REPORT ON

THE NEW JERSEY TORT CLAIMS

AND CONTRACTUAL LIABILITY ACTS

L. 1972, c. 45

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and

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INTRODUCTION

Under Chapter 14, Section 1, of the Tort Claims and Contractual Liability Acts:

> The Chief Justice of the Supreme Court and the Attorney General shall each compile annual reports on the operation and effectiveness of this act. At the expiration of 3 years from the date hereof and every 5 years thereafter the Chief Justice and the Attorney General shall jointly report to the Governor and the Legislature on the operation of this act and such report shall include any recommendations for changes necessary to improving the administrative or judicial implementation of the act.
>
> -- N.J.S.A. 59:14-1

This joint Report is submitted by the Chief Justice of the Supreme Court and the Attorney General in furtherance of their obligation described above.

The Report has been prepared with the joint cooperation of the Administrative Office of the Courts and the Office of the Attorney General.

The Chief Justice and the Attorney General wish to acknowledge the substantial contribution made in the preparation of this report through the efforts of the following members of their staffs: Cynthia M. Jacob, Director of Civil Practice, Administrative Office of the Courts; Robert P. Martinez, Special Assistant to the Attorney General; Colette A. Coolbaugh, Chief, Civil Court Services, Administrative Office of the Courts; Peter P. Aiello, Assistant Chief for Statistical Information, Administrative Office of the Courts; Paul Klein, Staff Attorney, Administrative Office of the Courts; Judith McConnell, Staff Attorney, Administrative Office of the Courts; Joseph M. Mahan,

Administrator, Claims Service Section; Lawrence Moncher, Deputy Attorney General, Chief, Claims Service Section; John S. Fitzpatrick, Deputy Attorney General; Mark A. Sullivan, Jr., Deputy Attorney General.

Chapter V, Recommendations for Amendments to the Tort Claims Act, represents the views of the Office of the Attorney General only, since it has been the long-standing policy of the Chief Justice of the Supreme Court to remain uninvolved with the legislative process. The chapter entitled, "Analysis of Existing Case Law and Judicial Response to the Tort Claims and Contractual Liability Acts", is a compilation of reported decisions prepared by staff members and is not intended to represent the views of the Chief Justice or the Attorney General on the issues.

CHAPTER I

HISTORY OF THE TORT CLAIMS AND CONTRACTUAL LIABILITY ACTS

From its very beginning until 1970 the State of New Jersey was considered to be totally immune from suit in tort and contract. This immunity dated back to the English common law which held that the sovereign was not subject to suit in his own courts without his consent. During this period of time the State was held to be answerable in condemnation, prerogative writs and in matters involving taxation, but the prohibition against tort and contract suits remained inviolate until two decisions were handed down by the Supreme Court of New Jersey in March and April of 1970. They were P.T. & L. Const. Co. v. Comm'r. Dept. of Trans., 55 N.J. 341 (1970) and Willis v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970). The former case abolished the State's immunity in contract while the latter imposed a deadline of January 1, 1971 on which date the State would lose its immunity in tort.

The Legislature, in attempting to obtain more time in which to deal with the change passed N.J.S.A. 52:4A-1 on June 15, 1970 which barred any action against the State accruing prior to July 1, 1971. The Act was later amended to extend the deadline until April 1, 1972. Subsequent to this last extension the Court decided P.T. & L. Const. Co. v. Comm'r Dept of Trans., 60 N.J. 308 (1972) based on the same cause of action as P.T. & L., supra. In this case the court rejected the extension as it applied to contracts on the grounds that there was "no overriding public

need" for such a provision. The Legislature then changed N.J.S.A. 52:4A-1 to apply to tort actions only and extended the deadline to July 1, 1972.

This does not mean that no claims against the State were paid prior to that time. There is now, and was at that time, a Subcommittee on Claims as part of the Joint Legislative Appropriation Committee. If that subcommittee was satisfied that a claim was justified, it could recommend that the Legislature pay it in the annual Supplemental Appropriation Act. The result was and still is what are in effect multitudinous "private bills." By virtue of L. 1966 c. 33 and subsequent annual appropriation acts, small claims may be paid by the State Treasurer without going through the Legislature upon the warrant of the Director of the Division of Budget and Accounting. Furthermore, many autonomous State agencies were specifically authorized by statute to sue and be sued in their own name.

It should also be noted that the State's immunity did not carry over to State employees. They were given a more limited immunity based on the discretionary-ministerial distinction. They were immune so long as they were in good faith exercising discretion vested in them; however, there was no immunity if they negligently performed a ministerial function that was required of them. Kisielewski v. State, 68 N.J. Super. 258 (App. Div. 1961). Certain immunities, however, were granted to certain State employees by statute. For example, members of the organized militia performing their official duties were exempted from all civil liability.

Local units of government were of course authorized by statute to "sue and be sued". However, since they did exercise governmental functions, certain immunities were afforded them. These were based at different times on various principles including the governmental-proprietary test, the active wrongdoing test, the test of ordinary negligence and the ministerial-discretionary test. There were also certain statutes which granted immunity for specific functions. N.J.S.A. 40:9-2 granted immunity from personal injuries resulting from the use of public grounds, buildings and structures, while N.J.S.A. 18A:20-35 granted a similar immunity to school districts.

Local government employees were generally subject to the same liabilities and immunities as State employees except that there were some provisions for defense and/or indemnification of certain employees such as teachers, members of boards of education, firemen and police officers.

In May of 1972 a report was submitted to the Legislature by the Attorney General entitled Report of the Attorney General's Task Force on Sovereign Immunity. The Legislature had, in 1966, authorized the preparation of such a report in N.J.S.A. 52:17B-5.2.

That report reviewed New Jersey's experience with sovereign immunity and compared it with the experiences of other states that had in some fashion waived their sovereign immunity and adopted tort claims acts, most notably California and New York. The Federal Tort Claims Act was also reviewed. Finally the report contained the proposed New Jersey Tort Claims Act, New Jersey Contractual Liability Act and standards for representation of State employees.

The proposals were passed by the Legislature in May of 1972, within a reasonably short time after the third P.T. & L. decision in March of 1972. They were passed by the Legislature and signed by the Governor on June 1, 1972. On July 1, 1972 Title 59 became law. The Tort Claim Act governs the responsibility in tort of all governmental bodies in the State including the State, local government, school boards, commissions and autonomous authorities. The Contractual Liability Act only governs the contract liability of the State.

CHAPTER II

THE OPERATION OF THE ACT

I. THE NEW JERSEY TORT CLAIMS ACT

The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. sets the parameters within which recovery may be had against public entities and public employees for negligence. It provides that public entities shall be liable for their negligence only," * * * within the limitations of this Act and in accordance with the fair and uniform principles established herein."

NOTICE OF CLAIM

The first procedure mandated by the Act for recovery against a public entity is the filing of a Notice of Claim against that entity. That notice of claim must contain:

> "a. The name and post office address of the claimant;
>
> b. The post office address to which the person presented the claim desires notices to be sent;
>
> c. The date, place and other circumstances of the occurrence of transaction which gave raise to the claim asserted;
>
> d. A general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;
>
> e. The name or names of the public entity, employee or employees causing the injury,

damage or loss, if known; and

> f. The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed."

It is further provided that public entities may enact rules or regulations adopting forms to be used for said claims which may call for the following additional information:

> "(1) written reports of a claimant's attending physicians or dentists setting forth the nature and extent of injury and treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity, (2) a list of claimant's expert witnesses and any of their reports or statements relating to the claim; (3) itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses; (4) documentary evidence showing amounts of lost income; (5) if future treatment is necessary, a statement of anticipated expenses for each treatment."

The claimant may also be required to submit to physical or mental examination and to permit the public entity to inspect relevent records.

Claims for damages against the State must be filed with either the Attorney General or the department or agency involved. A claim against a local public entity should be filed with that entity.

The filing must be within 90 days of the accrual of the

cause of action. Normally this would be the date of the accident. Infants or incompetents have until 90 days from their coming of age or returning to a sane mind respectively.

For those that have failed to file within the required period of time, there is a saving provision which provides that, upon a showing of sufficient reasons for failure to file within the period of time prescribed, a judge of the Superior Court may, at his discretion, grant the claimant leave to file a late Notice of Claim against a public entity at any time within one year of the accrual of the claim provided that the public entity has not been substantially prejudiced by the delay.

PROCESSING OF CLAIMS

The Act goes on to provide that after the expiration of six months from the date the Notice of Claim is received by the public entity, the claimant may file suit in an appropriate court of law. This allows the public entity six months to investigate the claim in question and to settle those that have merit.

Settlement of claims against the State up to $7,500.00 can be approved by the Attorney General or his designee. The First Assistant Attorney General has been designated to approve all claims up to $2,500.00, while the Director of the Division of Law can settle any claim up to $500.00. Settlements in excess of $7,500.00 must be approved by both the Attorney General and the Director of the Division of Budget and Accounting.

PUBLIC EMPLOYEES

According to the holding in Lutz v. Semcer, 126 N.J.

Super. 288 (Law Div. 1974), the above procedures do not apply to claims against public employees. While this may be changed by future court decisions or by legislative amendment as recommended herein, the subject will presently be discussed from the standpoint that no special procedure is required prior to bringing suit against a public employee.

State employees who are sued as a result of their employment are entitled to legal representation by the Attorney General, should they so request, and, where they have been so represented, to indemnification for any judgement returned against them, except for punitive or exemplary damages or damages resulting from the commission of a crime.

It is provided in the Act that local public entities such as counties and/or municipalities may grant their employees indemnification if they so wish. The statutory provisions mandating indemnification to certain local employees such as school teachers, are not affected by this provision.

SUIT

According to the provisions of the Act, suit must be brought no later than two years from the accrual of the claim. Under Lutz v. Semcer, supra, there is at present some question as to whether this provision applies to public employees.

All the defenses that would be available to a private person are available to public entities and public employees. Besides this, however, there are numerous other immunities

which apply to public entities and public employees: immunity where liability has been assumed by the United States, for discretionary activity or legislative or judicial action, for failure to adopt or enforce a law, for issuance, denial, suspension or revocation of a license, for failure to inspect or negligent or inadequate inspection, for failure to provide supervision of public recreational facilities, for termination or reduction of public assistance, for slander of title and for strict liability, implied warranty and products warranty. A public employee enjoys further immunities for acting pursuant to the apparent authority of an invalid law, instituting prosecution or judicial or administrative proceedings, entry upon property and misrepresentation. Public entities are immune for acts of public employees of a criminal nature.

Pursuant to C.3, L. 1975, trial can be either with or without a jury in accordance with the Rules Governing the Courts of the State of New Jersey. In accordance with that amendment, the standard of comparative negligence to be used at trial is the same as that used between private litigants.

DAMAGES

Unlike public employees, public entities are not liable for punitive or exemplary damages, nor can pre-judgement interest be assessed against either. It should further be noted that no award for pain and suffering can be returned against a public entity or public employee unless there is permanent loss of a bodily function, disfigurement or dismemberment and medical expenses with a reasonable value in excess of $1,000.00. In

any action brought against a public entity or public employee where no award is made for pain and suffering the court, at its discretion, may impose costs, expert witness fees not exceeding $100.00 and reasonable attorney's fees.

CONTRIBUTION

Public entities and public employees are liable for contribution as joint tortfeasors only to the extent of recovery provided for in the Act. Further, any amount received in a bona fide settlement from one tortfeasor is deducted pro tanto from the judgement against the public entity or public employee.

II. CONTRACTUAL LIABILITY ACT

The New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq. sets forth the conditions under which recovery may be had against the State of New Jersey in contract. Unlike the Tort Claims Act, it applies only to the State and not to other public entities.

NOTICE OF CLAIM

It is required that any party contracting with the State file a Notice of Claim with the State within 90 days of under the Act. Said Notice of Claim should contain the following information:

> "the name of the claimant, the nature of the claim, specific reasons for making the claim, and the total dollar amount of the claim if known."

Any contractor who fails to file such a notice of claim is barred from suing the State under this Act unless he obtains leave to file a late Notice of Claim in the same manner as provided for in the Tort Claims Act.

PROCESSING OF CLAIM

After 90 days from the filing of the Notice of Claim with the Contracting Agency, the claimant may file suit in the courts of the State of New Jersey. This 90 day period, like the six month period in the Tort Claims Act, allows the State to investigate the claims and settle those that are meritorious.

SUIT

A contractor wishing to file suit against the State under the Act must do so within two years of the accrual of the claim or one year from the completion of the contract, whichever is later. Jurisdiction is vested in the courts of the State of New Jersey and trial is by a judge sitting without a jury.

The State's liability extends to express contracts and contracts implied in fact but not to implied warranties or contracts implied in law. No punitive or consequential damages can be assessed against the State.

Nothing in the Act prohibits the parties from submitting the matter to arbitration.

CHAPTER III

STATISTICAL ANALYSIS OF THE IMPACT OF THE ACTS to MARCH 1975

COMPLAINTS FILED IN THE LAW DIVISION OF THE SUPERIOR AND COUNTY COURTS AND IN THE COUNTY DISTRICT COURTS OF THE STATE OF N.J., JUNE 1, 1972 TO MARCH 31, 1975

During the 34-month period of this study, 3,619 complaints were filed in the courts under the Act. There were 3,163 cases added to the calendars (first answer filed in the Law Division of the Superior and County Courts, and summons served in County District Court matters), of which 1,862 were disposed of, 16 were marked inactive by the judge, and 1,285 active cases were pending on March 31, 1975. Title 59 cases represent a relatively negligible proportion of the total civil caseload. The 3,163 cases accounted for only 0.4% of the total 828,204 civil cases added during that period in the Law Division of the Superior and County Courts and in the County District Courts. The data for calendar year 1974 shows a monthly average of 122 complaints filed and 84 cases added to the civil calendars under Title 59.

Of the 3,619 complaints filed, 585 (16%) were against the State and 3,034 (84%) against local public entities. For cases added to the court calendars the figures were: (State 495 (16%), local 2,668 (84%). Contractual liability accounted for 113 (19%) of the Title 59 complaints filed against the State and 99 (20%) of cases added. (Table III)

Of the 1,862 Title 59 cases disposed of by the courts, 195 (10%) were tried to completion, while another 70 (4%) were partially tried and disposed of during trial. The remaining 86% were disposed of without trial having commenced: Defaults entered 118 (6%); settled 435 (24%); dismissed 889 (48%); discontinued 78 (4%); transferred to other jurisdiction 77(4%).

The 1,285 Title 59 cases pending on March 31, 1975 represents an intake of over 15 months. Of these, 220 were claims against the State and 1,065 against local public entities (Table I). Because Title 59 cases represent only a very small proportion of the courts' total caseloads (0.4%), the delays in the processing of these matters are probably not due to the volume but rather to other factors, such as attorney conflicts, priorities in scheduling and the overall backlog in the courts. For all active pending civil cases in the Law Division, and also for Title 59 cases alone, 37% were over one year old on March 31, 1975. In the County District Courts 10% of all cases were over 6 months old while for Title 59 it was 2%.

CLAIMS AGAINST THE STATE PROCESSED IN THE FEDERAL COURTS AND HANDLED ADMINISTRATIVELY BY THE ATTORNEY GENERAL

From the effective dates of the acts, 6/1/72 and 7/1/72, to 3/31/75, the Attorney General's office represented State employees in 162 suits seeking monetary damages which were filed in the Federal courts under 42 U.S.C.A. 1983. In the event of adverse judgement, the State employees may be

entitled to reimbursement from the New Jersey Tort Claims Fund pursuant to N.J.S.A. 59:10A(1). Of these 162 suits, 83 were dismissed, 5 were settled without monetary payment, and 74 were pending as of March 1975.

TABLE 4

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CLAIMS AGAINST PUBLIC ENTITIES

N.J. Tort Claims Act [1] and N.J. Contractual Liability Act [2]

Claims Against State and Local Public Entities

	Period	Complaints Filed	Cases [3] Balance Brought Fwd.	Cases Added	Cases Disposed Of	Inactive Pending	Active Pending
State	6/72 - 12/72	94	0	84	31	0	53
Local Public Entities	"	523	0	442	192	0	250
State	1/73 - 12/73	187	53	168	53	2	166
Local Public Entities	"	1,045	250	971	382	1	838
State	1/74 - 12/74	247	166	195	128	0	233
Local Public Entities	"	1,219	838	1,013	702	1	1,148
State	1/75 - 3/75	57	233	48	59	2	220
Local Public Entities	"	247	1,148	242	315	10	1,065
TOTALS		3,619	--	3,163	1,862	16	1,285

1/ The Tort Claims Act includes claims against the state and all other public entities.

2/ The Contractual Liability Act only applies to contract claims against the State.

3/ Reporting instructions state: "'Cases'. For the Law Division of the Superior and County Courts, report cases added to the calendars when first answer is filed, R. 4:36-2.

For the County District Courts report complaints upon which summonses have been served. For both the Law Division and the County District Courts include also in this item all cases restored, transferred from another court or county, etc.

TABLE II

Rev. 8/14/75

CLAIMS AGAINST PUBLIC ENTITIES

N.J. Tort Claims Act

Tort Claims Against State and Local Public Entities

	Period	Complaints Filed	Cases*				
			Bal. Brought Forward	Cases Added	Cases Disposed Of	Inactive Pending	Active Pending
State	6/72 - 12/72	79	0	70	24	0	46
Local Public Entities	"	523	0	442	192	0	250
State	1/73 - 12/73	157	46	142	40	0	148
Local Public Entities	"	1,045	250	971	382	1	838
State	1/74 - 12/74	190	148	146	107	0	187
Local Public Entities	"	1,219	838	1,013	702	1	1,148
State	1/75 - 3/75	46	187	38	49	1	175
Local Public Entities	"	247	1,148	242	315	10	1,065
TOTALS		3,506	--	3,064	1,811	13	--

* Reporting instructions state: "'Cases'. For the Law Division of the Superior and County Courts, report cases added to the calendars when first answer is filed, R. 4:36-2.

For the County District Courts report complaints upon which summonses have been served. For both the Law Division and the County District Courts include also in this item all cases restored, transferred from another court or county, etc.

TABLE III

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CLAIMS AGAINST PUBLIC ENTITIES

N.J. Contractual Liability Act *

Contractual Liability Claims Against the State

Period	Complaints Filed	Cases **				
		Bal.Brought Forward	Cases Added	Cases Disposed Of	Inactive Pending	Active Pending
6/72 - 12/72	15	0	14	7	0	7
1/73 - 12/73	30	7	26	13	2	18
1/74 - 12/74	57	18	49	21	0	46
1/75 - 3/75	11	46	10	10	1	45
TOTALS	113	--	99	51	3	--

* The Contractual Liability Act applies only to contract claims against the State.

** Reporting instructions state: "'Cases'. For the Law Division of the Superior and County Courts, report cases added to the calendars when first answer is filed, R. 4:36-2.

For the County District Courts report complaints upon which summonses have been served. For both the Law Division and the County District Courts include also in this item all cases restored. transferred from another court or county, etc.

TABLE IV

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CLAIMS AGAINST PUBLIC ENTITIES

N.J. Tort Claims Act and N.J. Contractual Liability Act

Money Judgments
June '72 - March '75

		Up to $100. inc.	$100.01 to $500.	$500.01 to $1000.	$1000.01 to $1500.	$1500.01 to $2000.	$2000.01 to 3000.	$3000.01 to $4000.	$4000.01 to $5000.	$5000.01 to $10,000	Over $10,000.	TOTALS
State	Tort Claims	0	1	1	2	0	0	0	0	3	4	11
	Contr. Liab.	1	0	0	0	0	0	0	0	0	0	1
Local Public Entities	Tort Claims	7	15	23	14	9	22	12	9	23	15	149
TOTAL	Tort Claims	7	16	24	16	9	22	12	9	26	19	160
	Contr. Liab.	1	0	0	0	0	0	0	0	0	0	1
TOTALS		8	16	24	16	9	22	12	9	26	19	161

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TABLE V

CLAIMS AGAINST PUBLIC ENTITIES

N.J. Tort Claims Act[1] and N.J. Contractual Liability Act[2]

Manner of Disposition *

June '72 - March '75

		By Trial Commenced		Without Trial (Before Trial Commenced)					
		Partially Tried but Disposed of During Trial	Tried to Completion	Default Entered	Settled	Dismissed	Discontinued	Trans. to Other Juris.	Total Disposed Of
State	Tort Claims	5	15	5	47	130	6	13	221
	Contr. Liab.	1	2	2	14	23	5	3	50
Local Public Entities	Tort Claims	64	178	111	374	736	67	61	1,591
Total	Tort Claims	69	193	116	421	866	73	74	1,812
	Contr. Liab.	1	2	2	14	23	5	3	50
GRAND TOTAL		70	195	118	435	889	78	77	1,862

* Source: Figures collated from reports received from County Clerks and County District Court offices. Restorations or vacations of default are reflected under cases added, see Table I.

1/ The Tort Claims Act includes claims against the State and all other public entities.

2/ The Contractual Liability Act only applies to contract claims against the State.

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TABLE VI

CLAIMS AGAINST THE STATE HANDLED
ADMINISTRATIVELY BY THE ATTORNEY GENERAL
PURSUANT TO N.J. TORT CLAIMS ACT*

Period	Beginning Balance	Received	Closed	Pending, End of Period
7/72 - 12/72	0	160	87	73
1/73 - 12/73	73	512	309	276
1/74 - 12/74	276	694	539	431
1/75 - 3/75	431	150	124	457
Totals, Received and Closed		1,516	1,059	

* This table does not include claims which are covered by the State's liability insurance policies, such as those which arise from automobile accidents, but does include all tort claims received and investigated by the Attorney General's Office.

TABLE VII
SCHEDULE OF PAYMENTS MADE FROM
NEW JERSEY TORT CLAIMS ACT FUND
June 1, 1973-March 31, 1975

Name of Claimant-Date of Payment	State Agency	Claim	Payment
7/73 T. Willis	Dept. of Construction & Economic Development	Loss of arm due to negligent manner of keeping wild bear in a cage at a State Park.	$250,000.00
11/73 A. Acciani	Dept. of Law and Public Safety	Property damage to private property by State Employee.	50.00
12/73 L. Amella	Department of State	Claim arising from defense of a County Election Board member.	100.00
1/74 Kessler Institute	Dept. of Law & Public Safety	Administrative expense for investigation of claim.	47.00
1/74 Palmer	Dept. of Transportation	Property damage to farm property.	77.00
3/74 Holoch	Dept. of Transportation	Property damage - B.I. Highway Maintenance.	100.00
6/74 Cain	Dept. of Institutions & Agencies	Negligent maintenance of inmate account.	1,600.00
6/74 Perillo	Dept. of Law & Public Safety	Auto Accident - per authority of Supplemental Appropriations Act for settlement excess of State auto insurance policy.	75,000.00
10/74 Doneski	Dept. of Transportation	Property damage - Highway maintenance	44.36
10/74 Richmond	Dept. of Institutions & Agencies	Prison inmate - property damage claim	10.00
12/74 Calex	Dept. of Transportation	Auto property damage - Highway maintenance	40.00

SCHEDULE OF PAYMENTS MADE FROM
NEW JERSEY TORT CLAIMS ACT FUND
June 1, 1973-March 31, 1975

Name of Claimant - Date of Payment	State Agency	Claim	Payment
12/74 Krout	Dept. of Transportation	Boat property damage, negligent operation of bridge.	$ 100.00
12/74 Hawkins	Dept. of Institutions & Agencies	Prison inmate - loss of parcel by prison mailroom.	32.27
1/75 Russinko	Dept. of Transportation	Auto - property damage Highway maintenance.	13.19
1/75 Kasse	Dept. of Transportation	Auto - property damage Highway maintenance.	100.00
1/75 Higley	Dept. of Transportation	Auto - property damage Highway electrical maintenance.	83.95
1/75 Gentile	Dept. of Transportation	Auto - P.D. Highway maintenance.	77.44
1/75 Miller	Dept. of Transportation	Auto - P.D. Highway maintenance.	45.00
2/75 Hencheck	Higher Education	Personal injury on State property.	2,338.00
3/75 Tramontana	Dept. of Treasury	Personal injury on State owned property.	360.00
3/75 Williams	Dept. of Institutions & Agencies	Prison inmate - damage to parcel in prison mailroom.	15.00

CHAPTER IV

ANALYSIS OF THE JUDICIAL RESPONSE TO THE TORT CLAIMS AND CONTRACTUAL LIABILITY ACTS

In fulfilling the mandate of N.J.S.A. 59:4-1, which requires a joint report from the Supreme Court and the Attorney General, a survey was undertaken to review all published decisions dealing with Title 59.

A review was made of all decisions published which discuss Title 59. Listed below are the opinions (as of 6/30/75):

Barney's Furniture Warehouse v. Newark, 62 N.J. 456 (1973)

Briscoe v. Rutgers State University, 130 N.J. Super. 493 (Law Div. 1974)

Cancel v. Watson, 131 N.J. Super. 320 (Law Div. 1974)

Dambro v. Union Cty. Pk. Comm., 130 N.J. Super. 450 (Law Div. 1974)

Dependable Container Service Inc. v. N.J. Turnpike Authority ___ N.J. Super. ___ (App. Div. 6/24/75)

Harris v. State, 61 N.J. 585 (1972)

Lutz v. Semcer, 126 N.J. Super. 288 (Law Div. 1974)

Markey v. Skog, 129 N.J. Super. 192 (Law Div. 1974)

Maule v. Conduit and Foundation Corp., 124 N.J. Super. 488 (Law Div. 1973)

Perillo v. Dreher, 126 N.J. Super. 264 (App. Div. 1974), cert. den. 64 N.J. 512 (1974)

Reale v. Township of Wayne, 132 N.J. Super. 100 (Law Div. 1975)

Rost v. Bd. of Ed. of Fair Lawn, 130 N.J. Super. 187 (Law Div. 1974), Appeal pending

Steward v. Borough of Magnolia, ___ N.J. Super. ___ (App. Div. 1975)

Wade v. New Jersey Turnpike Authority, 132 N.J. Super. 92 (Law Div. 1975)

Winters v. City of Jersey City, 120 N.J. Super. 129 (App. Div. 1972), modified 63 N.J. 7 (1973)

Wuethrich et al v. Delia et al, ___ N.J. Super. ___ (Law Div. 1975)

Of these cases, five were found not to come under the provisions of the Tort Claims Act and were disposed of by prior law. In Harris v. State, supra, plaintiff, a prisoner who had been assaulted while in prison, claimed that he was entitled to damages from the State because of its alleged failure to provide suitable prison facilities for his care and safety while in custody. The Court disposed of the question of the State's liability under Title 59 by holding that it had no application in this case (the accident having occurred in 1967). Similarly, in Barney's Furniture, supra, where a claim was made against the City of Newark for flood damage, the court decided the case on the basis of law antedating the Tort Claims statute, at which time the damage had occurred.

In Maule v. Conduit and Foundation Corp., the court had to resolve the question of whether tort immunity was applicable in the hiatus between Willis, et al. v. Dept. of Cons. & Ec. Dev., 55 N.J. 534 (1970), and July 1, 1972, the effective date of the New Jersey Tort Claims Act. The court held that a cause of action arising subsequent to the 1970 Willis decision and prior

to July 1, 1972 was not covered by the Act and that the Act was not violative of the equal protection clauses of the Federal or State Constitutions. Perillo v. Dreher, supra, was a wrongful death automobile accident case against a State employee and the State of New Jersey. The plaintiff there argued that N.J.S.A. 52:4A-1 (postponing the effective date of the rule in Willis modifying the doctrine of sovereign immunity until July 1, 1972) was interim legislation imposing a moratorium only, rather than a temporary reinstatement of the pre-Willis rule. The Appellate Division held that the statute in question was not a moratorium which would allow the plaintiff to institute action after that date with respect to the accident occurring prior to that date. The statute constituted a temporary reinstatement of the sovereign immunity rule barring plaintiff's action.

Winters v. City of Jersey City, supra, involved an action by a husband and wife against the City of Jersey City for injuries sustained by the husband while he was a patient in a city hospital. The County Court had reduced the jury awards aggregating $60,000.00 to $10,000.00 (relying on N.J.S.A. 2A:53A-8 which provides that a non-profit corporation "organized exclusively for hospital purposes" shall not be liable to respond for its negligence beyond the sum of $10,000.00). On cross-appeals, the Appellate Division sustained the judgement of liability and also sustained the trail judge's reduction of damages to $10,000.00. The Supreme Court held that the Appellate Division erred in sustaining the trial court's

reduction of the jury's awards and agreed with the views expressed in the Appellate Division's dissent (120 N.J. Super. at 135-154) holding that N.J.S.A. 2A:53A-8 and the $10,000.00 limitation thereunder was not applicable where a city owned hospital was involved.

The reported cases actually construing the Tort Claims Act deal primarily with the questions arising under N.J.S.A. 59:8-8 (Time for Presentation of Claims) and N.J.S.A. 59:9-2(d) (Interest and Limitation on Judgements).

Markey v. Skog, supra and Cancel v. Watson, supra were both law division cases which dealt with contribution from a public entity as a purported joint tortfeasor in the context of N.J.S.A. 59:8-8. Markey was an automobile negligence action which, by reason of a third-party complaint filed by defendant Skog against the State, raised the question of "whether the viability of the right of a nonpublic defendant to seek contribution from a public entity as a joint tortfeasor is dependant upon plaintiff having complied with the claim presentation requirements of N.J.S.A. 59:8-8". The court held that the 90-day notice period was not a condition precedent to the existence of liability on the part of the State and that it was a condition only upon a plaintiff's right hereafter to pursue his remedy against the State:

> It is clear that a defendant's right to contribution from a joint tortfeasor is, therefore, an inchoate right which does not ripen into a cause of action until he has paid more than his pro rata portion of the judgement obtained against him by the plaintiff. It is at that point that his cause of action for contribution accrues ....
>
> * * * *

> It is common liability at the time of the accrual of plaintiff's cause of action which is the sine qua non of defendant's contribution right. If there is common liability to plaintiff at that time -- that is, common liability as a matter of fact even although, necessarily, then unadjudicated -- defendant cannot be deprived of his inchoate right by reason of plaintiff's loss thereafter of his own right of direct action against the joint tortfeasor. (Markey, supra at 200-201).

Markey was not appealed.

A different result was reached in Cancel where defendant moved to join the City of Vineland and the Vineland Recreation Commission as third-party defendants. There the court denied defendant's request to join the governmental agencies as third-party defendants, holding that where a plaintiff has failed to present a claim against a public entity under N.J.S.A. 59:8-8, a defendant may not file a third-party complaint for indemnification and contribution against such public entity.

The court in Cancel stated that Title 59 made no express provision for the joinder of public entities as third-party defendants and that the Legislature intended to discourage such joinder as is demonstrated by the conflicting standards provided for public and private parties and the complications which would arise should such parties be joined. The court finally states:

> The statute is silent as to the procedure to be invoked to adjudicate whether or not the parties are joint tortfeasors. It may well be that either

> legislation or a new court rule is required to fill the gap, but in view of the procedural problems set forth herein, joinder of a governmental entity as an additional defendant, particularly as an afterthought, as in this case, would neither solve the problem nor contribute to the administration of justice. [131 N.J. Super. at 326].

Recent statutory amendments simplifying litigation where public entities are joined with private defendants indicate that much of the court's reasoning in Cancel with regard to legislative intent is no longer valid. See Chapter 3 of the Laws of 1975 correcting the problem regarding jury trials under the Tort Claims Act and changing the comparative negligence provisions of the Act to conform to those in the general law. The provisions were made retroactive to the effective date of the Tort Claims Act (June, 1972). This still remains, however, as an area of concern in that no provisions exist whereby a defendant can join a public entity as a third-party defendant, unless the plaintiff has chosen to proceed against said public entity.

All but two of the remaining cases deal with the notice requirements of N.J.S.A. 59:8-8, which provides that claims be presented within 90 days after the accrual of the cause of action.

Lutz v. Sencer, supra, involved an action against the Township of Millburn and township police officers for damages for personal injuries which were allegedly sustained when a police

officer closed a window of the police car on plaintiff's finger. Plaintiff based his request for leave to file the late notice on the ground that he was not aware of the enactment of the New Jersey Tort Claims Act and its requirement that actions against public entities be preceded by a claim filed within 90 days after the accrual of the cause of action. Other grounds offered by plaintiff included excusable neglect in that he was unaware of the seriousness of his injuries until after hospitalization and further that his right to assert a claim for pain and suffering did not accrue until he incurred medical expenses greater than the amount of $1,000.00 under N.J.S.A. 59:9-2(d) which provides, in pertinent part:

> No damges shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000.00. * * *

The court found that the foregoing arguments advanced by the plaintiff failed to establish sufficient reasons for his failure to file notice within time and it further found that N.J.S.A. 59:9-2(d) referred to the damages which are allowable in an action against a public entity and had no bearing whatsoever on the time of the accrual of plaintiff's cause of action. See 126 N.J. Super. at 927. The court found, however, that the filing of a claim within the time limit set forth in N.J.S.A. 59:8-8 was not a prerequisite to the maintenance of an action

against a public employee and that the action could be maintained against the individual defendants.

In Rost v. Bd. of Ed. of Fair Lawn, supra, an action was brought on behalf of a child under the Tort Claims Act for injuries he sustained at school. The father sued for consequential damages. Defendants claimed by way of defense that plaintiffs failed to give timely notice of their claims as required under the provisions of the Tort Claims Act. Defendants later conceded that the infant's claim was not barred since N.J.S.A. 59:8-8 expressly extends the time limitations set forth therein for the giving of notice or the institution of an action by an infant until he has become of age. It was further conceded that the notice and time requirements set forth in the Act applied only to claims against public entities and did not afford a defense to negligence claims against public employees.

The question remained as to whether the father's claim for consequential damages was barred. Although the Tort Claims Act does not except a consequential damage claim from the operation of the prescribed time limits, plaintiff urged that the notice requirement was tolled by N.J.S.A. 2A:14-2.1 which provides, in effect, that the time period for the commencement of an action on the parental claim shall be coextensive with the limitation period applicable to the infant's claim so long as the parent's claim is joined in the same action as that of the infant. See 130 N.J. Super. at 190. In rejecting the father's argument and holding that the period for giving notice in his action for

consequential damages was not tolled, the court stated at p. 191:

> The tolling provisions of N.J.S.A. 2A:14-2.1 are directed solely to the extension of the limitation period for the institution of a civil action and do not affect notice requirements which must otherwise be met as a condition of liability. Thus, where the parent has given timely notice of his claim under N.J.S.A. 59:8-8, under N.J.S.A. 2A:14-2.1 the period of time in which he may institute his action is the same as that which applied to the infant.

The appeal in Rost has not yet been decided.

In Wade v. N.J. Turnpike Authority, supra, a truck driver injured in an accident on the New Jersey Turnpike, and his wife filed a motion to permit late filing of notice under the Tort Claims Act against both the New Jersey Turnpike Authority and the State. One of the two questions presented in the case was whether the New Jersey Turnpike Authority is a "public entity" within the meaning of the Act and whether it is covered by the Act notwithstanding that it has the power to sue or be sued. The second question concerned whether or not sufficient reasons were shown for not filing a notice of claim within the 90-day period after the accrual of the claim (here, eleven months after the date of the accident).

As to the first question, the court quoted from the definitions section of the Act and held that the New Jersey Turnpike Authority is a "body corporate and politic" which falls within the definition of "public entity" under the Act.

> "Public entity" includes the State, and any other county, municipality, district public authority, public agency, and any other political subdivision or public body in the State.
>
> "State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued.

The Turnpike Authority was held to be a "public entity" within the scope of the Tort Claims Act, its statutory sue and be sued status merely removed it from the definition state. Thus, the exclusion of entities which have the power to sue and be sued coming under the "State" section of the definition did not remove "sue and be sued" agencies from the coverage of the Act. The same result was reached in Dependable Container Service, Inc. v. New Jersey Turnpike Authority, supra, which also confirmed that subrogation claims were barred under N.J.S.A. 59:9-2(e).

The second question involving late notice was resolved in favor of the plaintiffs. Due to the nature of the accident (the Turnpike Accidents of October 23 and 24, 1973, involving some 66 vehicles and nine deaths), the extensive media coverage and the direct involvement of the Turnpike Authority and the State Police, the court held that the public entities were not substantially prejudiced by the delay in filing the notice of claim and sufficient reasons in the unique circumstances of the case for the delay. Thus, the motion to permit filing out of time was granted.

Reale v. Township of Wayne, supra, concerned a suit brought against the Township of Wayne by a father and his infant daughter who was injured in a fall from her bicycle allegedly caused by a depression in the street. Plaintiffs commenced suit without serving notice of claim and without the running of a six month settlement period, contrary to the provisions of N.J.S.A. 59:8-8. The Township denied all allegations of negligence, set out various defenses and moved for summary judgement dismissing the complaint due to plaintiff's failure to comply with the notice provisions of the Act by not having filed a notice of claim nor having sought judicial leave to file a late claim.

While the facts of this case were similar to those presented in Rost v. Bd. of Ed. Fair Lawn, supra, the arguments advanced were substantially different. In Rost, defendant conceded that the time limitations for filing notice were tolled as they affected the infant's action, and the court in its opinion dealt exclusively with the viability of the father's claim for consequential damages. Here, the defendant did not concede that the infant's claim was viable, but instead asserted that the language of the last sentence of N.J.S.A. 59:8-8 ("Nothing in this section shall prohibit an infant... from commencing an action under this Act within the time limitations contained herein, after his coming to or being of full age...") tolls only the limitations period for commencing

an action and not the condition precedent of complying with the notice requirements.

Following a discussion of the background of the notice provisions under our Act and the difference between our notice provisions and those contained in the California Tort Claims Act of 1963 (upon which our Act was modeled), the court disposed of the notice question before it. Holding that while a situation such as that presented would normally compel that a motion for summary judgement to dismiss be granted without prejudice, to grant such a dismissal on the facts before it would be inappropriate.

> Although the defendant public entity did not have the requisite period in which to investigate the claim, over a year had passed since the complaint was filed. During that period defendant has had ample opportunity through pretrial discovery to study the merits of plaintiffs' claim and work toward a settlement. To dismiss the complaint without prejudice at this late date would be contrary to the intent of our court rules to provide for 'simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay'. R. 1:1-2. If less than six months had passed since the action was commenced or if a showing was made that the municipality was frustrated in undertaking an investigation of the claim, dismissal without prejudice would be appropriate...

The court further held that the third count of plaintiffs' complaint on behalf of the child's father was not preserved. Quoting from Rost, supra, the court held that the Legislature did not extend the tolling provisions for the filing of an

infant's claim to the parent's claim for consequential damages.

Defendant's final contention was that the infant plaintiff's potential recovery should be limited to damages for injuries suffered and should not include recovery for permanent injury. Its position was based on N.J.S.A. 59:9-2(d) which provides in pertinent part:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000.00.

Defendant had argued that the intent of this section was to prevent recovery of speculative damages and that the infant plaintiff should be barred from recovering more than her actual loss ($447.00 in medical care). Plaintiffs countered with the argument that "pain and suffering" differs from permanent injury as an element of damages and that the section therefore did not preclude recovery for permanent injury. While N.J.S.A. 59:9-2(d) appeared on its face to limit recovery only for pain and suffering, defendant placed great emphasis on the official comment to that section to advance his position that pain and suffering was merely one example of "non-objective types of damages" for which recovery may not be awarded when the medical treatment expenses do not exceed $1,000.00

In rejecting defendant's contentions, the court stated:

> If the Legislature had intended the term "pain and suffering" to encompass other elements of recovery such as permanent injury it would have been a simple matter for it to have said so. The court is unwilling to ascribe such an intent to the lawmakers in the face of the language of the section. It is held as a matter of law that N.J.S.A. 59:9-2(d) does not bar infant plaintiff's potential recovery for permanent injuries regardless of her medical expenses. [132 N.J. Super. at 116.]

The court further noted that the fact that the infant plaintiff's medical expenses had not reached $1,000.00 did not necessarily bar recovery for pain and suffering.

> The term 'medical treatment expenses' is defined in the section as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant***'. Plaintiffs' counsel represented to the court that because of the child's tender years it is not yet certain what monies may have to be expended for her care. In such a case 'necessary treatment' may well include considerable future expenditures. If 'permanent loss of a bodily function, permanent disfigurement or dismemberment' is proved and competent evidence of anticipated future medical expenses is introduced so that the total medical expenses are in excess of $1,000.00 the bar to recovery for 'pain and suffering' should be lifted. [132 N.J. Super. at 116.]

The two most recent decisions discussing the Tort Claims Act are Wuethrich, et al v. Delia et al, supra, and Steward v. Borough of Magnolia, supra, which were decided on May 27 and 28, 1975, respectively.

In Wuethrich the police department of Township of Berkeley Heights was given notification on several occasions

during the afternoon and evening of February 9, 1974 that defendant Delia was menacing with a firearm certain persons within a short distance of the Berkeley Heights Police Department. The police department made no response to these warnings and less that 12 hours later in that same area Delia shot decedent, John Wuethrich, killing him instantly and leaving as survivors his wife (plaintiff) and three infant children. Plaintiff brought suit pursuant to N.J.S.A. 59:8-8 demanding judgement against Delia for damages, and against the Township for compensatory damages. Defendant Township moved for judgement seeking dismissal of plaintiff's complaint as to it relying upon the following three statutes:

(1) N.J.S.A. 59:2-4 (A public entity is not liable for an injury caused by adopting or failing to adopt a law or by failing to enforce any law);

(2) N.J.S.A. 59:5-4 (Neither a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service);

(3) N.J.S.A. 59:5-5 (Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.)

During the course of its decision, the court examines the aforementioned provisions of the Tort Claims Act

and their application to the facts in this situation. The court also discusses the distinction between discretionary and ministerial activities as encompassed by the Act and holds that once a clear warning of a threat to take life was received by the police, they had a ministerial and operational duty to investigate, and that a jury may find liability on the part of a public entity for its omission to investigate.

In Steward v. Borough of Magnolia, plaintiff's husband, a part-time police officer employed by the Borough of Magnolia, accidentially shot plaintiff with his service revolver while at home. Plaintiff filed a complaint against the borough seeking damages and the borough claimed immunity from liability by reason of the Tort Claims Act. The trial judge held on motion for summary judgement that since inter-spousal immunity existed, the municipality could not be liable under the Act.

The Appellate Division rejects the views expressed by the trial court and examines the provisions of N.J.S.A. 59:2-2 and N.J.S.A. 59:3-1. N.J.S.A. 59:3-1 provides the following:

> a. Except as otherwise provided by this Act, a public employee is liable for injury caused by his act or omission to the same extent as a private person.
>
> b. The liability of a public employee established by this act is subject to any immunity of a public employee provided by law and is subject to any defenses that would be available to the public employee if he were a private person.

The court found that the term "immunity" as used in subparagraph (b) relates only to those exemptions from liability for particular kinds of conduct or activities as were previously given to public employees by case law or as are now found in the Tort Claims Act and that "[I]t clearly does not encompass any immunity available to the employee for a reason other than his public employment, such as an interfamilial relationship".

The Appellate Division finally holds that under the Tort Claims Act a public entity may be liable for injury resulting from an act or omission of its employee within the scope of the employment, notwithstanding that a suit against the employee may be barred by reason of interspousal immunity.

> To clothe the public entity vicariously with its employee's purely personal immunity could lead to anomalous and incongrous results. Since, as we noted hereinabove, the Tort Claims Act explicitly imposes upon the public entity the same respondent [sic] superior liability as if it were a private individual (subparagraph (a) of N.J.S.A. 59:2-2), it should follow as a matter of course under existing law that the public entity may be sued where the injured person is the spouse of the public employee, even though the latter may not. Otherwise, subparagraph (b) would necessarily have to be construed as an exception to the preceding provision, and we find nothing in the statute or in any of the explanatory comments which supports that conclusion.
>
> Moreover, if this construction were to be adopted, the disfavored doctrine of interspousal immunity would expand to embrace public entities, a benefit not enjoyed by private employers.

The only reported case concerning the New Jersey Contractual Liability Act (N.J.S.A. 59:13-1 et seq.) is Briscoe v. Rutgers, supra, which involved three consolidated actions by separate contractors against Rutgers, the State University, based on contracts for construction of the university medical school.

The main issue to be resolved by the court was whether the actions were subject to the New Jersey Contractual Liability Act. The court found that the actions against Rutgers were proper and that N.J.S.A. 59:13-1 did not apply.

> "Based on the provisions of its charter authorizing Rutgers to sue and be sued, the absence of any affirmative evidence of an intent to repeal the right, the confirmation of existing charter power in the 1956 act, and on the history of Rutgers exercise of the power to sue and be sued in the courts after 1956, this court concludes Rutgers had the power to sue and be sued at the time the Contractual Liability Act was enacted and is not subject to said act". 130 N.J. Super. at 505, 506.

Implicit in the decision was that while Rutgers might be a "public entity" such term, in this instance, was not to be construed as synonomous with "State" for purposes of the Contractual Liability Act.

The court further found that Rutgers' assignment of its obligations under the contracts for construction to the newly created College of Medicine and Dentistry of New Jersey (which had no power to sue or be sued) did not relieve it of its original obligations under the contract.

[11] The fact that Rutgers assigned all its rights, duties and obligations to the CMDNJ does not relieve it of its obligation to plaintiffs, Riley v. New Rapids Carpet Center, 61 N.J. 218, 224 (1972) and 3 Williston, Contracts (3 ed. 1960, Jaeger), 411 at 18 states:

> Delegation of Duties - The duties under a contract are not assignable inter vivos in a true sense under any circumstances; that is, one who owes money or is bound to any performance whatever, cannot by any act of his own, or by any act in agreement with any other person, except his creditor divest himself of the duty and substitute the duty of another. "No one can assign his liabilities under a contract without the consent of the party to whom he is liable". [Footnotes omitted]

The State has not contended that there was a novation between plaintiffs and CMDNJ and there is no evidence before the court of such a novation. 130 N.J. Super. at 506.

CHAPTER V

RECOMMENDATIONS FOR AMENDMENTS TO THE TORT CLAIMS ACT

The Attorney General wishes to recommend the following amendments and supplements to the Tort Claims Act. Following the text of each proposal is a comment explaining reasons for each change or addition.

59:1-3 DEFINITIONS are amended to read as follows:

As used in this subtitle:

"Employee" includes an officer, employee, or servant whether or not compensated or part-time, who is authorized to perform any act or service; provided, however, that the term does not include an independent contractor.

"Employment" includes office, position or employment.

"Enactment" includes a constitutional provision, statute, executive order, ordinance, resolution or regulation.

"Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person.

"Law" includes enactments and also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

"Public Employee" means an employee of a public entity.

For purposes of this Act, a public employee who receives compensation for performing acts or services is, in connection with those services, the employee only of the public entity which pays the compensation to the employee and is not the employee of any other public entity; provided, however, nothing in this Act shall prohibit the Attorney General from providing representation to an employee of a public entity other than the State in any case in which the Attorney General determines that such representation will be in the best interest of the State. Nothing contained in this paragraph shall exclude from the definition "public employee", members of the New Jersey National Guard or organized militia who receive their compensation from the United States of America.

"Public entity" includes the State, any county, municipality, district public authority, public agency, and any other political subdivision or public body in the State.

"State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued [.]; provided, however, that the "State" shall also mean the Palisades Interstate Park Commission, but only with respect to employees, property and activities within the State of New Jersey.

"Statute" means an act adopted by the Legislature of this State or by the Congress of the United States.

COMMENT - AMENDMENT TO N.J.S.A. 59:1-3

The term "public employee" is redefined to eliminate confusion in the handling of tort claims arising from the activities of government employees who are paid by one governmental agency but may perform services for another governmental entity either sporadically or on a regular basis. It is intented that the payroll test contained in this definition will expedite the settlement of valid tort claims by pinpointing responsibility for employee negligence on a readily objectively determinable test rather than relying on later determinations of agency law. See Cashen v. Spann, 66 N.J. 541 (1975). The proposed amendment makes it clear that, for purposes of tort law, claims against public employees are attributable to the public entity which pays the employee's wages and expenses regardless of whether the employee performs services for another public entity or is the agent of another public entity. This allocation of responsibility for claims handling is consistent with the manner in which the salary is paid, fringe benefits are provided and workmen's compensation and other insurance obligations are provided. See N.J.S.A. 34:15-44 and N.J.S.A. 40A:14-155. Since most public entities carry liability insurance, this provision will follow the normal expectation of a public employee that he will turn to the entity which provides his salary for protection from negligence claims. When two or more public entities engage in a cooperative venture they can

if they wish allocate between themselves, by contract, the responsibility for the acquisition of insurance coverage to cover all their interests. Since members of the National Guard are paid by the Federal Government for most activities, it is provided that this amendment does not remove them from coverage under the Act.

The change in the definition of the term "State" is made necessary by the provisions of N.J.S.A. 32:17-9 which makes the liability for torts committed by the Palisades Interstate Park Commission, its members, officers or employees dependent upon the law of the states which are parties to the compact creating the commission and the fact that the New Jersey activities of the commission are funded in the annual budget of this state. Liability of New Jersey is restricted in the compact as in the proposed amendment to torts committed within the geographical confines of this State. This is the same practice followed by New York State for torts involving New York operations of the commission.

* * *

59:1-7 is amended to read as follows:

a. Any waiver of immunity and assumption of liability contained in this Act shall not apply in circumstances where liability or responsibility has been or is hereafter assumed by the United States [, to the extent of such assumption of liability].

b. Neither a public entity nor a public employee shall be liable on any claim based on activities of the New

Jersey National Guard when such claim is cognizable under the National Guard Tort Claims Act, 32 U.S.C. §715; provided, however, nothing in this section shall immunize a public entity or public employee or member of the National Guard to the extent that their liability is covered by a policy of liability insurance which requires the insurance company to defend and indemnify the public entity, public employee or member of the New Jersey National Guard.

COMMENT

This change to N.J.S.A. 59:1-7 is intended to make clear that the State of New Jersey does not waive sovereign immunity in any case where the Federal government has the power to assume liability in the absence of a waiver. Under the National Guard Tort Claims Act, the Secretary of the Army and the Secretary of the Air Force is authorized to settle any claim of not more than $25,000.00 and to recommend settlement of any claim in excess of that sum to Congress when an injury or damage has been caused by a component or member of the National Guard. If a state has waived its immunity, the Secretary of the Army and the Secretary of the Air Force have the power not to assume liability. The potential exposure in certain areas of military activity, including the use of military aircraft and the firing of weapons, is so substantial that it would be unfair for the taxpayers of the State of New Jersey to assume such a potential liability when assets of the Federal government are available to other states to

cover such exposure. There are approximately thirty-one states which have not waived their sovereign immunity plus five states which have enacted provisions substantially similar to this proposal. The states which have enacted similar provisions are Idaho, Iowa, Nebraska, Texas and Utah.

* * *

59:2-2 is amended to read as follows:

a. A public entity is liable for injury proximately caused by an Act or omission of [a] its public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

b. A public entity is not liable for an injury resulting from an Act or omission of a public employee where the public employee is not liable.

COMMENT

This change is intended to effectuate the amendment to the definition of the term "public employee" in section 59:1-3 so as to make clear the legislative intent that a public entity shall only be held liable for the torts of its own employee. This will avoid unnecessary court suits and simplify settlement procedures by making clear the identity of the public entity which is responsible for the negligence of employees of government.

* * *

59:4-7 is amended to read as follows:

Weather conditions; effect on use of [streets and highways-] public property - immunity

Neither a public entity nor a public employee is liable for an injury caused [soley] by the effect on the use of [streets and highways] public property of weather conditions.

COMMENT

This proposed amendment is intended to make clear the application of this Section to public property made dangerous by reason of weather conditions regardless of whether such property is properly defined as a street or highway for other purposes in existing law. It is contemplated that the Section will apply too, for example, roadways and appurtenant facilities in State owned parks and on State college campuses which are not necessarily public highways. The same conditions for protecting public entities against exposure to liability associated with weather conditions apply regardless of the nature of the particular public property involved.

* * *

59:5-3 is amended to read:

[No action shall be commenced by or on behalf of a prisoner against a public entity or public employee until such prisoner shall be released from institutional confinement. For the purposes of the claims notification requirement and the statute of limitations contained in Chapter 8 of this act,[1] a prisoner's claim shall accrue upon his release from institutional confinement; provided however that a prisoner may file a notice of claim in accordance with the procedures set forth in Chapter 8 at any time after an injury and nothing in this Act shall bar administrative review and settlement of

that claim prior to his release from institutional confinement.]

a. The claims notification requirements and statute of limitations contained in Chapter 8 of this Act shall apply to prisoners.

b. In any claim where the notice requirements and statute of limitations of Chapter 8 was suspended by reason of the imprisonment of the claimant on the effective date of this enactment, the claim shall be deemed to accrue on the date of this enactment.

COMMENT

The prohibition against the institution of civil suits for monetary damages by prisoners was intended to assist in the creation of prison harmony and the maintenance of necessary discipline within correctional institutions. This section, as originally enacted, has only barred law suits based on negligence in the State courts, it has not and cannot prevent prisoners from instituting suits for monetary damages in the United States District Court under 42 U.S.C.A. § 1983 on allegations of deprivation of constitutionally protected rights. At this time the Attorney General of New Jersey is presently defending approximately 70 suits seeking monetary damages from prison officers and administrators of the Department of Institutions and Agencies in the Federal court. In many of these cases the employees are indemnifiable under N.J.S.A. 59:10-1. The provisions of N.J.S.A. 59:5-3 have been

critized by the trustees of the State Bar Association and repeal has been recommended. Since the current provisions of N.J.S.A. 59:5-3 have not prohibited prisoners from bringing suits for monetary damages and the State can be impeded in the investigation and defense of civil suits brought many years after the occurrence when memories are not clear and records are not available; therefore, it is believed that it will be of the benefit of the State as well as prisoners to permit civil suits for damages under the same terms and conditions as apply to all other citizens.

Another concern which prompted the enactment of N.J.S.A. 59:5-3 was the fear of potential abuse by prisoners seeking an excuse for a day out of prison in court. The State is required to provide two officers, usually on overtime compensation for each prisoner transported from a correctional facility to a court house. Federal courts have resolved this problem by determining all pretrial motions and proceedings on the papers filed and dispensing with personal appearances. Since there is no constitutional right for a writ of habeas corpus ad testificandum in civil cases, it is hoped that the State courts will follow a similar procedure and lessen the opportunity for abuse.

N.J.S.A. 59:5-3(a) is intended to make clear that a prisoner's claim is governed by the same notice and statute of limitations requirements as all citizens. Section (b) provides for existing claims on which the notice requirement and statute of limitations is presently suspended.

* * *

N.J.S.A. 59:8-3 is amended to read:

59:8-3 - Claims for damages against public entities

No action shall be brought against a public entity or a public employee under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.

N.J.S.A. 59:8-7 is amended to read:

59:8-7 - Place for presentation of claim

A claim for damage or injury arising under this act against the State or its employee shall be filed either with (1) the Attorney General or (2) the department or agency involved in the alleged wrongful Act or omission. A claim for injury or damages arising under this act against a local public entity or its employee shall be filed with that entity.

N.J.S.A. 59:8-8 is amended to read:

59:8-8 - Time for presentation of claims

A claim relating to a cause of action for death or for damage or injury to person or to property shall be presented as provided in this chapter not later than the ninetieth day after accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise pro-

vided in section 59:8-9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or his authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit an infant or incompetent person from commencing an action under this Act within the time limitations contained herein, after his coming to or being of full age or sane mind.

N.J.S.A. 59:8-9 is amended to read:

59:8-9 - Notice of late claim

A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this Act, may, in the discretion of a judge of the superior court, be permitted to file such notice at any time within 1 year after the accrual of his claim provided that the public entity or public employee has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion based upon affidavits showing sufficient reasons for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this Act; provided that in no event may any suit against a public entity or public employee arising under this Act be filed later than 2 years from the time of the accrual of the claim.

COMMENT

The amendments to N.J.S.A. 59:8-3, 7, 8 and 9 are intended to rectify the omission of the term "public employee" from the aforementioned sections. All of the liability sections of the Tort Claims Act make the liability of government and its employees coextensive, i.e. when an employee is not liable, government is not liable. The State is required to indemnify its employees and it is only logical that the same conditions and same limits that are placed on a suit against government should also apply to a civil suit for damages or negligence asserted against a public employee for torts occurring during the performance of his duties for government. These limitations do not apply to claims outside the scope of government employment or to intentional wrongdoing. This amendment will correct the deficiency noted in Chapter 8 by the Superior Court in Lutz v. Semcer, 126 N.J. Super. 288 (Law Div. 1974).

* * *

59:9-3 is amended to read:

Notwithstanding any other law, in any case where a public entity or public employee acting within the scope of his employment is determined to a joint tortfeasor.

a. The public entity or public employee shall be required to contribute to a joint tortfeasor only to the extent of the recovery provided for under this Act;

b. Any payment received by the injured part on account of a settlement or a judgement paid by an alleged

tortfeasor shall be reduced pro tanto form the injured party's judgement against any other tortfeasor.

c. Neither a public entity or public employee shall be liable for contribution unless: (1) the claimant seeking damages from the joint tortfeasor has complied with the notice of claim requirements of Chapter 8 of this Act; or (2) the joint tortfeasor seeking contribution has filed a notice of claim with the public entity within the time provided for the presentation of a claim by the claimant seeking damages and from the joint tortfeasor under Chapter 8 of this Act.

COMMENT - AMENDMENT TO N.J.S.A. 59:9-3

This bill will make clear that joint tortfeasors are not intended to stand in a better position than an injured claimant. In Markey v. Skog, 129 N.J. Super. 192 (Law Div. 1974), the Court held that public entities could be sued for contribution even when the injured party cannot sue them directly and will obtain no benefit from the additional financial burden thus imposed on government. There is an element of inconsistency between that decision and Cancel v. Watson, 131 N.J. Super. 320 (Law Div. 1974). This bill will resolve whatever conflicts exist between these two decisions of the Superior Court. A claim for contribution can be made against a public entity or public employee if a timely notice of claim has been filed by either the injured employee or the party seeking contribution. This will enable a public entity to

to promptly investigate the facts and thus avoid being brought into court years after the occurrence when the facts are stale and records may no longer be available. This bill will not deprive an injured claimant of any benefits available under the Tort Claims Act but will expedite the flow of litigation through the courts.

* * *

N.J.S.A. 59:9-4 is amended to read as follows:

59:9-4 - Comparative negligence

Contributory negligence shall not bar recovery in an action by any party or his legal representative to recover damages to the extent permitted under this Act if such negligence was not greater than the negligence of the party against whom recovery is sought, but any damages sustained shall be diminished by the percentage of negligence attributable to the person recovering.

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

a. The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence, that is, the full value of the injured party's damages [to the extent permitted under this act].

b. The extend, in the form of a percentage, of each party's negligence. The percentage of negligence of each party shall be based on 100% and the total of all percentages of negligence of all the parties to a suit shall be 100%.

c. The judge shall mold the judgement from the findings of fact made by the trier of fact in accordance with the provisions of this act.

d. The injured party entitled to a recovery may recover the full amount of the molded verdict from any party against whom the injured party is not barred from recovery. Any party who is so compelled to pay more than such party's percentage share shall be entitled to contribution from the other joint tortfeasors for any payments in excess of such percentage share; provided, however, that liability of a public entity or public employee for contribution under this chapter shall be diminished by the deduction of all sums which are deductible pursuant to this chapter.

COMMENT

The proposed amendments to this section are designed to deal with multi-party suits. Subsection (a) is amended to insure that the verdict in such cases will reflect the entire amount of the injured party's damages without regard to the limitations on recoveries provided under this Act so that the injured party's rights as against defendants other than public entities or public employees are not impaired. The limitation on recoveries and collateral source deductions were never intended to benefit private litigants.

The addition of Subsection (d) clarifies the contribution rights of all parties under the comparative negligence provisions of the Act. It generally brings contribution

rights under the Tort Claims Act into conformity with the general comparative negligence provisions of N.J.S.A. 2A:15-5.1 et seq. In addition, it makes clear the fact that public entities and public employees do not have a greater liability to a joint tortfeasor than to the injured party. Consistent with the other provisions of this Chapter, it indicates that collateral source deductions are only for the benefit of public entities and public employees and are to be deducted from the percentage share of any judgement which is attributed to the public entity or public employee.

* * *

N.J.S.A. 59:10-1 is amended to read:

If [pursuant to the provisions of P.L. 1972 C. 48 Senate Bill No. 993 now pending before the Legislature] in accordance with P.L. 1972 Chapter 48 and N.J.S. 59:10A-1 et seq., and N.J.S. 59:10-3, the Attorney General provides for or has provided for the defense of a State employee or former State employee, the State shall provide indemnification for the State employee, or former State employee or his estate. This indemnification right shall apply to all claims which accrued prior to and subsequent to the effective date of the Tort Claims Act, on July 1, 1972.

Nothing contained herein shall be construed to confer any right or benefit upon any insurer, any party or person other than a State employee, former State employee or his estate, nor shall it be construed to permit substituted service of process upon the State.

Nothing in this section authorizes the State to pay for punitive or exemplary damages or damages resulting from the commission of a crime.

COMMENT - AMENDMENT TO N.J.S.A. 59:10-1

Prior to the enactment of the Tort Claims Act, the Attorney General provided for the defense of State employees sued in tort for Acts or omissions in connection with their State employment. However, such State employees were not eligible for indemnification except in specific instances covered by other statues such as N.J.S.A. 18A:60-4 which mandated indemnification of certain employees in State educational institutions. In addition, liability insurance policies afforded some protection to State employees under certain circumstances such as the operation of State motor vehicles. However, many areas of State activities were not covered by insurance including medical malpractice in State institutions, maintenance of State highways and State Police activities.

The satisfaction of judgements and settlements in cases against State employees arising prior to the Tort Claims Act have been handled by presentation to the Subcommittee on Claims of the Joint Appropriations Committee of the Legislature. With the approval of the Committee, such claims have been processed by inclusion in special appropriations Acts. This procedure is cumbersome and is complicated by the fact that the Committee's meetings do not coincide with the need to obtain authorization to settlement of tort claims. The pro-

posed amendment would save the Committee substantial time and end the discrimination among State employees dependent solely upon the date of the accrual of the claim against them. Under the existing law, the same employee can be made a defendant in two suits but be entitled to indemnification in only one depending upon the date on which he acted. Any settlements under the proposed amendment would be subject to the requirements for appropriate approval as set forth in N.J.S.A. 59:11-1(a). There are still approximately 20 suits involving pre-Tort Claims Act litigation in which the proposed amendment would authorize the Attorney General to afford the same protection to the State employees involved as is presently enjoyed by State employees for tort claims accruing on or after July 1, 1972.

While it is possible that additional suits may yet be filed against State employees for incidents presently unknown where the statute of limitations might be found by a court to have been suspended (See Fernandi v. Strully 35 N.J. 434 (1961)), it is unlikely that their amendment would effectively increase State expenditures.

* * *

N.J.S.A. 59:10-4 is amended to read:

[Local public entities are empowered to indemnify local public employees consistent with the provisions of this Act.]

a. Every public entity other than the State shall provide for the defense and indemnification of its employees

for claims arising for an Act or omission of its employee within the scope of the performance of its public employee's duties as an employee. Nothing in this section shall authorize the local public entity to pay punitive or exemplary damages or damages arising from the commission of a crime by the employee. No local public entity shall be required to provide for the defense or indemnification of its employee when the Act or omission which caused the injury was the result of actual fraud, actual malice or willful misconduct of the employee.

b. Duties of a local public employee

A public employee shall not be entitled to a defense or indemnification from a public entity other than the State unless:

1. Within 10 calendar days of the time he is served with the summons, complaint, process, notice or pleading, he delivers the original or exact copy to the person designated by the entity, or if no designation be made, to the person authorized to receive notices and service of process for the entity and requests that the entity provide for his defense;

2. He cooperates in the preparation and presentation of the defense with the attorney selected to defend the case.

3. Excepting in those instances when a conflict of interest exists, the public employee shall agree

that the public entity shall have exclusive control over the handling of the litigation.

c. If the public entity other than the State refuses to provide for the defense of the employee, the employee shall be entitled to indemnification from the public entity if he establishes that the Act or omission upon which the claim or judgement was based occurred within the scope of his employment and the public entity fails to establish that the employee acted or failed to act because of actual fraud, actual malice, or willful misconduct. If the public employee establishes that he was entitled to a defense under the provisions of this section. The public entity shall pay or reimburse the public employee for any bona fide settlement agreement entered into by the employee and shall pay or reimburse him for any judgement against the employee, and shall pay and reimburse him for costs of defending the action, including reasonable counsel fees and expenses together with costs of appeal, if any. Nothing in this section authorizes a public entity to pay for punitive or exemplary damage or damages resulting from the commission of a crime.

COMMENT

This section replaces the prior premissive provision of N.J.S.A. 59:10-4 which merely permitted but did not require local government to indemnify its employees for their negligence. There presently exists a patchwork of statutes which require indemnification of certain employees

and requires government to provide the defense costs of others. For example, local Boards of Education are required to provide the defense costs and indemnification for school teachers. N.J.S.A. 18A:16-6. Local municipalities are required to provide police officers with the means to defend civil cases but not necessarily indemnification. N.J.S.A. 40A:16-155. County Boards of Freeholders are required to provide county police departments with the means to defend cases but not indemnification. N.J.S.A. 40A:14-117. This provision will afford employees of local government the same right had by employees of State government.

* * *

Chapter 12A - Sue and be Sued Authorities

59:12A-1 - Elective coverage for certain authorities

Authorities and commissions which are authorized by statute to sue and be sued may obtain coverage for liability under the New Jersey Tort Claims Act for themselves and their public employees from the fund established under N.J.S. 59:12-1 when:

(a) The governing body of the authority or commission petitions the State Treasurer and the Attorney General for such coverage;

(b) More than fifty percent of the membership of the governing body of the authority or commission are appointed by the Governor or hold office merely by reason of their tenure as an officer of the State;

(c) More than fifty percent of the operating

budget of the authority or commission is provided by appropriation from or borrowing from the General State Fund;

(d) The Attorney General provides representation to the authority or commission; and

(e) The State Treasurer and the Attorney General determine that such coverage would be in the public interest.

59:12A-2 - Coverage

The State Treasurer and the Attorney General are authorized to approve applications for retroactive coverage for tort claims accruing on or after July 1, 1972; provided, however, their authority to provide retroactive coverage is limited solely to applications received by the State Treasurer and the Attorney General within 60 days of the effective date of this enactment. All other applications for coverage shall become effective on either the date of application or a later date fixed by the Attorney General and State Treasurer.

59:12A-3 - Duration and extent of coverage

Coverage afforded pursuant to this chapter shall expire on the 30th day of June following the approval of coverage and may be extended for additional one year terms and conditions fixed by the State Treasurer and the Attorney General.

59:12A-4 - Terms of Coverage

The State Treasurer and the Attorney General shall have

the power to set annual fees and charges payable by the authority or commission for coverage and fix monetary limits on the extent of coverage to be afforded an authority or commission and its employees shall cooperate with the Attorney General in the defense of all covered claims. The Attorney General shall have the exclusive right to control all such litigation.

Nothing contained in this chapter shall inure to the benefit of any insurance company which has issued a policy of liability insurance or to any person who is obligated to indemnify a public entity or public employee.

COMMENT

This chapter is intended to provide for liability coverage of certain independent State authorities and commissions which are authorized by statute to sue and be sued but which have no significant source of income independent of the annual State budget. The Hackensack Meadowlands Development Commission and its employees are at present defendants in litigations arising from a series of accidents which occurred on the New Jersey Turnpike on October 23, 1973. The commission has no significant current income other than borrowings from the General State Fund pursuant to the Annual Appropriations Act. In the event of an adverse judgement in these cases, the commission will be required to either borrow additional funds from the State Treasury. It is anticipated that coverage may also be afforded to the Palisades Interstate Park Commission under the provisions of this section. Since entities which generate fifty percent or

more of their operating income from sources independent of the State's Appropriation Act are excluded from this fund, the New Jersey Turnpike Authority, the New Jersey Highway Authority, the New Jersey Sports and Exposition Authority, and the Atlantic City Expressway, and other independent authorities similarly situated are not and cannot qualify for participation in this program.

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