road maintenance. The *German* court found that inadequate road markings caused plaintiff's collision.¹⁶² Although defendant-city admitted its duty to keep its streets in a reasonably safe condition for travel, the city contended that it was exempt from liability because plaintiff's complaint related directly to the "regulation and movement of traffic,"¹⁶³ a governmental function.¹⁶⁴ The court, however, held for plaintiff, finding that the city's failure to warn fell "within the stated exception to the governmental immunity doctrine."¹⁶⁵

The Tort Immunity Act will effectively eliminate the governmental-proprietary distinction that plagued pre-*Jones* common law.¹⁶⁶ Every "governmental entity" will be liable in tort in every way that municipal corporations previously had been liable. In addition, municipal corporations will be liable for torts arising from a broad range of functions in which it previously had enjoyed immunity.¹⁶⁷

III. STATUTORY CONSTRUCTION¹⁶⁸

A. *Scope of Retained Governmental Immunity*

Necessitated by the *Jones* court's abrogation of governmental immu-

161. 512 S.W.2d 135 (Mo. 1974) (en banc); see *Myers v. City of Palmyra*, 355 S.W.2d 17 (Mo. 1962):

[A] city must act with due care, not only to keep the streets free from dangerous conditions but also in doing any act to repair them and maintain them open for traffic, and under the well-established law of Missouri it is liable for its torts resulting from activities done in carrying out these duties regardless of the name by which they may be called.

Id. at 19.

162. 512 S.W.2d at 142 (partially obscured yellow lane lines inadequately informed motorists that four-lane undivided highway was being used temporarily for two-lane, two-way traffic; court based finding on unsatisfactory number, location, and condition of road signs, or absence of barricade and separation from oncoming traffic lanes).

163. *Id.* at 141.

164. *Id.* at 144.

165. *Id.* at 142. See note 145 *supra* and accompanying text.

166. The dichotomy created by *Bailey* and *Murtaugh*, see notes 32-37 *supra*, stemmed from classifying immune activities according to which political subdivision engaged in the activity rather than according to the function of the activity. The Tort Immunity Act extends liability for certain activities to *all* political entities.

167. See, e.g., notes 134, 139 *supra*.

168. To construe the Tort Immunity Act, this part of the Note will invoke several well-settled principles of statutory construction. See generally J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (4th ed. C. Sands 1972). If the language of a statute is not clear, plain, and unambiguous on its face, courts may appropriately use extrinsic aids to assist in its construction. See *Jackson County v. Spradling*, 522 S.W.2d 788 (Mo. 1975); cf. *Chapman v. Sanders*, 528

nity,¹⁶⁹ the Tort Immunity Act "was intended to be a stop gap matter."¹⁷⁰ The Act waives immunity only for acts or omissions of public employees, but fails to define "employee." Only the workers' compensation statute among Missouri laws offers a definition of employee.¹⁷¹ This statute includes as employees elected or appointed officials as well as salaried and wage earning individuals.¹⁷² Because the definition does not expressly include independent contractors, the rule of statutory construction *expressio unis est exclusio alterius*¹⁷³ compels their exclusion from the provisions of the Act. The status of agents under the Act remains open to question.¹⁷⁴

The waiver of immunity under the Tort Immunity Act applies to

S.W.2d 462 (Mo. Ct. App. 1975) (when language of statute is unambiguous and conveys plain and definite meanings, courts have no business foraging among rules of construction to impose other meanings). In examining the legislative purpose behind a statute, it is proper for courts to consider not only acts passed at the same session of the legislature, but also acts passed at both prior and subsequent sessions. See *Missouri Power & Light Co. v. Riley*, 546 S.W.2d 792 (Mo. Ct. App. 1977) (construction of statute often requires an examination of historical developments of legislation and related statutes). Statutes pertaining to the same subject matter should be considered as a unit. See *Raytown v. Danforth*, 560 S.W.2d 846 (Mo. 1977); *State v. Kraus*, 530 S.W.2d 684 (Mo. 1975); *ITT Canteen Corp. v. Spradling*, 526 S.W.2d 11 (Mo. 1975); *Southwest Foreign Indus., Inc. v. Loehr Employment Serv., Inc.*, 543 S.W.2d 322 (Mo. Ct. App. 1976).

The Tort Immunity Act should be construed in the light of *O'Dell v. School Dist.*, 521 S.W.2d 403 (Mo.) (en banc), *cert denied*, 423 U.S. 865 (1975), because it recounts the legislative attrition of governmental immunity in Missouri. This chronicle, *id.* at 408-09, indicates the probable scope and intent of the Act. In addition, the Act should be read in *pari materia* with the provisions that authorize the acquisition of insurance by municipalities against tort liability in the exercise of governmental functions, Mo. REV. STAT. § 71.185 (1978), the procurement of similar insurance by the State Highway Commission, *id.* § 226.092, the extension of workers' compensation to state employees, *id.* §§ 105.800- .850, the Executive Branch Liability Insurance program, *id.* §§ 34.260-.275, and the Tort Defense Fund provisions, *id.* § 105.710.

169. *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc). "In order that . . . the legislature be afforded an opportunity to consider the subject in general, the [sovereign immunity] doctrine is abrogated prospectively as to all claims arising on or after August 15, 1978." *Id.* at 231.

170. Letter from Joe D. Holt, Missouri State Representative, Majority Floor Leader and Sponsor of the Tort Immunity Act, to Michael S. Anderson, January 8, 1979, on file with the *Washington University Law Quarterly*. Representative Holt stated that the Tort Immunity Act "is not intended to be a comprehensive all knowing piece of legislation for the next one hundred years." *Id.*

171. Mo. REV. STAT. § 105.800- .850 (1978).

172. *Id.* § 105.800:

As used in sections 105.800 to 105.850, the term "state employee" means any person who is an elected or appointed official of the state of Missouri or who is employed by the state and earns a salary or wage in a position normally requiring the actual performance by him of duties on behalf of the state.

173. See generally 2A J. SUTHERLAND, *supra* note 168, at 123-36.

174. Representatives Holt, *supra* note 170, and Dill, *supra* note 48, disagree over whether the

both "real and personal property" of the public entity.¹⁷⁵ The public entity, therefore, must maintain all its property—whether a playground or a courthouse—in a safe condition.¹⁷⁶

B. *Insurance Options*

The insurance procedures constitute an important, but confusing, part of the Tort Immunity Act.¹⁷⁷ Governmental entities "may purchase liability insurance for tort claims made"¹⁷⁸ against it, with an arbitrary \$800,000 maximum recovery for claims arising out of a single occurrence and a \$100,000 maximum per person per occurrence.¹⁷⁹ The Act waives sovereign immunity only to the maximum amounts of insurance purchased or to the maximum amounts of "any self insurance plan duly adopted by the governing body of any political subdivisions of the state."¹⁸⁰ Plaintiffs may recover compensatory, but not punitive or exemplary, damages.¹⁸¹

Tort Immunity Act intended "employee" to include agents; Representative Holt maintains that agents are included, but Representative Dill contends that they are excluded.

175. MO. REV. STAT. § 1.020(11) (1978). This definition derives from a section of the Missouri Statutes that defines common terms appearing in statutes throughout the code.

176. Tort law has commonly defined the property owners' duty to maintain property in terms of the intended users. The traditional categories are trespasser, licensee, and invitee, with the corresponding duty becoming stricter as one moves along the continuum. Common carriers and innkeepers, moreover, have generally been held to a higher standard of care. *See generally* W. PROSSER, *supra* note 1, at 180-87. It is not unreasonable to inquire whether the state assumes the same standard of care in the maintenance of its parks and sewers as it assumes in the maintenance of its governmental buildings and garbage trucks. Representatives Holt, *supra* note 170, and Dill, *supra* note 48, agree that the state's duty to the public is identical for all of its property. The duty assumed is that of a property owner to an invitee; that is, the public entity "is under an affirmative duty to protect [the people], not only against dangers of which he knows, but also against those which with reasonable care he might discover." W. PROSSER, *supra* note 1, at 385. The statute phrases this duty in terms of "actual or constructive notice of the dangerous condition." MO. REV. STAT. § 537.600(2) (1978).

177. Representative Holt, *supra* note 170, explained:

[The Act] has another weakness in that it attempts to create some kind of an insurance agency between governmental entities who allow themselves to self-insure. That's ridiculous. The strengths of the legislation include that it does restore some measure of immunity to government and clouds the issue considerably for anyone who wants to bring an action between now and the time we can enact a decent piece of legislation.

178. MO. REV. STAT. § 537.610(1) (1978).

179. *Id.* Representatives Holt and Dill agree that these figures were arbitrary. Representative Dill explained: "It was considered that limits would allow compensation to an injured party at a satisfactory level in most situations while limiting the total liability of a political subdivision." Dill, *supra* note 48.

180. MO. REV. STAT. § 537.610(1) (1978).

181. *Id.* § 537.610(3).

Political subdivisions, upon payment of a license fee to the Director of Insurance and compliance with certain filing procedures, may join together for the purpose of creating an entity to provide liability insurance.¹⁸² The Director must approve the articles of the self-insurance association, issue a license to the association to do business in the state¹⁸³ as a nonprofit corporation,¹⁸⁴ examine amendments to the articles of incorporation and renew licenses,¹⁸⁵ and take charge of the association if it defaults.¹⁸⁶

Public entities apparently have three options under the Act: purchase insurance, self-insure, or remain uninsured. The statute provides that political subdivisions "may" purchase insurance. *Bloom v. Missouri Board for Architects, Professional Engineers and Land Surveyors*¹⁸⁷ held that the term "may" in a statute, unless otherwise indicated, is permissive, not mandatory; moreover, a permissive construction accords with common usage.¹⁸⁸ The statute also authorizes waiver of sovereign immunity up to the maximum amount of any self-insurance plan "duly adopted by the governing body of any political subdivision of the state."¹⁸⁹ The "duly adopted" language clearly militates against a construction that would deem the political entity to be self-insured as a matter of law if a commercial insurance policy were not purchased.¹⁹⁰

On the other hand, it could be argued that the legislature did not intend to leave open this third option to public entities, because to permit a political subdivision to decide whether to insure, and therefore, whether to waive its sovereign immunity, would be like trusting the cat to guard the bird cage. To impute this intent to the legislature, however, would be to ignore that both the House and Senate had identical

182. A letter from Christopher M. Lambrecht, Counsel for the Missouri Division of Insurance, to Michael S. Anderson, October 26, 1978, on file with *Washington University Law Quarterly*, states that the Division has not, per MO. REV. STAT. § 374.045 (1978), formulated rules and regulations regarding the insurance provisions of the Tort Immunity Act. Further, they "do not contemplate promulgating any such rules in the near future."

183. MO. REV. STAT. § 537.630 (1978).

184. *Id.* § 537.635.

185. *Id.* § 537.640.

186. *Id.* § 537.645.

187. 474 S.W.2d 861 (Mo. Ct. App. 1971).

188. *Cf.* *Howard v. Banks*, 544 S.W.2d 601 (Mo. Ct. App. 1976) (word "shall" within a statute is construed to mandate the doing of whatever is required).

189. MO. REV. STAT. § 537.610(1) (1978).

190. As unpersuasive as a "self-insured by default" argument is, both representatives Holt, *supra* note 170, and Dill, *supra* note 48, presume that this was the intent of the legislature.

bills that would have accomplished the identical wholesale reinstatement of sovereign immunity in a much less circuitous manner.¹⁹¹ Moreover, it was the political subdivisions that, in the wake of *Jones*, clamored for a complete reinstatement of governmental immunity.¹⁹² Nevertheless, the legislature erred when it left the decision whether to insure with the individual political subdivisions.¹⁹³

Although the speedy enactment of the Tort Immunity Act is largely attributable to the fear that adequate insurance against unlimited liability would be too costly, it has been impossible to determine reasonable estimates of the financial impact of insurance provisions on Missouri and its political subdivisions.¹⁹⁴ Commentators from a previous generation¹⁹⁵ generally concluded that, "The tort burden of small municipalities has been greatly exaggerated."¹⁹⁶ These conclusions,

191. H.R. 988, 79th General Assembly (1978), and S. 684, 79th General Assembly (1978) both provided:

Neither the state of Missouri nor any political subdivision of the state is liable in tort for any of its acts or any act of any of its officials, employees or agents nor is the state or any political subdivision subject to suit for any tortious conduct it commits or is committed by any of its officials, employees or agents unless otherwise expressly provided in the statutes of this state. Any common law rule to the contrary is hereby specifically abrogated.

192. Dill, *supra* note 48.

193. One commentator observed:

The fact that most statutes are permissive rather than mandatory, however, indicates that the legislatures, too, are not totally committed to shifting the risk of such injuries to taxpayers. The effect of these statutes, then, is to pass the policy choice on this issue back to the local governmental entities.

Gibbons, *Liability Insurance and the Tort Immunity of State and Local Governments*, 1959 DUKE L.J. 588, 605-06.

194. Christopher M. Lambrecht, *supra* note 182, stated that the Division of Insurance does not have sufficient information to estimate the financial impact on the municipalities. Gary S. Markenson, Deputy Executive Director of the Missouri Municipal League, in a letter to Michael S. Anderson, January 4, 1979, on file with the *Washington University Law Quarterly*, wrote, "We regret to inform you that we do not have the data to respond to your recent inquiries [about the anticipated financial impact on municipalities] . . . [W]e doubt that any organization has such information." Representative Dill, *supra* note 48, acknowledged that, "The insurance cost to political subdivisions was the major impetus behind the new legislation." As to specific costs, Representative Dill recalls, "Wide variety of estimates were presented on potential insurance costs, but none were conclusive." *Id.* Representative Holt, *supra* note 170, explained that a reasonable estimate would be impossible because, for example, "[i]he cost would be radically different for the City of St. Louis than for New Bloomfield, Missouri, and would be considerably different for Wright County than it would be for St. Louis County."

195. See David & French, *Public Tort Liability Administration: Organization, Methods, and Expense*, 9 L. & CONTEMP. PROB. 348 (1942).

196. Warp, *Tort Liability Problems of Small Municipalities*, 9 L. & CONTEMP. PROB. 363 (1942).

however, are suspect. They were based on the dubious premise that the standard of care is less exacting in smaller cities than in larger ones because in small cities people presumably have greater knowledge of street or sidewalk defects and thus would be contributorily negligent if injured by the disrepair.¹⁹⁷

Recent studies paint a much more sobering picture of both the standard of care and the cost of insurance.¹⁹⁸ In 1967 Oregon established maximum recoveries of \$25,000 per claimant for destruction of property in one occurrence, \$50,000 for other damages to a claimant per occurrence, and \$300,000 for all claims arising out of a single occurrence.¹⁹⁹ Although these maximums were significantly lower than the recovery limits of the Tort Immunity Act,²⁰⁰ Portland was the only entity large enough to absorb the risks of self-insurance.²⁰¹ In 1975 Oregon raised the maximum limits to \$50,000, \$100,000, and \$300,000,²⁰² respectively, at which time liability premiums rose as much as five hundred percent over 1974.²⁰³ The experience of Oregon teaches that the cost of assuming even limited tort liability should not be minimized, and the option of self-insurance is a feasible alternative only for very large cities.

197. See *id.* at 364. "The standard of care required of small municipalities differs, in practice, considerably from that required of large municipalities. It is common knowledge that streets are not kept in good repair. Sidewalks frequently are non-existent. One who is injured because of a sidewalk or street defect is considered careless." *Id.* Those days are no more, as Representative Dill, *supra* note 57, explained: "Years ago, government was a comparatively small enterprise having little effect on the day to day living of the Citizens. Today, with government at all levels expanding and getting into an ever increasing variety of enterprises, the potential for citizen injury by public employees is greatly expanding."

198. For a more optimistic forecast of the government's ability to pay, see Note, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity*, 26 U. FLA. L. REV. 89, 90-91 (1973).

199. See NAAG REPORT, *supra* note 3, at 81.

200. \$100,000 per person and \$800,000 per occurrence; see note 179 *supra* and accompanying text.

201. See NAAG REPORT, *supra* note 3, at 83. According to the COMMERCIAL ATLAS & MARKETING GUIDE (Rand McNally & Co. 110th ed. 1979), Portland's estimated 1979 population is 368,000 (1,154,500 metropolitan area). The only cities in Missouri as large or larger than Portland are St. Louis, 489,000 (2,380,700 metropolitan area) and Kansas City, 438,000 (1,291,900 metropolitan area).

202. OR. REV. STAT. § 30.270 (1977).

203. See NAAG REPORT, *supra* note 3, at 83.

Colorado limits liability to \$100,000 per claim and \$300,000 per occurrence (as compared with Missouri's \$800,000 maximum per occurrence). Figures for the two-year period from 1975 to 1977 show that, "Costs for the program mentioned above are rising quickly, with insurance premiums skyrocketing." *Id.* at 87.

C. *Critical Evaluation*

One criticism of the Tort Immunity Act is that the absence of a provision for out-of-court settlements will lead to the litigation of each tort claim against a public entity. Because two bills that would have expressly authorized out-of-court settlements²⁰⁴ were defeated at the same time that the Tort Immunity Act was under consideration, it cannot be presumed that the authority to settle out-of-court is incidental to the waiver of immunity. To the contrary, the clear implication is that out-of-court settlements are not permitted under the Act. The Tort Immunity Act thus completely disregards the economics of litigation-avoidance.

The Act also fails to explain how a small county or municipality can afford to pay what could easily be a budget-wrecking judgment. Arguably, an entity's decision to be self-insured implicitly evidences an intent to satisfy a judgment, if necessary, by means of a bond issue²⁰⁵ or an increase in the ad valorem tax. Clearly, however, authority to tax beyond the stated legal limit or to pay judgments by installments cannot be inferred from the Act. House Bill 886 would have authorized a unit of government that was not fully covered by liability insurance to levy an ad valorem tax at a rate, if found by the unit of government to be necessary, in excess of any legal limit otherwise applicable except as may be imposed by the Constitution of Missouri,²⁰⁶ and would have authorized a governmental unit to pay a judgment over a period of not more than five years in equal annual installments plus interest on the unpaid balance at the rate provided by law, if the judgment exceeded one percent of the budgeted tax funds for the fiscal year.²⁰⁷ Neverthe-

204. H.R. 886, 79th General Assembly (1978); H.R. 1505, 79th General Assembly (1978). H.R. 886, § 12 authorized: "A cause of action brought under this act may be settled and compromised [when it] . . . would be in the best interest of the unit of government."

205. Warp suggests that municipalities probably would not need to avail themselves of this alternative:

The need for protecting small municipalities from occasional large claims is more theoretical than real. It is easy to say that a \$10,000 judgment against a village or town of 300 inhabitants would throw that village or town into bankruptcy. While such a judgment could probably be paid off with minimum hardship by means of a bond issue, the fact is that, to this writer's knowledge, such judgments are nonexistent.

Warp, *supra* note 196, at 366.

If this analysis was ever valid, its persuasiveness is fatally undermined when one subjects Warp's hypothetical town of 300 residents to a potential \$800,000 judgment; see note 179 *supra* and accompanying text.

206. H.R. 886, 79th General Assembly, § 13 (1978).

207. *Id.*

less, political subdivisions must inherently possess the authority to raise extraordinary funds to satisfy unbudgeted tort judgments and to mitigate the budgetary shock of one or more sizable judgments against a governmental entity during a single fiscal year. Either or both of these authorizations are necessary to prevent the waiver of sovereign immunity from bankrupting political subdivisions that rightly or wrongly decide to self-insure.

The Act also creates an unnecessary ambiguity through its failure to address the status of causes of action that accrued in the period between the *Jones* decision and the passage of the Tort Immunity Act.²⁰⁸ Because *Jones* purported to abrogate sovereign immunity *in toto* and the Act effects a waiver in certain circumstances, the equities weigh in favor of permitting those causes of action which otherwise would be cognizable under the Act. *Gray v. State*,²⁰⁹ however, held that statutes will be construed to operate prospectively unless a legislative intent to the contrary is either clear on the face of the statute or necessarily implicit in its provisions. Moreover, because the Tort Immunity Act is in derogation of common law, it must be strictly construed.²¹⁰ This ambiguity, therefore, may inequitably prejudice those claims which accrued during the period between judicial abrogation and legislative reenactment of sovereign immunity.

IV. CONCLUSION

The Tort Immunity Act represents a compromise on the issue of governmental immunity for torts committed by political entities. Most negligent torts of governmental entities will find their way into the courts under one of the two broad waivers found in the Act,²¹¹ but recoveries will be limited to the stated maximums.

As a hastily drafted piece of legislation, the Tort Immunity Act is flawed by omissions and ambiguities that subsequent legislatures and courts should clarify to effectuate the policies embodied in the current statute. In the meanwhile, the substantive policies within the Act rep-

208. This period extends over eleven months. *Jones* was decided September 12, 1977; the Tort Immunity Act went into effect August 13, 1978.

209. 524 S.W.2d 172 (Mo. Ct. App. 1975); *accord*, *Brown v. State*, 509 S.W.2d 472 (Mo. Ct. App. 1974).

210. *See Watkins v. Wattle*, 558 S.W.2d 705 (Mo. Ct. App. 1977).

211. *See, e.g.*, note 155 *supra*.

resent a reasoned effort to deal with a problem far more complex than
“the king can do no wrong.”

Michael Steven Anderson

