MUNICIPAL TORT LIABILITY: A LEGISLATIVE SOLUTION BALANCING THE NEEDS OF CITIES AND PLAINTIFFS

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Many of the nation's cities have become liable for their tortious conduct.[1] Courts in thirty-seven states[2] have abrogated general governmental immunity for their cities, while only six have retained the purest traditional forms.[3] Just six years ago, the figures were twenty-five and eight, respectively.[4]

From personal injury to negligent decisionmaking, from misfeasance in office to the intentional torts, a city may face wide exposure to varied causes of action.[5] While exposure can be direct,[6] or arise

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1. *See* Appendix *supra*. The Wyoming Supreme Court most recently joined the ranks, abrogating municipal immunity in Oroz v. Board of County Comm'rs, 575 P.2d 1155 (Wyo. 1978).

2. *See* Appendix *supra*.

3. *Id.* Additionally, seven states maintain full governmental immunity for their cities except where the municipality purchases insurance. *See* notes 118-20 and accompanying text *infra*.

4. RESTATEMENT (SECOND) OF TORTS § 895A (Tent. Draft No. 19, 1973).

5. *Id.* The range of municipal exposure to tort suit is indeed wide. The fire protective services bring up problems of negligence in fire fighting, maintenance of equipment and destruction of property. Municipal medical services can create liability for malpractice, improper standards for admissions or refusal to admit due to overcrowding, and problems concerning care and custody of mental patients. Recreation facilities are often rugged and remote, and fraught with potential injury causes. Police brutality, false arrest and imprisonment, harm done to bystanders, as well as nonfeasance problems of failing to provide adequate protection open vast possibilities of problems for suit. Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161, 185 (1963) [hereinafter cited as Kennedy & Lynch]. *See also* Cronan, *Governmental Immunity Abolished*, 42 MO. MUNICIPAL REV., No. 11, at 4-5 (1977) (describing such horribles as a $218,000 judgment against Salix,

indirectly on a *respondeat superior* theory,[7] the present trend toward judicial abrogation of immunity threatens a municipality with great potential liability.

As the decline of governmental immunity continues[8] it leaves many fears in the minds of municipal leaders—fears of excessive judgments and fears of unmanageable financial planning problems.[9] These concerns can be alleviated by the enactment, at the state level,

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Iowa, which had only $100,000 of insurance coverage and a population of 387 to absorb the balance).

As a result of Illinois' landmark decision in Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (abrogating governmental immunities), the state legislature was required to appropriate $750,000 in a special relief act for defendant-Kaneland's unexpected liability. *See* D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM, 871 (1977) [hereinafter cited as D. MANDELKER & D. NETSCH]. *See also*, Van Alstyne, *Government Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919 [hereinafter cited as Van Alstyne] (cities' greatest concern is the "crushing burden" of liability).

6. *E.g.*, Monell v. Department of Social Services, 98 S. Ct. 2018 (1978) (city liable for civil rights infringements which arise from "governmental custom" and *not* on a *respondeat superior* basis); Greenwood v. Evergreen Mines Co., 220 Minn. 296, 19 N.W.2d 726 (1945) (city liable for damages incurred in construction of a dam); Henning v. City of Casper, 50 Wyo. 1, 57 P.2d 1264 (1936) (cities subject to "personal judgments"); 18 E. MCQUILLIN, MUNICIPAL CORPORATIONS, § 53.01a (3rd ed. 1977) [hereinafter cited as E. MCQUILLIN].

7. *See, e.g.*, Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965) (city liable for employee's tort); Bailey v. New York, 3 Hill 531 (N.Y. 1842) (leading case defining governmental torts); E. MCQUILLAN, *supra* note 6, at §§ 53, 65.

8. *See* note 1 *supra.*

When Arkansas judicially abrogated sovereign immunity, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968), its legislature reimposed immunities. 1977 Ark. Acts § 12-2901. The enactment was held constitutional. Hardin v. City of Devalls Bluff, 256 Ark. 480, 508 S.W.2d 559 (1974). *But see* Hutchings v. Kraject, 34 Ill. 2d 379, 215 N.E.2d 274 (1966); Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1965) (both holding blanket legislative reimposed immunities unconstitutional).

Missouri's supreme court recently imposed liability on its municipalities in Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977). The court gave the legislature eleven months to enact protective or comprehensive legislation. *Id.* at 231. The legislative response, enacted as MO. REV. STAT. § 537.600 (1978), reimposes immunities except where waived by the purchase of insurance. However, this bill is only a "temporary answer" to the tort immunity question. The Missouri Senate is currently studying alternative measures which better balance municipal needs for protection from excessive judgements against the individual plaintiff's needs for compensation. REPORT OF THE MISSOURI SENATE SELECT COMMITTEE ON SOVEREIGN IMMUNITY (1979).

9. *See, e.g.*, St. Louis Globe-Democrat, December 2, 1977, Sec. N, at 1, col. 4.

of a comprehensive Tort Claims Act.[10] Such an Act is warranted in light of unsatisfactory developments following judicially-created governmental liability, which often leave municipalities in untenable positions.[11] Current law, both pre- and post-liability, stems from old common law doctrines of governmental immunity replete with inconsistencies and anachronistic distinctions.[12] There is a clear need[13] for comprehensive policy formulations from the state legislatures.

This Note will examine past doctrines of governmental tort immunity law to discover their impact on modern municipal tort law. Solutions will be offered to guide the state law maker away from past mistakes and toward a system that can provide tort claimants with a means for relief while protecting municipalities from financial instability.

I. SOVEREIGN AND GOVERNMENTAL IMMUNITY—THE EVOLUTION

Governmental tort immunity is a doctrine distinct from, though related to, sovereign tort immunity. Sovereign immunity as an adjunct of state sovereignty,[14] directly protects a municipality in its function as a political subdivision of the state.[15] Thus, since a city's authority to enact ordinances must arise from a delegation of state power,[16] the state's *sovereign* immunity attaches to the delegation.[17]

10. The term "Tort Claims Act" will be used throughout this Note as a collective term for the varied legislative responses to municipal tort liability.

11. *See* note 5 *supra*, and note 74 *infra*.

12. *See* notes 43-54 and accompanying text *infra*.

13. *See* notes 43-70 and accompanying text *infra*.

14. Sovereign immunity was upheld in Osburn v. Bank of the United States, 22 U.S. 738, 846-49 (1824). *See also* W. PROSSER, LAW OF TORTS § 131 (4th ed. 1971) [hereinafter cited as W. PROSSER]; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. PA. L. REV. 515 (1977). *But see* note 27 *infra*; Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 696-705 (1949) (specific relief generally obtainable from immune sovereigns, but never damages).

15. *See* E. MCQUILLAN, *supra* note 6, at § 10.03; Note, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend With a Pennsylvania Perspective*, 78 DICK. L. REV. 365, 365-401 (1973) [hereinafter cited as DICKINSON Note].

16. *E.g.*, O'Haver v. Montgomery, 120 Tenn. 448, 111 S.W. 449 (1908) (municipal power to create misdemeanors must stem from legislative grant). *See* E. MCQUILLAN, *supra* note 6, at §§ 2.08-2.09. *Cf.* Cooper v. Town of Valley Head, 212 Ala. 125, 101 So. 874 (1924) (state statutory requirements for ordinance authorization); Webb City & Carterville Waterworks v. City of Carterville, 153 Mo. 128, 54 S.W. 557, 558-59 (1899) (state limits on city taxation power).

17. *See* W. PROSSER, *supra* note 14, at 977-78.

Other traditional *municipal* immunities, however, attach to locally-originated activities.[18] For example, the authority to operate a municipal golf course requires no state-power delegation[19] as it arises from the city's corporate character. This latter class of activities, similarly immune, are labeled "governmental" not sovereign in nature. This Note will focus on the governmental side of this dichotomy, and will not discuss tort immunities arising from such activities as municipal courts, whose authority is strictly sovereign.

Sovereign immunity was formed from an ancient mistake. Originally postulated as *rex non potest peccare* (the King can do no wrong), the doctrine was actually intended to create a means of equitable relief against the King. The King must make reparation for his errors; he could not be allowed to do wrong.[20] The doctrine was quickly up-ended and became, as we know it today, the basis for barring suit against the King or the government.[21]

18. Griffin v. Salt Lake City, 111 Utah 94, 176 P.2d 156, 158-59 (1947). *See* D. MANDELKER & D. NETSCH, *supra* note 5, at 856-57; Potter, *Sovereign Immunity in Pennsylvania: An Open Letter to Mr. Justice Pomeroy*, 38 U. PITT. L. REV. 185, 185 nn.2 & 3 (1977) [hereinafter cited as Potter].

19. *See, e.g.*, Department of Treasury v. City of Evansville, 223 Ind. 435, 444, 60 N.E.2d 952, 955 (1945) (city ownership of golf course not sovereign in character); State v. City Council of Helena, 102 Mont. 27, 34-35, 55 P.2d 671, 675 (1936) (governmental functions arise out of the corporate character of the municipality). *See generally* E. MCQUILLIN, *supra* note 6, at §§ 2.08-2.09.

This sovereign-governmental dichotomy gave rise to the earliest judicial exception to tort immunities: the governmental-proprietary distinction, discussed in the text accompanying notes 29-37 *infra*.

20. *See* D. MANDELKER & D. NETSCH, *supra* note 5, at 853. *See also* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 3-5 (1972) [hereinafter cited as Engdahl]; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3-4 (1963) [hereinafter cited as Jaffe].

21. Engdahl, *supra* note 20, at 13.

Even if the foundations of governmental immunity are built on soft logic, more tenacious support for the doctrine has developed through the years. Despite an intuitive feeling that governments should be responsible for their tortious conduct, at least six rationales have emerged in support of governmental immunity. They are listed below, followed by a synopsis of the usual counter-argument.

1) Justice Oliver Wendell Holmes said that *there is neither logic nor practical ground for supporting a legal right of action against the authority which makes the law upon which any right of action depends.* Kawananahuan v. Polyblank, 205 U.S. 349, 353 (1907). *Accord*, Holcombe v. Georgia Milk Producers Confed., 188 Ga. 358, 362, 3 S.E.2d 705, 708 (1939). *See also* Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting) ("it is not a tort for government to govern"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (where Chief Justice Marshall summarily declared immunity for all suits against the United States); Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964); W. PROSSER, *supra* note 14, at 971 n.4.

Tort immunity for local political entities may be traced to the eighteenth century English case of *Russell v. The Men of Devon*,[22]

However, the separation of the branches of government should provide the mechanism necessary to bring an action in the courts against the creators and enforcers of the law. Judges are independent "architects of justice." They can and often do find against sovereign irresponsibility. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01 (1958) [hereinafter cited as K. DAVIS]; notes 99-103 and accompanying text *infra*. *See generally* Borchard, *Government Responsibility in Tort*, 36 YALE L.J. 757 (1927) [hereinafter cited as Borchard II].

2) *A sovereign cannot be sued without its consent.* However, the city is a corporate entity and is not itself sovereign. While the state's sovereignty is often imputed to the city, it remains essentially a corporate entity. *See* E. MCQUILLAN, *supra* note 6, at § 1.58. *See also* Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 42 (1924) [hereinafter cited as Borchard I].

3) *"The King can do no wrong."* Not only is this old maxim operated in reverse, *see* note 20 and accompanying text *supra*, it is anomalous in any democracy.

4) *There is no specific municipal fund to pay tort judgements.* There seems to be no reason for one. Corporate municipalities are normally authorized to expend general revenues for this purpose. *E.g.*, MONT. REV. CODES ANN. § 82-4335(b) (Supp. 1977). *See also* N.D. CENT. CODE § 32-12.1-11 (Supp. 1977), which authorizes cities to raise additional taxes to cover a tort judgment.

5) *The public policy rationale behind the early English cases was that it is better for the injured individual to bear the loss than to inconvenience the public.* This harsh rationale is now uniformly rejected. *See, e.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 21, 163 N.E.2d 89, 94 (1959) (such a theory is "almost incredible"). *Cf.* Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo. 1969) (*en banc*) (this type of allocation of risk is inherently unfair).

6) *The fear of financial instability and destruction of local governments supports immunity.* There is no empirical data to support the fear that judgments will impair municipal functions. *See* Jones v. State Highway Comm'n, 557 S.W.2d 225, 229 (Mo. 1977) (suit against the Missouri Highway Department for negligence in highway design and maintenance). Also, many decisions abrogating immunity include a prospective effective date, giving cities and state legislatures time to create precautionary measures. *See, e.g.*, Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) (making the effective date of liability the end of the next legislative session); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977) (allowing eleven months for legislative action); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1975) (allowing seven months for legislative action).

7) Perhaps a seventh rationale should be posited here. A government must perform certain functions for which no tort law "reasonable man" standard can apply. Functions such as mass swine flu inoculations expose a government to liabilities far in excess of normal expectations. Yet the very lack of a reasonable man standard forms a basis on which to choose whether the actor-city should be held liable. *See* notes 80-103 and accompanying text *infra*. *See generally* Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 163, 165 (1977); Note, *Apportioning Liability in Mass Inoculations: A Comparison of Two Views and a Look at the Future*, 6 N.Y.U. REV. L. & SOC. CHANGE 239, 241-44 (1977).

22. 2 Term Rep. 667, 100 Eng. Rptr. 359 (1789). Although this case obviously was decided after the Declaration of Independence, it is valuable as a statement of the common law as adopted in the United States. DICKINSON Note, *supra* note 15, at 370.

introduced into this country through the Massachusetts decision of *Mower v. The Inhabitants of Leicester*.[23] The English court based its finding of immunity on Devon's unincorporated status and consequent lack of a corporate fund from which to pay tort judgments.[24] The *Mower*[25] court relied on this same theory, even though Leicester was incorporated, without offering an explanation.[26]

The harshness of the local government immunity doctrine led courts to create numerous exceptions[27] such as the governmental-pro-

23. 9 Mass. 247 (1812).

24. The court failed to explain its requirement of a particular fund. 2 Term Rptr. at 672-73, 100 Eng. Rptr. at 362.

25. 9 Mass. 247 (1812).

26. *Id. See* Borchard I, *supra* note 21, at 41-42; D. MANDELKER & D. NETSCH, *supra* note 5, at 853-54.

27. *See* W. PROSSER, *supra* note 14, at 978-79.

Governmental immunity has also been challenged on due process and equal protection grounds. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 895A (Tent. Draft No. 19, 1973). However, the due process argument has found no favor in the courts. The argument was raised in an amicus curiae brief of the National Council of Churches of Christ in the U.S.A. in Krause v. Ohio, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971), *rev'd*, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972) (suit arose out of the Kent State shootings; due process issue was not discussed by any of the courts). *See also* Engdahl, *supra* note 20, at 77 n.372; Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 686-88 (1976).

The equal protection argument has gained only marginal success. An Ohio appellate court's holding of sovereign immunity as an improper classification of plaintiffs with tort claims against governments was reversed by the Ohio Supreme Court. *See* Krause v. State, 28 Ohio App. 2d 1, 6, 274 N.E.2d 321, 325 (1971), *rev'd*, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

Other state supreme courts have similarly denied equal protection challenges to sovereign immunity. *See* Hardin v. City of Devalls Bluff, 256 Ark. 480, 508 S.W.2d 559 (1974) (upholding the legislative reimposition of governmental immunity after judicial abrogation); County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 846, 402 P.2d 868, 872, 44 Cal. Rptr. 796, 800 (1965) (upholding classification of plaintiffs suing for injuries sustained in governmental mental institutions, as provided by CAL. GOV'T CODE § 854.8 (Deering 1973)); Wall v. Sonora Union High School, 240 Cal. App. 2d 870, 50 Cal. Rptr. 178 (1966) (upholding the denial of a claimed injury not discoverable within the 100-day period required for notice to the defendant); Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973) (upholding classification as reasonable); Brown v. Wichita State Univ., 219 Kan. 2, 547 P.2d 1015 (1976) (rejecting equal protection arguments). *Cf.* Turner v. Staggs, 89 Nev. 230, 235, 510 P.2d 879, 882 (1973) (six-month notice requirement held an unreasonable classification); Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972) (sixty-day statute of limitations held an unreasonable classification). The Michigan Court, however, has refused to extend the *Reich* holding to all special rules for tort claims against govern-

prietary distinction.[28] Its genesis began with the recognition of the dual character of municipal powers—sovereign and governmental. The courts refused to immunize cities when they functioned in roles similar to profit-making businesses. Distinctions between cities' governing activities (immune) and their for-profit proprietary activities (liable in tort) became commonplace.[29] Activities analogous to if not in *pari materia* with the state's sovereignty, such as police protection or municipal recreation activities,[30] were immune from tort liability. On the other hand, selling mineral water[31] fell outside the special class of governmental activities and became subject to tort liability.

One common test for municipal liability focused on the functional purpose of the activity. A city using DC electricity for street lighting undertook a governmental activity for the general public good.[32] But when the same city sold AC electricity to homeowners for municipal gain, a profit-making venture resulted.[33] Consequently, recovery was allowed for injuries sustained by contact with the AC wires, while denied for injuries from the DC wires on the same pole.[34]

Not surprisingly, the governmental-proprietary distinction led to great confusion[35] and, as arbitrary line drawing intensified,[36] com-

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ment bodies. *See* Hanger v. State, 64 Mich. App. 572, 580 n.4, 236 N.W.2d 148, 152 n.4 (1975).

Notice requirements of short limitation also lead to incompletely investigated complaints asking for arbitrarily high damages to protect against subsequently discovered injuries. This practice may result in increased litigation. Comment, *The Constitutionality of California's Public Entity Tort Claims Statutes*, 6 PAC. L.J. 30, 38-39 (1975).

28. *See* W. PROSSER, *supra* note 14, at 978-79.

29. Cities enjoyed a dual character as governmental subdivisions of the state and as corporations due to their different functions. *See* W. PROSSER, *supra* note 14, at 977; note 7 *supra*. *Cf.* K. DAVIS, *supra* note 21, at § 25.01 (describing another line of attack on immunity by an extended "taking" theory).

30. *See* Lively v. City of Blackfoot, 91 Idaho 80, 82, 416 P.2d 27, 29 (1966); Daniels v. Kansas Highway Patrol, 206 Kan. 710, 712, 482 P.2d 46, 48 (1971) (both cases hold the operation of police departments is governmental in nature and immune); E. MCQUILLAN, *supra* note 6, at §§ 53.24, 53.30, 53.51; W. PROSSER, *supra* note 14, at 979. *See also* note 19 and accompanying text, *supra*.

31. New York v. United States, 326 U.S. 572 (1946).

32. *E.g.*, Hodgins v. Bay City, 156 Mich. 687, 690-92, 121 N.W. 274, 276-77 (1909).

33. *Id.*

34. *Id.*

35. *See* D. MANDELKER & D. NETSCH, *supra* note 5, at 857; Comment, *Virginia's Law of Sovereign Immunity: An Overview*, 12 U. RICH. L. REV. 429, 437 (1978).

36. *Compare* Griffin v. Salt Lake City, 111 Utah 94, 176 P.2d 156 (1947) (public

mentators increasingly attacked the theory.[37] The time was ripe for the demise of municipal tort immunity when the Illinois[38] and California[39] Supreme Courts abolished the doctrine in their jurisdictions. As noted above, judicial abolition of governmental immunity has proliferated.[40]

II. THE DEVELOPMENT OF POST-IMMUNITY COMMON LAW

The majority of states changing from municipal immunities in tort have done so judicially.[41] But whether accomplished judicially or legislatively, the courts have developed a body of post-abrogation law.[42] This law, built in part on old common law doctrines,[43] brings with it new difficulties.

A. *Uncertain Distinctions*

Two state legislatures have deferred entirely to the judicial process

swimming pool was a proprietary function) *with* Ramirez v. Ogden City, 9 Utah 2d 102, 279 P.2d 463 (1955) (governmentally subsidized, non-profit community center was a governmental function). The courts of the forty-eight states were in "irreconcilable conflict." K. DAVIS, *supra* note 21, at § 25.01.

37. Professor Borchard was the preeminent early author. Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 221 (1924); Borchard, *Government Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926); Borchard, *Government Responsibility in Tort*, 28 COLUM. L. REV. 577, 734 (1928). *See also* Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954).

38. *See* Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (where an incorporated school district lost its immunity in a case arising from a school bus accident). *See also* Hickman, *Municipal Tort Liability in Illinois*, 1961 U. ILL. L.F. 475.

39. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). *See also* Note, *Sovereign Immunity: Scope of Doctrine Severely Limited in California*, 49 CAL. L. REV. 400 (1961). However, the New York Court of Appeals earlier abolished municipal immunity in Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). Though this abolition precedes the Illinois and California cases, the New York court said it was only construing the 17-year old state Court of Claims Act, N.Y. CT. CL. ACT § 8 (Consol. 1976), as allowing suit against municipalities in tort. *See* Van Alstyne, *supra* note 5, at 919. *Cf.* K. DAVIS, *supra* note 21, at § 25.01 (describing the piecemeal legislative activity in this area).

40. *See* notes 1-4 and accompanying text *supra*.

41. *See* Appendix *supra*.

42. *See, e.g.*, W. PROSSER, *supra* note 14, at 986-87. *See also* notes 44-54 and accompanying text *infra*.

43. *See, e.g.*, Thomas v. State Highway Dep't, 398 Mich. 1, 247 N.W.2d 530 (1976) (court used a governmental-proprietary rationale to decide a discretionary-ministerial question).

for development of municipal tort liability doctrines. The Alabama Supreme Court based its new governmental liability rule[44] on a theory that the legislature had eliminated immunity from a certain class of entities. This legislative categorization, created sixty-eight years before the court discovered it, opened some governmental activities to liability as provided in the state constitution.[45] Consequently, a delineation of governmental tort liability turns on whether the governmental defendant falls within the liable class.[46] While this analysis leaves municipal airports[47] and boards of education[48] immune, county hospitals are liable, construed as a part of that hard to define class.[49] Such judicially drawn lines are as arbitrary as governmental-proprietary distinctions.[50]

The Pennsylvania legislature did not act after its state supreme court removed municipal tort immunity.[51] The resultant uncertainty allowed courts to interpret municipal punitive damage cases with contrary results.[52] Without a legislative prescription uncertain liabil-

44. Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68 (1975).

45. *Id.* at 597, 320 So. 2d at 72.

46. Scotti v. City of Birmingham, 337 So. 2d 350 (Ala. 1976).

47. *Id.* (the court viewed its abrogation of immunity as a proper construction of the Alabama municipal corporation enabling act, now ALA. CODE tit. 4, § 11-40-1 (1977), which did not mention airports).

48. *See* Enterprise City Bd. of Educ. v. Miller, 348 So. 2d 782 (Ala. 1977) and Simms v. Etowah County Bd. of Educ., 337 So. 2d 1310 (Ala. 1976) (construing city and county boards of education acts, ALA. CODE tit. 16, §§ 11-12 & 8-40 (1977) respectively, as separate from the municipal enabling act construed in *Jackson*, discussed at text accompanying note 44 *supra*).

49. Lorence v. Hospital Bd., 294 Ala. 614, 320 So. 2d 631 (1975) (unlike *Jackson*, the court found a specific intent to make county hospital boards liable under ALA. CODE tit. 22, § 204(24) (1958)).

50. *See generally* Comment, *Contractual Recovery for Negligent Injury*, 29 ALA. L. REV. 517 (1978) (concluding that municipal tort liability law is confused and unsettled).

51. Ayala v. Philadelphia Bd. of Educ., 453 Pa. 584, 305 A.2d 877 (1973) (recovery for student injured in city school).

52. *Compare* Santucci v. Wincber Borough, 31 Som. L.J. 281 (1974) (city immune from punitive damages) *with* Henninger v. Atlantic Refining Co., 282 F. Supp. 667 (E.D. Pa. 1967) (city liable in punitive damages). For a discussion of municipal liability for punitive damages, see note 117 *infra*.

Additionally, a lower Pennsylvania court narrowed the scope of municipal liability by establishing immunity for "high level" township officials, based on a discretionary-ministerial argument. Wicks v. Milzoco Builders, Inc., 25 Pa. Commw. Ct. 340, 360 A.2d 250 (1976). *See* Sloan, *Lessons in Constitutional Interpretation: Sovereign Immu-*

ity exists for such activities as police nonfeasance[53] and officials' discretionary acts.[54]

From the developments of the law in Alabama and Pennsylvania it is clear that a need exists for legislative definition of the scope of governmental liability. Case by case common law development fails to establish clear limits of liability.

B. *Discretionary-Ministerial Distinctions*

In government-liable states, courts usually retain a blanket immunity[55] for actions characterized as discretionary.[56] This merely substitutes an immunity based on a characterization of the governmental act as discretionary in place of an immunity which relied on the difference in the labels "governmental" and "proprietary."[57] The ease by which this judicial sleight-of-hand can destroy, then re-create the immunity, makes study of this development critical in understanding governmental tort law.

By the discretionary-ministerial distinction any tortious conduct arising from the exercise of officials' discretion is immune. Discretionary acts, as opposed to those merely ministerial, require the employee to look at all the facts and act upon them in some manner of his own choosing. These procedures are not mandated by law.[58] Ministerial acts, on the other hand, arise where a law or regulation

nity in Pennsylvania, 82 DICK. L. REV. 209 (1978). For a discussion of discretionary immunity, see notes 55-73 & 79-104 and accompanying text *infra*.

53. Santucci v. Wincber Borough, 31 Som. L.J. 289, 293, 298 (1974) (while police might be held liable for acts of nonfeasance, "it is very unclear where the abrogation of the doctrine of sovereign immunity has left the state of Pennsylvania. . . .").

54. *See, e.g.*, Nido v. Chambers, 70 Pa. D. & C.2d 129, 134 (1975) (lack of clear standard of discretionary immunity for "high public officials"). *See also* discussion of discretionary immunity at text accompanying notes 79-104 *infra*.

55. *E.g.*, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977).

56. For a thorough discussion of acts usually classed as discretionary or ministerial, see E. MCQUILLAN, *supra* note 6, at § 53.22a-g.

57. *E.g.*, Partain v. Maddox, 131 Ga. App. 778, 781-84, 206 S.E.2d 618, 620-22 (1974).

58. *See e.g.*, First Nat'l Bank of Key West v. Filer, 107 Fla. 526, 534, 145 So. 204, 207 (1933). *See also* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 267 (1937) [hereinafter cited as Jennings].

imposes a duty to perform at a designated time and place.[59] In other words, discretionary acts are those which result in the exercise of the discretion vested in the employee;[60] ministerial acts are those acts in which the employee does not use his own judgment.[61]

Unfortunately, these definitional approaches are circuitous and often not mutually exclusive. No ministerial act is wholly without an element of judgment—even the driving of a nail involves some discretion.[62] However difficult to define, the implication of the discretionary-ministerial distinction is clear: discretion involves policy *formulation* while administration consists of policy *execution*.[63]

The essence of discretionary immunity is belief in the integrity of the executive or quasi-judicial function[64]—the act of *governing*. The discretionary-ministerial distinction, therefore, is little more than the

59. Jennings, *supra* note 58, at 297.

60. Comment, *Discretionary Immunity in California in the Aftermath of* Johnson v. State, 15 SANTA CLARA LAW. 454, 458 (1975).

61. *Id.*

62. Ham v. Los Angeles County, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920).

Many states reject the definitional approach for discretionary activities. *E.g.*, State v. Abbott, 498 P.2d 712, 717-26 (Alaska 1972); Johnson v. State, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968); Rogers v. State, 51 Haw. 293, 298, 459 P.2d 378, 381-82 (1969). But the cure can be worse than the illness. Florida's rejection of the old definitional approach led, in the course of three decisions, to an increasingly rigid, formulated approach. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (policeman and municipal employer liable through *respondeat superior* in a wrongful death case); Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967) (narrowing employee and employer liability through *respondeat superior* in a wrongful death action); Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970) (an almost unexplained grant of immunity to policemen and municipal employers in a negligence case). *See*Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 163, 178-82 (1977).

Of course, rigidity is not the necessary end result of rejecting the old definitions in favor of new formulas. Oregon's judicially devised formula, a five-part test, represents a flexible approach. *See* Smith v. Cooper, 256 Or. 485, 475 P.2d 78 (1970) (the five factors are: 1) the importance of the allegedly discretionary act to the public function; 2) the extent which liability would impair that function; 3) the availability of other remedies; 4) whether discretion, *literally*, was involved; and most importantly 5) considerations of separation of powers). *See also* Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965) (balancing considerations include how basic the policy or program involved is to government goals, whether the acts in question are essential to achieve those policies or programs, whether there was an exercise of evaluation, judgment, or expertise, and whether the acts were made with constitutional, statutory or lawful authority).

63. D. MANDELKER & D. NETSCH, *supra* note 5, at 859.

64. *See* notes 81-104 and accompanying text *infra*.

old unsatisfactory governmental-proprietary rationale.[65] In mechanically maintaining local government's sovereignty in governing, the rationale underlying the governmental-propriety cases,[66] the courts have failed to see that administrative acts can be appropriately reviewed without improper judicial interference. Though the means for accomplishing this will be developed later,[67] it is evident that by ignoring the ease with which government agents can injure the citizenry,[68] the doctrine grants a virtual unlimited immunity sounding in the old, discarded governing or profit-making dichotomy. The discretionary doctrine thus becomes another special tort rule to protect governments, in opposition to the modern trend toward municipal accountability.[69] And as could be expected, the lines between discretion and administration are indistinctly drawn.[70]

The progressive view favors elimination of discretionary immunity. One argument is economic: if society is to make sound decisions regarding the risk-benefit trade-offs of its programs,[71] it must know all the costs involved. Shifting the burden of tortious conduct of discretionary decisionmakers to the injured citizen effectively hides part of the cost of that activity.[72] It is more economically proper, and fits with the modern enterprise theory of paying the "full cost" of doing business,[73] that a municipality be responsible for the *foreseeable* injuries of its activities.

65. *See* K. DAVIS, *supra* note 21, at § 25.11; notes 28-34 and accompanying text *supra*. *But see* Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQ. L. REV. 163, 167 (1977).

66. *See* notes 28-36 and accompanying text *supra*.

67. *See* notes 81-104 and accompanying text *infra*.

68. *See* notes 28-36 and accompanying text *supra*.

69. Van Alstyne, *supra* note 5, at 974-75.

70. Haslund v. Seattle, 86 Wash. 2d 607, 547 P.2d 1221 (1976) (takes a narrow view of the discretionary immunity). *Compare* D. MANDELKER & D. NETSCH, *supra* note 5, at 1085 *with* Lansing, *The King Can Do Wrong! The Oregon Tort Claims Act*, 47 OR. L. REV. 357, 359 (1968) (governmental immunities should be broadly protected) [hereinafter cited as Lansing] *and* Mosk, *The Many Problems of Sovereign Liability*, 3 SAN DIEGO L. REV. 7, 12 (1966) (courts have traditionally been too eager in finding discretionary immunity).

71. *See* text accompanying note 128 *infra*.

72. Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047, 1057 (1968).

73. R. KEETON & J. O'CONNELL, PROTECTION FOR THE TRAFFIC VICTIM 115 (1967); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 654 (1955).

Summary

Judicial development of post-governmental liability law fails to create a concise and wholly satisfactory doctrine. Conflicting judicial opinions[74] and the substitution of discretionary-ministerial distinctions for discredited governmental-proprietary dichotomies[75] demonstrates that the current status of government tort law is no more progressive than in prior years. Tort immunity law demands a legislative response to balance the governmental and public interests.[76] A well drafted Tort Claims Act offers the basis for such a balance.

III. THE TORT CLAIMS ACT

State courts of last resort are more forceful in opening municipalities to the claims of injured citizens than are legislatures restrained by politics and inertia.[77] Yet because court decisions lack the particularity of the usual legislation in this field, there is a clear need for a

74. *Compare* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 11 Cal. Rptr. 89 (1961) (court maintained discretionary immunities even while creating governmental liability) *with* Breiner v. C & P Home Builders, Inc., 536 F.2d 27, 30 (3d Cir. 1976) (court interpreted the Pennsylvania Supreme Court's abrogation of municipal immunity as wholly eliminating discretionary immunity).

75. *See, e.g.*, Hoy v. Capelli, 48 N.J. 81, 90, 222 A.2d 649, 654 (1966) (evaluation of discretionary immunities using a governmental-proprietary analysis).

76. The policy consideration can be summed up as a clash between the philosophy that "no men are above the law . . . that color of office creates no immunity for the wrongful invasion of another's rights" against the tenacious principle of governmental immunity. Jennings, *supra* note 58, at 263. On the plaintiff-defendant level, the conflict is between the desire to protect victims of governmental torts and the need to protect local governments from liability incurred in operating programs designed to benefit the community. *See* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (stating that in some instances it is unfair for injured plaintiffs to carry the burden of governmental torts).

Of course, an imaginative attorney can often find relief for his client against an immune municipal defendant. For example, in Alabama, before its abrogation of municipal and county immunities, see notes 49-50 and accompanying text *supra*, a plaintiff found relief for the tortious wrongful death of her baby. Eschewing a tort claim, plaintiff alleged an implied contract for proper nursing and care for the expectant mother and newborn child. The court held that the county hospital liable for breach of its contractual duties. Paul v. Escambia County Hosp. Bd., 283 Ala. 488, 218 So. 2d 817 (1969). Another plaintiff successfully brought a similar contract action against an immune municipal hospital in Berry v. Druid City Hosp. Bd., 333 So. 2d 796 (Ala. 1976).

77. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 473-75 (1962).

legislative response.[78]

A. *Legislative Answers to the Discretionary-Ministerial Problem*

Certainly, a legislative answer to the discretionary-ministerial distinction problem can and should be developed. Most legislatures encountering this subject have reestablished blanket discretionary immunities.[79] However, there are alternatives that can be utilized by the legislature to give governments adequate protection to freely make vital decisions without wholly depriving injured citizens of a means of recovery. The legislature should consider each alternative available, and through its deliberations satisfy its duty to consider all competing interests.[80]

Three basic rationales are commonly asserted in support of discretionary immunity:[81] 1) fairness to the decisionmaker; 2) encouragement of enthusiastic, aggressive public service; and 3) separation of powers.

The fairness consideration inquires whether it is proper to require administrators to make discretionary decisions and then subject the government to liability for the results of those decisions.[82] Such a rationale equates the discretionary duties of executive and quasi-judicial government employees with the firmly grounded discretionary immunity of the judiciary.[83] Since a judge is not accountable in tort for his exercise of discretion, the argument goes, persons exercising quasi-judicial powers should be similarly immune. Therefore, when

78. The Pennsylvania Insurance Department indicates that a comprehensive tort claims act would alleviate current unpredictability in municipal tort liability. Letter to the author, from Department of Insurance, Commonwealth of Pennsylvania dated February 28, 1978. *See also* Potter, *supra* note 18, at 187-89.

79. *E.g.*, CAL. GOV'T CODE § 820.2 (Deering 1973). *See* W. PROSSER, *supra* note 14, at § 132. Generally, however, the exercise of discretion with malice or bad faith will make the government tortfeasor personally liable. D. MANDELKER & D. NETSCH, *supra* note 5, at 1086.

While some legislative inroads do little more than control liability litigation procedure, *e.g.*, W. VA. CODE § 8-12-20 (1976), others extensively cover procedure, recovery, and definitions of liability and immunity. *See, e.g.*, CAL. GOV'T CODE § 815 (Deering 1973); ILL. ANN. STAT. ch. 85, § 1-101 (Smith-Hurd 1966).

80. *See* note 76 *supra.*

81. Note, *Utah Governmental Immunity Act: An Analysis*, 1967 UTAH L. REV. 120, 133-34.

82. Jaffe, *supra* note 20, at 223. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1973) (dicta that the Ohio governor may be hampered by the imposition of tort liability).

83. *See* W. PROSSER, *supra* note 14, at 987-88.

a government official decides controversies or exercises discretion, neither he nor the government should be liable for his actions.[84]

By equating judicial with non-judicial activities, such an argument goes too far. The judge's immunity arises from generations of judicial professionalism, ingrained with a tradition of restraint.[85] While not wholly perfect, judges work within a balanced system of personal self-control and appellate review. All bureaucrats, on the other hand, do not necessarily have the same tradition of thoughtful, constrained analysis in their decisionmaking processes.[86] On the contrary, a primary reason for creating quasi-judicial agencies is expediency. Thus judicial and quasi-judicial actions are not *pari materia*, and do not deserve the same level of immunity. A municipal employee normally wields less discretion than a judge. Consequently, a municipal administrator may be fairly held to a standard of honest, non-negligent performance of his duties.[87] Therefore, the first discretionary immunity justification, fairness, fails.

A legislature drafting a Tort Claims Act should set limits on tort immunity that reflect the level of discretion required of various officials. Some municipal functions do demand discretionary immunity—for example, administrative agency quasi-courts.[88] By contrast, high level, popularly elected officials should be answerable, at least for policy choices, only to the voters.[89] A limited grant of

84. Potter, *supra* note 18, at 198. As many as nine reasons have been given for the traditional immunity of judges: 1) avoidance of extra litigation; 2) prevention of undue influence on judges through fear of suit; 3) assurance that persons of means and property will accept judicial appointments; 4) preservation of judicial independence; 5) guarantee of finality; 6) avoidance of biased judges by change of venue, new trial, or prospectively, reversal; 7) recognition that judges owe no duty to parties, precluding any cause of action; 8) creation of a rule which protects the architects of the immunity; and 9) recognition of the judge's special position—their judgments should be accepted. Jennings, *supra* note 58, at 271-72.

The weak link between judicial immunity and rationales for quasi-judicial or administrative immunities is exemplified by over-inclusive statements such as, "Governmental liability for judicial or quasi-judicial action is unthinkable. No one could ever argue seriously that reversal of a trial judge on appeal should give rise to a cause of action in tort against the state." Potter, *supra* note 18, at 198.

85. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 323 (1959) [hereinafter cited as Gray]; Jennings, *supra* note 58, at 270.

86. Gray, *supra* note 85, at 323; Jennings *supra* note 58, at 270.

87. Gray, *supra* note 85, at 323.

88. *See* W. PROSSER, *supra* note 14, at 988-89.

89. *See* K. DAVIS, *supra* note 21, at § 25.17 (suggesting that damage suits cannot adequately correct negligent errors affecting thousands of people). *See also* McHenry

immunity can protect those officials while retaining municipal liability for the actions of low-level administrators.[90]

The line drawing required here necessarily involves considerations of public policy and the general welfare, a more proper legislative role.[91] The strict limiting of immune activities to specified narrow fields[92] will, of course, make it easier for the injured to be compensated. This result would achieve the same protection or compensation for the person inadvertently injured by a governmental tort as tort law presently protects the person injured by a private tortfeasor.

The second rationale states that the threat of suit and judicial review of the decisionmaking process will dampen the enthusiasm of the public servant.[93] We should hesitate, this argument runs, to stifle municipal employees' enthusiasm, creativity and innovation.[94] Yet non-governmental employees often make similar decisions without the benefit of tort immunity. Why then does the municipal government need protection? Governmental decisionmaking requires administrators to enter into highly vulnerable transactions for which there is no

v. Sneer, 56 Iowa 649, 10 N.W. 234 (1881) (defendants, mayor and city councilmen, are "amenable only to the public").

90. *See* notes 93-98 and accompanying text *infra.*

91. *See* note 76 *supra.*

92. The legislature should separate the various governmental employee categories into liable and immune groupings. Easily, the categorization can immunize all judicial and quasi-judicial positions as well as all elected officials. At the municipal level, there would be little need to create immunities for any lower positions. *See* notes 93-98 and accompanying text *infra.*

93. *See* C. RHYNE, W. RHYNE & S. ELMSDORF, TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS 340 (1976) (protection for discretionary acts is necessary for "efficient and zealous operation of municipal government.").

94. *See* W. PROSSER, *supra* note 14, at 987-92. *Cf.* Lipman v. Brisbane Elem. School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (court implies that liability for exercise of discretion may impair free exercise of administrative authority).

This Note discusses governmental tort liability rather than the personal liability of any individual employee. Under most Tort Claims Acts, the employee is fully indemnified by the municipal employer. That does not mean, however, that employees have no fear of tort suits. An adverse judgment will certainly affect an employee's job efficiency ratings, promotion opportunities, reputation and feeling of personal responsibility. One author suggests that these factors will provide sufficient restraints on governmental employees to provide the deterrent factor of tort theory. Comment, *Government Immunity Unavailable to California State Agencies Except in Some Cases of Discretionary Acts*, 46 MINN. L. REV. 1143, 1151 (1962). Yet these considerations do not directly answer whether discretionary immunity is warranted.

civil counterpart.[95] These activities fall into two basic categories: usual, day-to-day decisions, and occasional long-range projections. The latter activities, such as comprehensive land use planning, fiscal management, and social welfare programs, could produce unforeseen results with staggering tort damages.[96] But when viewed from a tort law perspective, this very lack of foreseeability will defeat a tort claim.[97] The foreseeability test would also apply to shorter range activities. Since these decisions are more susceptible to reasoned, calculated decisionmaking, they require no more of the municipal employee than is expected from the business employee. Therefore, traditional tort concepts such as foreseeability provide a sufficient solution.[98]

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95. These activities include planning and maintaining highways, providing police and fire protection, establishing quarantines, taking life or limiting freedom, and informing the public of imminent disaster—all subject to legitimate political pressures.

96. K. DAVIS, *supra* note 21, at §§ 25.11-25.13. *Cf.* Schwartz, *Public Tort Liability in France*, 29 N.Y.U. L. REV. 1432, 1454 (1954). *See, e.g.*, United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (recovery for damages due to dam construction); Bullock v. United States, 133 F. Supp. 885 (1955) (recovery for damages due to nuclear testing).

97. Professor Davis, without citation, suggests that chief executive officers and major agency heads should not be held liable for their negligent consideration of governmental policy. K. DAVIS, *supra* note 21, at § 25.11. While elected officials certainly should answer primarily to the electorate for errors in judgment, appointed officials should arguably be liable for the foreseeable injuries of their actions. *See* note 92 *supra*.

98. *See generally* Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047 (1968).

This solution will answer some common objections to discretionary immunity. K. DAVIS, *supra* note 21, at § 25.11, suggests that discretionary immunity for negligence in lower-level governmental functions is unjust and should be extinguished. It is more just to employ a forseeability test in long-range decisionmaking than to condition liability on some unusual tort rule inapplicable to decisionmaking.

Foreseeability is also a more manageable distinction in Ramos v. County of Madero, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971). Here, the California Supreme Court wrestled with the "semantic quicksand" of the California Tort Claims Act's discretionary immunity provisions, 1963 CAL. STATS. ch. 1681, § 1 (currently enacted as CAL. GOV'T. CODE § 820.2 (Deering 1973)). The defendant county welfare office had required plaintiffs to work in order to receive benefits, a practice forbidden by the applicable laws. CAL. WELF. & INST. CODE § 11200 (Deering 1969); CAL. WELF. & INST. CODE § 12500 (Deering 1969). The court, using a sound policy rationale, found that the *legislature* had exercised the true discretionary decisionmaking, and that there was no room left for any discretion by the county to determine, on its own, the qualifications for welfare. Yet, no one in the litigation disputed that the injuries sustained by "forced labor" in the grape fields were foreseeable. Should the defendant county have even had an opportunity to argue the question of discretion and thus possibly avoid liability for tortious conduct?

For that reason, a Tort Claims Act need only establish that the acts of the municipality or its agents will be held to the common law tort standards, perhaps allowing for judicial consideration of the uniqueness of the governmental defendant. This exposure will not create an atmosphere any more dampening than that affecting private business lives daily.

The third rationale supporting discretionary immunity holds that judicial review of executive action threatens the separation of powers.[99] However, the separation of powers doctrine is less vital at the municipal stage than at the federal level since it is not a constitutional issue. Municipal agencies' powers often cross over traditional lines of tort immunity.[100] Moreover, local agency actions, at times quasi-ju-

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99. *See* Haslund v. City of Seattle, 86 Wash. 2d 607, 617, 547 P.2d 1221, 1228 (1976), *citing* Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 254, 407 P.2d 440, 444 (1965) ("[l]iability cannot be imposed when condemnation of the acts or omissions relied upon *necessarily* brings into question the propriety of governmental objectives or programs [or of decisions made] for the advancement of government objectives").

100. An example, originated by Professor Gray, *supra* note 85, at 324-25, will illustrate: Suppose a municipal Board of Safety regulates taxi service. If a Board employee wrongfully arrests a driver for a suspected violation he is held to a reasonable standard. *See, e.g.*, United States v. Poller, 43 F.2d 911 (2d Cir. 1930) (reasonable standard applied to arresting officer in non-warrant arrest). If the Board improperly prosecutes, the standard for malicious prosecution is a dishonest motive. *See, e.g.*, MacIntosh v. City of Denver, 98 Colo. 403, 55 P.2d 1337 (1936) (proof of malice required in malicious prosection case). Should the Board wrongfully seize a taxi, it may be liable in trespass or conversion. *See, e.g.*, Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (administrator found liable in conversion for seizure and destruction of an allegedly diseased horse). Defamatory remarks made during Board meetings are prima facie immune. *See, e.g.*, Tatro v. Eshan, 335 A.2d 623, 726 (Del. Super. Ct. 1975) (absolute privilege for statements made in quasi-judicial board meetings); Rainier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 117 A.2d 889 (1975) (competitor's statements before a licensing board are immune); Tanner v. Gault, 20 Ohio App. 243, 153 N.E. 124 (Ohio App. 1925) (County Commissioners' statements in proceedings are immune). *See also* Gravel v. United States, 408 U.S. 606, 613-22 (1971) (United States Senator discussing classified materials on the Senate floor is immune). If charged with improperly denying a license application, errors are held to a good faith standard. *See, e.g.*, Aiken v. City of Miami, 65 So. 2d 54 (Fla. 1953) (expression of good faith standard); Amperse v. Winslow, 75 Mich. 228, 42 N.W. 821, 826 (1889) (denial of liquor license held to good faith standard); Rottcamp v. Young, 15 N.Y.2d 831, 835, 205 N.E.2d 866, 868, 257 N.Y.S.2d 944, 946 (1965) (Burke, J., dissenting) (denial of license cannot be for malicious, corrupt, dishonest, or bad faith reasons).

This illustration of the executive, legislative and judicial activities of one administrative body exemplifies the difficulties encountered when discretionary immunity is based on the type of governmental function performed. Different discretionary im-

dicial or quasi-legislative, defy easy categorization under a separation of powers scheme.[101] However, another valid reason may exist for separation.

Judicial review of social or fiscal administrative actions may improperly replace political decisionmaking with legal decisionmaking. In *Pratt v. Robinson*,[102] the court refused to interfere with a discretionary decision of the Rochester, New York, School Board. An injured student claimed that the Board's decision to discharge school bus passengers several blocks from their homes breached the school's duty to protect the children. In denying the cause of action, the court properly left that type of decisionmaking with the municipal agency. A court that restricts its review to the negligence issue, without ruling on the correctness of a municipal decision, preserves the separation of powers.[103] A well-drafted Tort Claims Act can make this distinction, allowing judicial review only of the means of agency action and leaving the technical questions to agency experts.[104]

B. *Legislative Determination of Approach*

The California Tort Claims Act,[105] described as "closed-ended,"[106] reestablishes general immunity with an extensive list of exceptions.

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munity theories result in a maze of judicial standards for municipal employees' liability.

101. Gray, *supra* note 85, at 324-25. *See also* E. MCQUILLIN, *supra* note 6, at § 21.296.

102. 39 N.Y.2d 554, 349 N.E.2d 849, 384 N.Y.S.2d 749 (1976).

103. *See* Kennedy & Lynch, *supra* note 5, at 180.

104. State enactments and subsequent case law employ a variety of means to create or minimize discretionary immunity. *See, e.g.*, CAL. GOV'T CODE § 820.2 (Deering 1973) and Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (creates a 'subsequent negligence' rule, that acts which follow discretionary decisions may be ministerial); 1977 ME. LEGIS. SERV. ch. 578, § 8103 (re-establishes general immunities, specifically listing immunity for performance or failure to perform discretionary acts); MONT. REV. CODES ANN. §§ 82-4328, 4329, 4330 (Supp. 1977) (establishes immunity for legislative, judicial and gubernatorial acts); N.M. STAT. ANN. § 5-14-2-B (Supp. 1976) (abolishes all governmental-proprietary distinctions, establishing concepts of duty and the reasonable prudent person's standard of care.); WASH. REV. CODE ANN. § 4.96.010 (1962 & Supp. 1977) and Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 407, 445 (1965) (creates a four-part test to narrow discretionary immunity: 1) the activity must involve a basic governmental policy or program or objective; 2) the activity must be essential to that policy, program, or objective; 3) the act in question must involve the exercise of a basic policy evaluation or judgment; and 4) the government agency must be acting within the scope of its authority).

105. CAL. GOV'T CODE § 815 (Deering 1973). *See, e.g.*, Ramos v. County of Ma-

In contrast, Oregon's act[107] is "open-ended,"[108] making all municipal activities subject to liability except for those functions specifically exempted. In view of principles of statutory construction, this difference in approach can be significant. Since statutes in derogation of sovereignty traditionally are construed narrowly,[109] courts will view "closed-ended" acts conservatively, in favor of immunity. Under the "open-ended" approach courts may rule that, given the absence of general immunity, a narrow statutory construction is inapplicable.[110] This has been the result in Oregon and California.[111] To a legislature seeking to protect its municipalities, a "closed-ended" approach offers obvious advantages. On the other hand, an "open-ended" scheme more closely follows the modern equitable trend requiring governments to redress their torts.[112]

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dera, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971) (holding liability is the rule, immunity the exception).

106. Lansing, *supra* note 70, at 359.

107. OR. REV. STAT. § 30.260 (1975). *See* Pickett v. Washington County, 31 Or. App. 1263, —, 572 P.2d 1070, 1072-73 (1977).

108. *See* Lansing, *supra* note 70, at 359.

109. *Id.* at 359-60.

110. Statutory construction problems may also arise under the closed-ended approach. When a court must decide if an activity, very close to one of the enumerated liabilities on the list but not precisely identical, is to be immune, the maxim *expressio unius est exclusio alterius* (the expression of one excludes all others) may lead to a narrow view of the liability. Moreover, a court finding this construction unsatisfactory might look to prior governmental-proprietary distinctions for authority, a regressive approach in light of the legislative closed-ended prescription. *See* Comment, *The Colorado Governmental Immunity Act: A Prescription for Regression*, 49 DEN. L.J. 567, 586-87 (1973).

111. Sava v. Fuller, 249 Cal. App. 2d 281, 284, 57 Cal. Rptr. 312, 313 (1967) (clearly setting out the government's immunity priority unless excepted in the statute). *Accord*, Universal By-Products, Inc. v. City of Modesto, 43 Cal. App. 3d 145, 154, 117 Cal. Rptr. 525, 531 (1974) (the Code's immunity provisions are superior to its liability provisions).

Swanson v. Coos County, 4 Or. App. 587, 590, 481 P.2d 375, 377 (1971) (the general rule is liability unless limited by statute). *Accord*, Weaver v. Lane County, 10 Or. App. 281, 292, 499 P.2d 1351, 1356 (1972) (general governmental liability is the rule under the act).

See also Holt v. Utah State Road Comm'n, 511 P.2d 1286 (Utah 1973) (governmental immunity is the rule with listed liabilities construed narrowly in favor of the state).

112. *See* E. MCQUILLIN, *supra* note 6, at § 53.02 (the municipal doctrine is contrary to the precept that liability should follow tortious conduct). *See also* Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1965) (both cases holding that blanket governmental immunities are inequitable).

C. *Legislative Restrictions*

Tort Claims Acts may include a number of methods to limit plaintiffs' recoveries. Many states require that prospective plaintiffs give notice to the government agency they intend to sue, usually within a short time span.[113] A sixty- or ninety-day limit for notice ensures that municipalities can fully investigate an alleged cause of action.

Legislative limits on damage awards offer another safeguard to municipalities. Limits from as low as $100 to $300,000 or more, are common,[114] as are limits set by the city's insurance coverage.[115] Opponents of damage limitations argue that the limits fail to reflect differing abilities to pay between major cities and minor hamlets,[116] and, moreover deny deserving claimants full compensation. States should adopt sliding scale damage limits to reflect municipalities' varying size and capacity to absorb the costs of tort suits.[117]

D. *Restrictions Within Control of the Municipality*

Faced with tort liability, a prudent city manager can minimize his city's tort exposure. Within three general categories—insurance management, risk evaluation and administrative and procedural

113. *See, e.g.*, IOWA CODE ANN. § 615A.5 (1973) (requires notice within 60 days to enjoy 2-year statute of limitations, or must commence suit, without notice, within 90 days); TENN. CODE ANN. § 6-1003 (1971) (requires notice within 90 days for injuries sustained from defect in street or sidewalk).

114. *See, e.g.*, OR. REV. STAT. § 30.265 (1975) (retains prior statutory immunities and limits such at $100 maximum recovery for injury from sidewalk defects). *See also* Lansing, *supra* note 70, at 367.

In contrast, the Montana limits are $300,000 per individual. MONT. REV. CODES ANN. § 82-4334 (Supp. 1977).

115. *Compare* 1977 ME. LEGIS. SERV. § 8105 (general tort liability ceiling of $30,000) *with* 1977 ME. LEGIS. SERV. § 8116 (purchase of insurance of higher maximum coverage supersedes § 8105 limit).

116. Van Alstyne, *supra* note 5, at 972 n.369. *See* Kennedy & Lynch, *supra* note 5, at 180.

117. Using another mode of restriction, the legislature can prohibit exemplary and punitive damages on the theory that the government cannot be "punished" or made example of for deterrent effect. *See, e.g.*, Fisher v. City of Miami, 172 So.2d 455 (Fla. 1965); UTAH CODE ANN. § 63-30-22 (1968). However, where malice can be proven, these remedies may have their place in a Tort Claims Act. *See* Nixon v. Oklahoma City, 555 P.2d 1282, 1285 (Okla. 1976) (city not liable for exemplary damages "unless citizens of the governmental unit are in some sense real participants in the wrongful conduct"); N.D. CENT. CODE § 32-12.1-03.2 (Supp. 1977) ($25,000 damages limit per person against political subdivisions except for punitive or exemplary dages "caused by willful or malicious conduct").

remedies—the manager can guard against large outlays for tort judgment.

1. Insurance Management

Although municipalities have long used insurance,[118] a history of inadequate controls and uninformed purchases indicates inefficient municipal utilization of the insurance dollar.[119] The solution lies in gaining control of the situation through an insurance management program.[120] Large cities,[121] for example, may may choose between

118. *See, e.g.*, MISS. CODE ANN. § 21-37-37 (1975) (authorizing municipal insurance purchases). Georgia, for example, holds to traditional immunity doctrines except for implying waiver on the purchase of insurance. Davis v. City of Macon, 122 Ga. App. 665, 178 S.E.2d 557 (1970); GA. CODE § 69-301 (1967).

There are four reasons why a city might purchase insurance although immune from tort suit: 1) By purchasing general liability coverage, the city can obtain the insurer's services to defend all suits; 2) If the status of the immunity doctrine is uncertain, the risk of abrogation falls on the insurer; 3) In states providing for waiver of immunity with an insurance prupose, insuring protects injured citizens; 4) Insurance may protect personally liable employees from personal liability. Note, *Municipal Tort Liability: Purchase of Liability Insurance as a Waiver of Immunity*, 18 WYO. L. J. 220, 229 (1964).

119. A National Institute of Municipal Law Officers study found ineffective utilization of insurance dollars. C. RHYNE, W. RHYNE & S. ELMSDORF, TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICERS 340-42 (1976). Many municipalities could not identify their premium costs and few utilize cost saving deductibles. *Id.*

Further, some cities purchasing practices violated state law. In Missouri, many cities may be in violation of the Missouri Anti-Trust Law, MO. REV. STAT. § 416.011 (1978). A city may restrain trade by practices which a) successively award insurance purchases to the same firm absent a clear showing of the reasonableness of this practice, b) awarded insurance contracts to local insurance agents only, or c) allowed only locals to bid. Kooistra, *Risk Management*, 41 MO. MUNICIPAL REV., No. 12, 13-14 (1976).

In another Missouri study, 50% of the city administrators surveyed had no knowledge of their loss experiences, 89% were unaware of the extent of their risk exposure, and more than 5% had no insurance manager to administer their insurance program. *Id.* at 14.

120. Pfennigstorf, *Government Risk Management in Public Policy and Legislation: Problems and Options*, 1977 AM. BAR FOUNDATION RESEARCH J. 255, 256 [hereinafter cited as Pfennigstorf]. The term "insurance management" encompasses two elements of risk management, the systematic analysis of risk exposure and implementation of data systems designed to keep managers knowledgeable of the risk situation. The other elements are the design of methods to optimize risk retention and risk trade-off, and a program of risk prevention. *Id.*

121. The smaller city which cannot provide a full-time insurance expert can hire a consultant, or participate in a buying group with other cities when allowed by state law. *See, e.g.*, CAL. COV'T CODE § 990.8 (Deering 1973). An alternative is to participate in a state level insurance program. While most states have risk management

purchasing commercial coverage[122] or self-insuring.[123] Often a combination of these techniques is most cost effective. A city may self-insure for small damage claims payable out of the operating budget while purchasing insurance against the threat of large claims. A city may further cut costs by selecting insurance with a designed maximum coverage, above which the city will "take its chances"[124] and finance any extraordinary judgment through bond issues[125] or special tax levies.[126]

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departments which control the state's insurance purchases and liability problems, only a few extend these services to the municipalities. Pfennigstorf, *supra* note 120, at 267-73. These states rarely do more than authorize municipalities to set up similar offices. *Id. Accord*, IND. CODE ANN. § 18-4-7-4 (Burns 1974) (makes municipal purchasing agents responsible for their own insurance purchases). Utilization of the state's services would eliminate procurement problems as well as lower municipal administrative costs. Pfennigstorf, *supra* note 120, at 303.

Some states create a centralized purchasing act for local governments. *See, e.g.*, NEV. REV. STAT. § 332.115(1)(e) (1975). COLO. REV. STAT. § 24-30-402(3) (1973), makes the state's risk management office's services available to small government units. Wisconsin's state-wide municipal fire insurance program, WIS. STAT. ANN. §§ 605.01-605.30 (1973), experienced great savings. In the years from 1934 through 1973, the effective rates of premiums was 50% lower than it would have been through individual purchases. For the years 1961-1971, no premiums had to be collected at all and yet during that period the insurance department was able to return $11,500,000 of excess to the state general fund. Pfennigstorf, *supra* note 120, at 306.

122. Letter to author from the Pennsylvania Department of Insurance, dated February 28, 1978, stating that insurance is available although the state has no legislative protection. *But see* St. Louis Globe-Democrat, December 2, 1977, § N, at 1, col. 4, reporting statements made by concerned city administrators which claim that insurance will be unavailable at any cost in a government-liable environment. These administrators expressed fear and concern for municipal financial health in the wake of the Missouri Supreme Court's abrogation of municipal immunity. Further evidence of insurability problems is expressed in a letter to author from James S. Kemper & Co. This insurance broker states that the demise of governmental immunity, coupled with rising social expectations and increased judgments, contributes to many insurers refusal to consider insuring municipalities. Apparently, for some insurers, the risks are too great to warrant investment of insurer capital in these lines when it can be placed elsewhere more profitably. Some companies are refusing to insure for specific high risks resulting from faulty design, advertising or printed material prepared by or developed by the municipality. Hencke, *Oregon's Governmental Tort Liability Law from a National Perspective*, 48 OR. L. REV. 95, 118-20 (1968).

123. *See generally* Pfennigstorf, *supra* note 120, at 281-85.

124. Such a system is advantageous since excessive judgments occur less frequently from municipal budget cycles. *Id.* at 282.

125. *E.g.*, CAL. GOV'T CODE § 975.2 (Deering 1973); MONT. REV. CODES ANN. § 82-4335(d) (Supp. 1977).

126. N.D. CENT. CODE § 32-12.1-11 (Supp. 1977); MONT. REV. CODES ANN. § 82-4335(c) (Supp. 1977).

2. Risk Evaluation

Risk management goes beyond insurance procurement, however. Municipalities should make resource allocation choices concerning trade-offs between the social utilities of their programs (such as the advantages of municipal swimming pools or craft shops) and their costs in terms of tort liability exposure. In certain situations the potential financial burden will so outweigh the social benefit as to compel elimination of the program. If the function is of significant social value but marginally budgeted, a legislative exemption from liability may be warranted.[127]

3. Administrative and Procedural Remedies

Finally, a city can initiate an administrative mechanism to keep tort claims from getting to court while still providing for compensation of the injured. A few states utilize imaginative dispute resolution mechanisms which, in essence, arbitrate tort and other claims.[128] While this system should be separate from the department charged with the tortious conduct, even the smallest of cities can set up a program to hear local complaints. The city can negotiate a settlement and avoid expensive litigation at a small administrative cost.

CONCLUSION

The evolution of sovereign liability is an excellent example of the growth of state law. A social goal of protection for injured citizens is closer to fruition. Common law evolutions, however, leave unsettled gaps and uncertainty. Clarity can be achieved by a legislative entry into this developing field of law. The informed policymaking inherent in the legislative process establishes it as the proper forum for solution of the municipal tort problem. The legislature can utilize fact-finding methods such as hearings to encourage full discussion and evaluation of the interests to be protected. In balancing these interests, the legislature should eschew blanket discretionary immunities and create a system that protects deserving claimants without subjecting municipalities to unlimited tort liability.[129]

127. *See, e.g.*, ILL. REV. STAT. ch. 85, § 3-106 (1965) (exempting park activities from municipal liability). *See generally* Van Alstyne, *supra* note 5, at 972-73.

128. *See, e.g.*, CAL. GOV'T. CODE § 935.2 (Deering 1973).

129. An off-shoot of this growth is the extension of liability to other municipal activities. For example, the Illinois Supreme Court abrogated the doctrine of municipal immunity from garnishment. *See* Henderson v. Foster, 59 Ill. 2d 343, 319 N.E.2d

789 (1974) (governmental tort liability rationale used to allow garnishment of municipal employee's wages). *See also* Monell v. Department of Social Services, 98 S. Ct. 2018 (1978) (municipalities liable for civil rights violations under federal law, *overruling* Monroe v. Pape, 365 U.S. 167 (1961)).

Not every legislative solution to the discretionary immunity problem clarifies municipal tort law. For example, the Colorado legislature apparently opted for the discredited governmental-proprietary distinction. COLO. REV. STAT. §§ 24-10-103(3)(a), 24-10-106, 24-10-108 (1973) (immunity for operation of public facilities in employees' performance of duties "vested in them by law."). If the court must determine which activities vest in employees by law, it must use the traditional governmental-proprietary doctrine. Comment, *The Colorado Governmental Immunity Act: A Prescription for Regression*, 49 DEN. L.J. 567, 586-87 (1973). Similarly Utah's Governmental Immunity Act, UTAH CODE ANN. § 63-30-3 (1968), makes a municipality immune in activities arising in the performance of *governmental* functions. *See* Note, *The Utah Governmental Immunity Act: An Analysis*, 1967 UTAH L. REV. 120, 128-29 (1967).

Moreover, unless Tort Claims Acts clearly identicate the manner in which the acts should be adjudicated, judicial regression to old common law doctrines may result. *E.g.*, Young v. Chicago, R.I. & Pac. R.R., 541 P.2d 191, 193 (Okla. 1975) (notwithstanding a state Tort Claims Act, OKLA. STAT. tit. 11, § 1751 (1971), the court used a traditional ministerial and governmental (discretionary) immunity test.)

APPENDIX

MUNICIPAL IMMUNITIES: HOW THEY STAND

Abolished		Modified	Insurance[1]	Traditional Position
J Ala.[2]	J Neb.	Conn.	Ga.	J Ark.[3]
J Alas.	J Nev.	S.C.	Kan.	Del.
J Ariz.	J N.D.	Tex.	Miss.	Md.
J Cal.	J N.H.		J Mo.[4]	Mass.
J Colo.	J N.J.		N.C.	S.D.
J Fla.	J N.M.		Ohio	Va.
Hawaii	N.Y.		Tenn.	
J Idaho	Okla.		Vt.	
J Ill.	Ore.			
J Ind.	J Pa.			
Iowa	J R.I.			
J Ky.	Utah			
J La.	J Wash.			
J Me.	J W. Va.			
J Mich.	J Wis.			
J Minn.	J Wyo.			
J Mont.	J D.C.			
34 (28 J)		3	8	6

1. This list contains the states which follow traditional governmental immunity rules, but provide that an insurance purchase constitutes a waiver of that immunity.
2. A "J" indicates the change to liability was made judicially.
3. Arkansas changed to liability judicially and was changed back to immunity legislatively. *See* note 8 *supra.*
4. Missouri abrogated its immunity for municipalities and the legislature reimposed immunity with an optional insurance waiver. *See* note 8 *supra.*

Adapted from RESTATEMENT (SECOND) OF TORTS § 895A (Tent. draft No. 19, 1973), as up-dated by the author.